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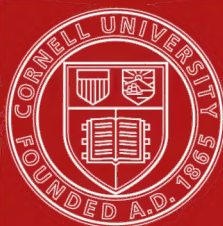
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THE
ENCYCLOPÆDIA
OF
PLEADING AND PRACTICE

UNDER THE CODES AND PRACTICE ACTS,
AT COMMON LAW, IN EQUITY
AND IN CRIMINAL CASES.

COMPILED UNDER THE EDITORIAL SUPERVISION OF
WILLIAM M. MCKINNEY.

VOL. XVIII.

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BY CHARLES H. STREET.

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I. REHEARINGS IN EQUITY — 1. In General — *a.* **WHEN DECREE MAY BE CORRECTED BY REHEARING.** — A rehearing is one of the methods commonly employed for the correction of error in a decree. Whether or not it is the proper method in a given case depends upon the stage of the proceedings at which correction is sought, and upon the nature of the error involved. It is the only proper method where a final decree has been rendered, but not signed and enrolled, and where the error is material, that is to say, not merely clerical or accidental.¹

Before Enrolment. — Thus, while an interlocutory decree may sometimes be set aside on motion — “the distinction between cases where it can be done by motion and where it must be by petition not being clearly defined”² — a final decree cannot be altered in any material respect, before enrolment, without a rehearing.³

1. *Finlayson v. Lipscomb*, 15 Fla. 558; *McGregor v. Gardner*, 16 Iowa 538; *Robertson v. Maclin*, 4 Hayw. (Tenn.) 53; *Bolger v. Mackell*, 5 Ves. Jr. 510.

2. *Fowler v. Lewis*, 36 W. Va. 129. See also *Kendrick v. Whitney*, 28 Gratt. (Va.) 646.

Decree Ordering Account. — A petition for a rehearing is not necessary in order to modify an interlocutory decree ordering an account. *Pulliam v. Pulliam*, 10 Fed. Rep. 53.

An Opinion Given in the Progress of an Account, upon exceptions to a report, or instructions to a commissioner, as to the propriety of allowing items of debit or credit, is not equivalent to a final decree, and a party is not precluded from taking new evidence without obtaining a review or rehearing of the opinion. *Dunbar v. Woodcock*, 10 Leigh (Va.) 660.

In Virginia interlocutory decrees are generally modified by means of a rehearing obtained by petition. *Purdie v. Jones*, 32 Gratt. (Va.) 827. Thus

where a bill was filed by the executor of a decedent for the construction of a will and the administration of the estate under the direction of the court, it was held that a decree which referred the cause to one of the commissioners of the court to take, state, and report to the court an account of the transactions of the executor, and of the debts against the estate, might be reheard upon petition, since it was in its nature an interlocutory decree, although it proceeded to construe the will, and to declare in what manner the estate should be distributed. *Sims v. Sims*, 94 Va. 580.

3. *Hendricks v. Robinson*, 2 Johns. Ch. (N. Y.) 484; *Fanning v. Dunham*, 4 Johns. Ch. (N. Y.) 35; *Ray v. Connor*, 3 Edw. (N. Y.) 478; *Goodhue v. Churchman*, 1 Barb. Ch. (N. Y.) 596; *In re Salter*, 4 Deac. & C. 569; *Atty.-Gen. v. Croft*, 15 Jur. 1028; *Fyler v. Fyler*, 8 Jur. 211; *Brookfield v. Bradley*, 2 Sim & St. 64.

Modification on Petition Without Formal Rehearing. — In *McLane v. Piaggio*, 24 Volume XVIII.

After Enrolment. — On the other hand, after enrolment according to English chancery practice, or after entry of record by any process corresponding to enrolment in the United States, a bill of review is necessary for the correction of material error, and a rehearing does not lie.¹

b. WHAT DECREES MAY BE REHEARD. — A Decree for Costs Only may be reheard in special cases where good reasons are shown why the application should be granted, but not otherwise.²

A Decree Made by Consent of Counsel cannot be impeached by a rehearing, even though it was made without consent of the party for whom counsel appeared,³ except in a case where reasons exist sufficient to authorize setting aside the consent or agreement by virtue of which the decree was rendered.⁴

c. ALLOWANCE OF REHEARINGS. — Under the English Chancery Practice rehearings were generally granted as a matter of course upon the certificate of counsel to the effect that the case ought to be reheard.⁵

Fla. 71, after a final decree had been entered, a petition for a rehearing was filed within the statutory time, and it was held that the court, upon hearing such petition, might modify the decree by correcting an error which the chancellor discovered therein, and which was admitted by the complainant, although a formal rehearing was denied.

1. *Hughes v. Washington*, 65 Ill. 245; *Thompson v. Goulding*, 5 Allen (Mass.) 81; *Robertson v. Maclin*, 4 Hayw. (Tenn.) 53; *Groom v. Stinton*, 11 Jur. 895; *Atty.-Gen. v. Stamford*, 6 Jur. 117. And see *infra*, I. 5. *Time of Making Application*.

As to Bills of Review, see article BILLS OF REVIEW, vol. 3, p. 569.

2. *Travis v. Waters*, 1 Johns. Ch. (N. Y.) 48; *Eastburn v. Kirk*, 2 Johns. Ch. (N. Y.) 317.

3. *Coster v. Clark*, 2 Ch. Sent. (N. Y.) 38; *Jones v. Williamson*, 5 Coldw. (Tenn.) 371; *Bradish v. Gee*, Ambl. 229. *Contra*, *Buck v. Fawcett*, 3 P. Wms. 242.

Right Waived by Laches Subsequent to Decree. — In *Winchester v. Winchester*, 121 Mass. 127, a decree was made with the consent of the petitioner's counsel, and said counsel afterward declined to make affidavits in support of petitions for a rehearing in the case. The petitioner, although immediately informed of the entry of the decree, filed no petition for a rehearing, but on the thirtieth day thereafter entered an appeal. This appeal was afterwards

heard, the petitioner being present at the hearing with counsel, and was dismissed by the court on motion of the adverse party. Thereafter the petitioner took no further steps to obtain a rehearing for more than eight months, and, without filing any paper reserving or insisting upon any supposed right to a rehearing of the main question, took part in repeated hearings before different justices of the court, and before the master, upon motions of the plaintiff in execution of the original decree. It was held that by these acts the petitioner, whatever his secret belief or intention might have been, had in legal effect conclusively waived any right to a rehearing upon the merits of the original decree.

Not Barred by Consent Order Rendered After Decree. — Although a decree made by consent cannot be reheard, a decree which is in reality the finding and judgment of the court upon the bill, answer, proofs, and exhibits in the case is not, properly speaking, a consent decree, and the fact that an interlocutory order subsequently made upon the foot of said decree is rendered by consent will not prevent the impeaching of the decree. *Wilcox v. Wilcox*, 1 Ired. Eq. (N. Car.) 36.

4. *Ex p. Gresham*, 82 Ala. 359; *Hodges v. McDuff*, 76 Mich. 303.

5. *Gwynne v. Edwards*, 9 Beav. 22; *Blount v. Great Southern, etc.*, R. Co., 1 Ir. Ch. 590; *Cunyngham v. Cunyngham*, Ambl. 89; *White v. Fussell*, 1 Ves. & B. 151.

In the United States, in view of the vexatious delays consequent upon this practice, courts of equity have refused to adopt the English rule,¹ and rehearings are not granted as a matter of right, except in cases provided for by statutes or rules of court.²

Discretion of Court. — In all other cases the allowance of a rehearing rests wholly in the discretion of the court.³ This discretion, however, is not an arbitrary one, and it should be exercised liberally in favor of granting a rehearing where the application is supported by the certificate of responsible counsel, and where there are good reasons for believing that the decree is erroneous, and that a further hearing will advance the ends of justice.⁴

1. In the Federal Courts a rehearing will not be granted on the mere certificate of counsel. *American Diamond Rock Boring Co. v. Sheldon*, 1 Fed. Rep. 870; *Emerson v. Davies*, 1 Woodb. & M. (U. S.) 21; *Tufts v. Tufts*, 3 Woodb. & M. (U. S.) 426.

2. *Land v. Wickham*, 1 Paige (N. Y.) 256; *Field v. Schieffelin*, 7 Johns. Ch. (N. Y.) 250.

In the Court of Equity of Florida, which is a court of original jurisdiction, rehearings are a matter of right, resting in the discretion of the court, subject to appeal, and are most uniformly allowed. *Internal Imp. Fund v. Bailey*, 10 Fla. 238.

Exception in Favor of Nonresident Defendant. — In *Mississippi*, where a nonresident defendant against whom a decree has been rendered by publication only petitions for a rehearing and brings his case within the provisions of the code which authorize rehearings in such cases, the statute confers a right of which he cannot be deprived by the court. When the facts required by the code are shown, the discretion of the court ceases, the right to a rehearing becomes absolute, and it must be granted. *McAllister v. Plant*, 49 Miss. 628.

3. *Lyon v. Bolling*, 14 Ala. 753; *New Jersey Zinc Co. v. New Jersey Franklinite Co.*, 14 N. J. Eq. 308; *Field v. Schieffelin*, 7 Johns. Ch. (N. Y.) 250; *Land v. Wickham*, 1 Paige (N. Y.) 256; *Johnson v. Tucker*, 2 Tenn. Ch. 244; *Daniel v. Mitchell*, 1 Story (U. S.) 198; *American Diamond Rock Boring Co. v. Sheldon*, 1 Fed. Rep. 870.

4. *Lutt v. Grimont*, 17 Ill. App. 308; *Hoggatt v. Hunt*, Walk. (Miss.) 216; *Cotton v. Parker*, Smed. & M. Ch. (Miss.) 125; *New Jersey Zinc Co. v. New Jersey Franklinite Co.*, 14 N. J. Eq. 308; *Railway Register Mfg. Co. v.*

North Hudson County R. Co., 26 Fed. Rep. 411.

Error of Law. — Thus a rehearing will be granted if the court thinks that the case ought to be reheard, even though the error alleged is simply an error of law. *Shepard v. Taylor*, 16 R. I. 166, citing *Hodges v. New England Screw Co.*, 3 R. I. 9.

Policy to Encourage Rehearings. — In *Kendrick v. Whitney*, 28 Gratt. (Va.) 646, the court said: "The policy of the law is to encourage petitions for a rehearing as cheaper and more expeditious than the expensive remedy by appeal; and the courts ought to give to the statute such an interpretation as will preserve this mode of proceeding according to the long-established course of the courts, rather than to compel parties to await a final decree, and then incur the expense of appeals, or to lie down under interlocutory decrees grossly unjust and illegal."

Stipulation Providing for Rehearing Enforced. — In *Auditor-Gen. v. Smith*, 95 Mich. 132, two decrees were made in the Circuit Court in suits involving the same questions and between the same parties. One of these suits was appealed to the Supreme Court, and it was stipulated between the parties that in the event of a reversal of the decree by the Supreme Court the appellant should have ten days after such reversal within which to apply for a rehearing of the other decree in the Circuit Court. The decree having been reversed, it was held that the stipulation was binding, and that a rehearing must be granted in accordance therewith.

Where Rehearing Would Produce Mischiefs. — In *Hughes v. Jones*, 2 Md. Ch. 289, it was held that the court might look into all the circumstances of the case, and if, upon full consideration, it

Review of Discretion. — The decision of the court granting or refusing a rehearing is final, and it is not reviewable by appeal¹ or by mandamus.²

2. Grounds — *a.* **ERROR APPARENT ON FACE OF DECREE.** — A rehearing will generally be granted when a decree is erroneous on its face, or where the court fears that it may have made a mistake in its decision of the case.³

came to the conclusion that rehearing the cause would be productive of mischief to innocent parties, or that for any other reason it would be inexpedient, it might refuse the application, although the facts set up by the petition, if admitted, would vary the decree.

Circumstances Warranting Interposition by Court. — In support of a petition for a rehearing it is not sufficient to show that injustice has been done, but it must also appear that it occurred under circumstances which authorize the court to interfere. *Walsh v. Smyth*, 3 Bland (Md.) 9.

1. *Lyon v. Bolling*, 14 Ala. 753; *Exp. Gresham*, 82 Ala. 359; *Waring v. Turton*, 44 Md. 535; *Jacobs v. Bealmear*, 41 Md. 484; *Crane v. Judik*, 86 Md. 63; *Read v. Patterson*, 44 N. J. Eq. 211; *Roddy's Appeal*, 99 Pa. St. 10; *Galloway v. Dunnington*, 10 Lea (Tenn.) 218; *Roemer v. Bernheim*, 132 U. S. 103; *McLeod v. New Albany*, 66 Fed. Rep. 378.

In *Sullivan v. Boston Bar Assoc.*, 170 Mass. 504, it was held on appeal to the Supreme Court that after the Superior Court had rendered a decree it was not bound, on a motion for a rehearing, to hear arguments respecting the facts, or to consider questions of law in respect to which exceptions had not been saved; and the Supreme Court refused to review a decision of the Superior Court refusing to rehear the decree.

In *Hoyt v. Smith*, 28 Conn. 471, after the case had been heard by a committee and the facts had been reported to the Superior Court, that court allowed the plaintiff to amend his bill by the insertion of additional averments. The defendant thereupon claimed a further hearing upon all the facts newly set up by the amendments, but the Superior Court granted a rehearing only with regard to material facts not already found by the committee. On appeal it was held that the whole matter rested in the discretion of the Superior Court, and that the exercise of this

discretion could not be reviewed by the Supreme Court.

Nor Can the Same Court, at a subsequent term, vacate an order which it has previously made denying an application for a rehearing. *Coates v. Cunningham*, 100 Ill. 463.

2. *Exp. Gresham*, 82 Ala. 359.

3. *Pingree v. Coffin*, 12 Gray (Mass.) 288; *Atty.-Gen. v. New York, etc.*, R. Co., 24 N. J. Eq. 59; *Andrews v. Crenshaw*, 4 Heisk. (Tenn.) 151; *Hill v. Southern R. Co.*, (Tenn. Ch. 1897) 42 S. W. Rep. 888; *Canerdy v. Baker*, 55 Vt. 578; *American Diamond Rock Boring Co. v. Sheldon*, 1 Fed. Rep. 870.

Analogous to New Trial. — A rehearing in a suit in equity will be granted for very nearly the same reasons that a new trial at law would be granted. *Bentley v. Phelps*, 3 Woodb. & M. (U. S.) 403.

Decree Containing Erroneous Instructions to a Master. — After a master in chancery has made a report in accordance with a decree in the case, a party who considers himself aggrieved by such report, and who believes that the instructions given to the master by the chancellor, in the decree which ordered the reference, were erroneous, may take exceptions and bring the point to the attention of the chancellor. If, on the argument of these exceptions, it is made to appear that justice cannot be effected without the alteration of the decree in accordance with which the report was made, the chancellor will direct the report to stand over, and order that portion of the former decree containing the erroneous instructions to be reheard. *Lang v. Brown*, 21 Ala. 179.

Decree Confirming Commissioner's Report in Administration Suit. — After a report made by a commissioner in chancery, in a suit for the settlement of an administration account, has been confirmed without objection, the decree confirming said account cannot be reheard on the petition of a person who was a party to the suit at the time

Errors of Law and Fact. — Thus, error of law apparent on the face of the decree is a strong reason in favor of granting the application,¹ but petitions based on error of fact alone are not generally favored.²

Immaterial Error. — In either case the error must be clearly apparent, and in a matter material to the decision of the case;³ and when it is clear that the mistake, if there be any, is immaterial, and that a rehearing of the case could not alter the original decision, it will be refused.⁴

when it was entered, in the absence of proof showing that some item in the account was erroneously allowed, or of any newly discovered facts. And this is especially true where the petition for a rehearing is not presented until after the lapse of a considerable time from the entry of the decree complained of. *Radford v. Fowlkes*, 85 Va. 820.

1. *Re Lindsay*, 27 Pittsb. Leg. J. N. S. 435; *Hunt v. Smith*, 3 Rich. Eq. (S. Car.) 465.

Resort May Be Had to Any Part of the Record for the purpose of making such error manifest. *Hunt v. Smith*, 3 Rich. Eq. (S. Car.) 465.

2. **Rehearing for Error of Fact.** — In *South Carolina* a rehearing cannot be had on the ground that the court erred in deciding an issue of fact. *Hunt v. Smith*, 3 Rich. Eq. (S. Car.) 465.

And in *Delaware* it has been held that where the chancellor errs in his decree in a matter of fact, the decree is final and cannot be reviewed; but if he errs in his conscience upon a matter of fact proved before him, there may be a review of this matter. *Fennimore v. Rahow*, 1 Del. Ch. 88.

In *New Jersey* a rehearing will be granted for error either of law or of fact; but not where the introduction of new evidence is necessary in order to show the mistake. *Brumagim v. Chew*, 19 N. J. Eq. 337.

In *Tennessee* a rehearing may be had where the court errs in its conclusion drawn from the facts. *Robertson v. Maclin*, 4 Hayw. (Tenn.) 53.

3. *Andrews v. Crenshaw*, 4 Heisk. (Tenn.) 151.

Error in Conclusion—Doubtful Evidence. — A rehearing will not be granted for a supposed error in a conclusion drawn from doubtful evidence. *Johnson v. Lewis*, 1 Rich. L. (S. Car.) 390; *Ex p. Dunovant*, 16 S. Car. 299.

Rule Stated. — In *Canerdy v. Baker*, 55 Vt. 578, the court, stating the grounds on which a rehearing might

be had in a suit remanded from the Supreme Court to the Court of Chancery, said: "The 'proper grounds' have already been somewhat indicated. They should be limited to substantial errors apparent or manifest from the papers and pleadings, errors plainly resulting from inadvertence, or oversight of an uncontroverted or settled fact, errors or mistakes such as it is evident the Supreme Court would correct upon suggestion before the cause was remanded. In a cause remanded this remedy is in no sense applicable for the purpose of review. Every consideration demands that a decision of the Supreme Court should be final, and especially that it should not be changed by a single judge as chancellor. But error, inadvertence, mistakes happening in the manner above indicated, is not 'decision.' Beyond the above limitation we think a chancellor has no right to rehear a cause remanded. Within that limitation he may in his discretion grant a rehearing."

In the *Circuit Court of the United States* a rehearing on the original evidence will not be granted unless some plain, obvious, and palpable error, omission, or mistake in something material to the decree is brought to the attention of the court, having previously escaped its attention. *Jenkins v. Eldredge*, 3 Story (U. S.) 299.

4. **A Motion for a Rehearing Made for Delay Only** will be refused. *Land v. Wickham*, 1 Paige (N. Y.) 256.

Matter Not Affecting the Decree. — In *New Jersey Zinc Co. v. New Jersey Franklinite Co.*, 14 N. J. Eq. 308, a rehearing was denied, since it appeared that if all the allegations of the petition were admitted, the adverse party would still be entitled to the same relief which was granted by the original decree, and because the matter suggested as constituting error was a matter of indifference, a decision of which could not affect the issue in the case.

b. MATERIAL FACTS OVERLOOKED. — That the court has overlooked material facts in arriving at its decision is a good reason for a rehearing.¹

Points Argued but Not Noticed in Opinion. — Although certain points presented by the argument are not noticed in the opinion, it does not follow that they escaped the attention of the court,² and where all the points presented have in reality been duly considered and passed upon by the court a rehearing will be denied.³

c. NEWLY DISCOVERED EVIDENCE. — In some jurisdictions a rehearing may be had where new evidence, which might probably change the decision, has been discovered since the hearing.⁴ The allowance of applications on this ground, however, is not in accordance with strict chancery practice, since a rehearing, properly speaking, is simply a new hearing upon the original record,⁵

If a Decree Rendered in a Foreclosure Suit Is Invalid a rehearing is unnecessary, since such a decree cannot prejudice the right of the petitioner; if, on the other hand, the decree is valid, a rehearing will not be granted where the only result would be the rendering of a second decree for substantially the same amount. *Hurlburd v. Freelove*, 3 Wis. 537.

1. *Hill v. Southern R. Co.*, (Tenn. Ch. 1897) 42 S. W. Rep. 888; *Jenkins v. Eldredge*, 3 Story (U. S.) 299.

But in order that an application based on this ground may be successful, it must be shown that the fact in question was raised by the pleadings and was brought to the attention of the court on the hearing. *Buffalow v. Buffalow*, 2 Ired. Eq. (N. Car.) 113.

2. *Bentley v. Phelps*, 3 Woodb. & M. (U. S.) 403.

3. *Fennimore v. Rahow*, 1 Del. Ch. 88; *Boucher v. Boucher*, 3 Mac Arthur (D. C.) 453; *Martindale v. Waas*, 11 Fed. Rep. 551; *Tufts v. Tufts*, 3 Woodb. & M. (U. S.) 426.

Question Raised by Cross-bill. — When a certain question has been raised and controverted in the original bill, and has been duly passed upon and adjudicated by the decree rendered, a rehearing will not be allowed on the ground that a cross-bill and answer raising the same question have been filed since the hearing upon the original cause. *Barker v. Belknap*, 39 Vt. 168.

Misapprehension of Testimony by Court. — Although testimony which is offered on the hearing for the purpose of establishing certain points is applied by the court to an entirely different point in the case, a rehearing will not be granted for the purpose of reconsid-

ering such testimony, where it has in fact been fully considered by the court before the decree was rendered. *Hunter v. Marlboro*, 2 Woodb. & M. (U. S.) 168.

4. *Detroit Sav. Bank v. Truesdail*, 38 Mich. 430; *Dennett v. Dennett*, 44 N. H. 531; *Carr v. Green*, Rich. Eq. Cas. (S. Car.) 405; *Tomlinson v. Tomlinson*, 11 Rich. Eq. (S. Car.) 52; *Hunt v. Smith*, 3 Rich. Eq. (S. Car.) 465; *Whitman v. Brotherton*, 2 Tenn. Ch. 396; *Scales v. Nichols*, 2 Yerg. (Tenn.) 140; *Mays v. Wherry*, 3 Tenn. Ch. 219; *Radford v. Fowlkes*, 85 Va. 820; *Hunter v. Marlboro*, 2 Woodb. & M. (U. S.) 168.

For the corresponding rule on application for a new trial, see article NEW TRIAL, vol. 14, p. 790 *et seq.*

As to the Form of Application proper to be employed when the rehearing is sought on the ground of newly discovered evidence, see *infra*, I. 6. *How Application Is Made.*

Evidence to Impeach Former Testimony. — A rehearing should be granted to the defendant in a suit where it appears that on the original hearing the complainant himself gave the only testimony which was offered in his behalf, and where the petition for a rehearing alleges newly discovered evidence tending to prove that the complainant has made statements contradicting his previous testimony in a material point. *Sheldon v. Hawes*, 15 Mich. 519.

A Master's Report upon a Reference may be modified on rehearing at any time prior to its final settlement, upon the discovery of new proof after the original hearing. *Pattison v. Hull*, 9 Cow. (N. Y.) 747.

5. *Fennimore v. Rahow*, 1 Del. Ch. 88; *Read v. Patterson*, 44 N. J. Eq. 211.

and for this reason the power to grant a rehearing for newly discovered evidence should be exercised with great caution.¹

Evidence Merely Cumulative — *Laches of Petitioner.* — Where the evidence is merely cumulative, or is offered simply for the purpose of contradicting or discrediting a witness of the adverse party,² or where the petitioner was aware of its existence before the hearing and failed through laches to obtain it, the application must be refused.³

1. *Kelley v. McKinney*, 5 Lea (Tenn.) 164; *Allis v. Stowell*, 85 Fed. Rep. 481.

Parties ought not, as a general rule, to be allowed to go into further proofs, but should be confined to the testimony used, or which might have been used, on the hearing, unless, as in a bill of review, new evidence is disclosed which could not possibly have been used before. Rehearings on the ground of newly discovered evidence must be confined within rigid limits, and carefully guarded, not merely because they tend to protract litigation unnecessarily, but because they also open the door to fraud and perjury. The evidence offered ought to be material if not controlling. A rehearing will not be granted to take a party's own deposition where no excuse is offered for his failure to testify on the hearing. *Kelley v. McKinney*, 5 Lea (Tenn.) 164.

Confessions by Adverse Party Subsequent to Decree. — When rehearings are asked for on the ground of newly discovered evidence they are mainly governed by the same considerations as apply to cases where leave is asked after publication of testimony, and before the hearing, to file a supplemental bill in order to bring such new evidence before the court, or where, after a decree, leave is asked on like ground to file a bill of review or bill in the nature of a bill of review. It is doubtful whether in any case the court will grant a rehearing on the ground of confessions made by the adverse party since the decree was rendered. If this can be done under any circumstances it can be only where the confessions are of the most full and direct character, and are proved by disinterested testimony, and are not susceptible of different interpretations. A rehearing will not be granted on this ground where the application is supported only by the affidavit of a single witness as regards the alleged confession, and where this affidavit is distinctly contradicted by affidavits of the adverse party and also

by his answer to the original bill. *Daniel v. Mitchell*, 1 Story (U. S.) 198.

Evidence Not Admissible on Original Hearing. — A rehearing will be refused where the newly discovered evidence concerns a parol agreement, and is offered for the purpose of varying a written contract, since such evidence would not have been admissible on the original hearing. *Dale v. Smith*, 1 Del. Ch. 11.

Oral Evidence. — In *South Carolina* it has been held that a rehearing will not be granted in any case on the ground of newly discovered oral evidence. *Hinson v. Pickett*, 2 Hill Eq. (S. Car.) 351.

Facts Fully Examined. — A rehearing will not be granted for the consideration of new evidence in regard to facts which were at issue and were fully examined on the original hearing. *Fennimore v. Rahow*, 1 Del. Ch. 88.

2. *Hall v. Fullerton*, 69 Ill. 448; *Detroit Sav. Bank v. Truesdail*, 38 Mich. 430; *Dennett v. Dennett*, 44 N. H. 531; *McDowell v. Perrine*, 36 N. J. Eq. 632; *Dunham v. Winans*, 2 Paige (N. Y.) 24; *Reeves v. Keystone Bridge Co.*, 11 Phila. (Pa.) 498, 33 Leg. Int. (Pa.) 149; *Akers v. Akers*, 83 Va. 633; *Powell v. Batson*, 4 W. Va. 610; *Baker v. Whiting*, 1 Story (U. S.) 218; *Rogers v. Marshall*, 13 Fed. Rep. 59; *Pittsburgh Reduction Co. v. Cowles Electric Smelting, etc., Co.*, 64 Fed. Rep. 125; *Bentley v. Phelps*, 3 Woodb. & M. (U. S.) 403. See also article NEW TRIAL, vol. 14, p. 811 *et seq.*

Thus where the testimony of a witness for the complainant is rejected at the hearing, on the ground of interest, a rehearing will not be granted to enable the complainant to release the interest of the witness and to re-examine him, the only object being to contradict witnesses for the adverse party. *Dunham v. Winans*, 2 Paige (N. Y.) 24.

3. *Robinson v. Sampson*, 26 Me. 11; *Detroit Sav. Bank v. Truesdail*, 38 Mich. 430; *Dennett v. Dennett*, 44 N. H. 531; *Cummings v. Parker*, 63 N. H.

d. **MATTERS NOT IN ISSUE ON HEARING.** — As a general rule a rehearing will not be granted for the consideration of matters which were not put in issue by the pleadings and which did not make a part of the case as it stood on the original hearing.¹

e. **MISTAKES AND OMISSIONS IN PRESENTING CASE ON HEARING** — (1) *In General.* — Failure to Present the Case Fully, or to give sufficient attention to the argument or presentation of evidence

198; *Baker v. Whiting*, 1 Story (U. S.) 218; *Colgate v. Western Union Tel. Co.*, 19 Fed. Rep. 828; *Norton v. Walsh*, 49 Fed. Rep. 769; *Bentley v. Phelps*, 3 Woodb. & M. (U. S.) 403.

In *Owens v. Love*, 9 Fla. 334, the court said: "In the first place, the new matter must be relevant and material, and such as might probably have produced a different determination. In other words, it must generally be new matter to prove what was before in issue, and not to prove a title not before in issue; not to make a new case, but to establish the old one. In the next place, the new matter must have first come to the knowledge of the party after publication has passed. And in the next place, the matter must not only be new, but it must be such as the party, by the use of reasonable diligence, could not have known, for if there be any laches or negligence in this respect that destroys the title to the relief. 2 Smith's Ch. P., page 58 (marginal page). The party must show that the new matter is relevant or that there is probable cause that it may be relevant to the matters in question. On this application for leave to file supplemental bill, and for a rehearing, this court can only consider the prior interlocutory decree, so far as to ascertain and inquire whether the new matter sought to be introduced is relevant and material, and such as, had the same then been before the chancellor, might properly have produced a different determination."

Ability of Petitioner to Obtain Evidence. — On a petition for a rehearing for newly discovered evidence, in order to determine whether reasonable and ordinary care, attention, and diligence have been exercised in obtaining such evidence, the physical and pecuniary condition of the petitioner must be considered, and also the information or knowledge which he then had of the important facts of the case, and in the light thereof the difficulties likely to be encountered in tracing up and estab-

lishing such facts by competent testimony. *Detroit Sav. Bank v. Truesdail*, 38 Mich. 430.

1. *Nevinson v. Stables*, 4 Russ. 210; *Horne v. Barton*, 8 De G. M. & G. 587. But see *Hoagland v. Titus*, 16 N. J. Eq. 44, where the chancellor, of his own motion, directed a reargument of the case where the evidence, although it failed to support the allegations of the bill, gave rise to considerations of a character different from those presented on the hearing.

Matters Not in Issue on the Hearing. — A rehearing will be refused where the grounds on which it is asked do not affect the merits of the controversy, and consist of matters which were not put in issue by the pleadings, and where the only effect of the rehearing, if granted, would be to turn the complainants out of court as improper parties, leaving the controversy undecided. *New Jersey Zinc Co. v. New Jersey Franklinton Co.*, 14 N. J. Eq. 308.

Where the Question of Costs Is Not Suggested while the case is before the court on the hearing, the court will not entertain a motion, made at a subsequent term, for a rehearing upon the question of costs. *Bradlee v. Appleton*, 2 Allen (Mass.) 93.

Grievance Consequent upon Decree. — A rehearing will not be granted for the purpose of remedying a grievance consequent upon the decree, resulting from circumstances occurring after the decree was rendered, and not making part of the case as it originally stood, where no error in the decree itself is alleged. *Bowyer v. Bright*, 13 Price 316.

Rehearing to Exclude Evidence Filed on Hearing. — A rehearing can, as a general rule, be had only for altering a decree upon grounds which existed at the time when the decree was pronounced. Whether an application which seeks to change the status of the case at that date by excluding some of the evidence then filed would fall within this rule is doubtful. *Whitman v. Brotherton*, 2 Tenn. Ch. 396.

on the original hearing, cannot be urged as a ground for granting a rehearing;¹ and this is true even where such failure arises from surprise occasioned by the unexpected conduct of the opposing counsel,² except, perhaps, in a case where such conduct amounts to a violation of some stipulation or agreement between the parties as to the conduct of the cause, and where the decree rendered is interlocutory in its nature.³

(2) *Improper Exclusion of Evidence.* — The improper exclusion by the court of material evidence, whereby the petitioner has been

1. *Railway Register Mfg. Co. v. North Hudson County R. Co.*, 26 Fed. Rep. 411; *Hunter v. Marlboro*, 2 Woodb. & M. (U. S.) 168.

Omission of Evidence from Master's Report. — Where a petition for a rehearing alleged that on a reference to the master, preliminary to the decree, material evidence had been given for the petitioner, but that said evidence was accidentally omitted by the master from his report, and that the petitioner was ignorant of this omission when the decree was entered, a rehearing was refused. *Buffalow v. Buffalow*, 2 Ired. Eq. (N. Car.) 113.

Failure to Present Evidence. — Failure to present on the original hearing certain testimony which the party then had in his possession is no ground for a rehearing where it appears that the testimony, if given, would not have affected the result. *Hand v. Rogers*, (Supm. Ct. App. T.) 16 Misc. (N. Y.) 364.

Failure to Make Defense. — After an interlocutory decree has been rendered, a rehearing will not be granted on a petition which alleges that the party had a defense which might have been made before, but which was not presented because he had supposed that it could not be maintained. *Cock v. Evans*, 9 Yerg. (Tenn.) 287.

Immaterial Defects Waived on Hearing. — Where, on the hearing, a party has waived an objection as to parties, or as to proof of a document, the same objection cannot be urged as ground for a rehearing. *Malone v. Geraghty*, 2 Con. & Law 235.

And where technical and unimportant defects exist in the steps preliminary to the hearing, but the parties are not prejudiced thereby, and no objection is made at the time, they will be considered waived, and after decree rendered a rehearing will not be granted on their account. *Allen v. New York*, 7 Fed. Rep. 483.

But a Rehearing Was Granted, where

it appeared that the decree was based on an imperfect presentation of the facts, that the application for a rehearing was promptly made, and that the rights of third persons had not intervened. *Parker's Estate*, 6 Pa. Dist. 519.

2. *Everest v. Buffalo Lubricating Oil Co.*, 22 Fed. Rep. 252.

3. In *Spilman v. Gilpin*, 93 Va. 698, "the defendants moved the court for a continuance, upon the ground of the existence of a convention between their counsel and opposing counsel that depositions taken in a similar case might be read in this, which, if read, would have established a complete defense to the action; that, relying upon this convention, made in the interest of economy, and for the promotion of speedy justice, they had failed to prepare their case; that a decree upon the bill taken for confessed had gone against them, interlocutory in its character; and that at a subsequent term these facts were all called to the attention of the court, and none of them denied." It was held that a rehearing ought to be granted, and the court said: "It is difficult to define the precise limits of the duty of courts upon petitions to rehear. It may be safely stated, however, as being established by the authorities, that where a case has not been heard upon the merits, but an interlocutory decree has been rendered upon the bill taken for confessed, and other circumstances tending to excuse the defendant's default in making his defense at the proper time appear, the rehearing of the decree upon a petition filed for that purpose, showing that the defendant had a meritorious defense, may, in the discretion of the court, be entertained. The discretion thus exercised is, of course, a judicial discretion, and one not to be exercised arbitrarily either in granting or withholding the relief sought."

prejudiced and the adverse party has obtained an inequitable decree, is generally considered good ground for granting a petition for a rehearing.¹

(3) *Negligence, Mistake, or Misconduct of Counsel.* — A rehearing in equity cannot be had on account of the negligence² or bad advice of counsel,³ or his mistake as to the pertinency, force, or

1. In *Hodges v. McDuff*, 76 Mich. 303, a rehearing of a supplemental decree for compensation was allowed where it appeared that the trustee against whom it was rendered had properly managed the trust estate, and that the decree had been entered without permitting him to prove the value of his services.

In *Nicoll v. Huntington*, 1 Johns. Ch. (N. Y.) 166, a rehearing was granted on a petition which alleged that the chancellor had improperly excluded certain affidavits offered by the plaintiff, and that a feigned issue, awarded by the court, to try title to real estate, was improper, since it brought in question only the plaintiff's title without presenting that of the defendant.

Rehearing Granted on Terms. — Where a party has obtained an inequitable decree in his favor through the exclusion of evidence offered by the adverse party, the latter may have a rehearing, although in strictness no rule of law has been violated; but a rehearing granted on this ground is not allowed as a matter of right, and in granting the application the court may impose terms upon the petitioner. *Simms v. Smith*, 11 Ga. 195.

2. *Birmingham, etc., Land Co. v. London, etc., R. Co.*, 34 Ch. D. 261; *Hood v. Pimm*, 4 Sim. 101.

Negligence of counsel is not ordinarily considered good ground for a rehearing in *Virginia*. If a review of the decree can be had in any case on this ground, the application must be by bill of injunction, and not by motion. *Scott v. Hore*, 1 Hughes (U. S.) 163.

Exception in Favor of Married Women. — In a case where there is a meritorious defense, and where the defendant, a married woman, has been deprived thereof by the negligence of her counsel in obtaining proofs and presenting them to the court, it is discretionary with the court to grant a rehearing if the application therefor is made promptly. And if it can be shown that the negligence of the attorney

amounted to bad faith on his part, this will be an additional reason in favor of the application. *Day v. Allaire*, 31 N. J. Eq. 303.

3. *Warner v. Warner*, 31 N. J. Eq. 549.

In *Smith v. Patton*, 12 W. Va. 541, a bill was filed to enforce payment of the balance due on a final settlement in full of all accounts between the plaintiff and the defendant. The answer admitted the settlement, but alleged that it was made by the defendant in ignorance of the existence of certain accounts against the plaintiff, which accounts were not included in the settlement. This was denied by the replication, but no proof was taken in the case. The court did not refer the cause prior to the date of the settlement, but rendered a decree for the amount due by such settlement without making any order of reference. The defendant thereupon filed a petition for a rehearing of the cause on the ground that he had been advised by his counsel that the court would make an order of reference without any proof being taken of the allegations in his answer, and that the petitioner, under such advice, failed to take such proof, though he could, if opportunity was offered, prove the truth of such allegations. It was held that the action of the court in rendering a decree without ordering a reference of the cause prior to the date of the settlement was proper, and that the petition for a rehearing must be refused.

Where a decree has been rendered against a defendant, chiefly because the evidence offered in his behalf was insufficient to establish his defense, he cannot have a rehearing on a petition which alleges that at the time of the hearing he intended to procure the evidence of another witness who was without the state, but that his counsel told him it would be of no use to do so, and that, relying on this advice, he neglected to procure the evidence in question. *Perrine v. White*, 36 N. J. Eq. 1.

admissibility of certain evidence,¹ or his abandonment of the defense after hearing the evidence of the adverse party.²

(4) *Absence of Party from Hearing.* — A party who has failed to attend the hearing of a cause cannot have a rehearing if his absence was voluntary; and even though his failure to attend was involuntary or accidental, his petition will be refused unless a sufficient excuse for the default is given.³

f. DECREE RENDERED BY DIVIDED COURT. — Where the members of the court rendering the decree were equally divided in opinion a rehearing will sometimes be ordered.⁴

g. DECREE OBTAINED BY FRAUD. — Fraudulent representations by the adverse party, resulting in an erroneous decree, are not sufficient to authorize a rehearing. In such a case the proper remedy is by independent bill setting up the fraud.⁵

h. REVERSAL OF JUDGMENT ON WHICH DECREE IS FOUNDED. — Where a judgment under which a judicial sale has been made is reversed, after submission, but before decision of the cause, on a bill to confirm the title of the purchaser, a rehearing may be granted on the application of a defendant in the judgment.⁶

1. *Lyon v. Bolling*, 14 Ala. 754; *Robinson v. Sampson*, 26 Me. 11; *McDowell v. Perrine*, 36 N. J. Eq. 632; *Baker v. Whiting*, 1 Story (U. S.) 218; *Lockwood v. Cleveland*, 20 Fed. Rep. 164; *Cutten v. Sanger*, 3 Y. & J. 374.

Counsel Misled as to Real Issue. — The fact that on the hearing of a cause a party and his counsel were misled as to the real issue involved, by the argument of counsel for the adverse party, and for that reason failed to present certain important evidence, is no ground for a rehearing. *Pittsburgh Reduction Co. v. Cowles Electric Smelting, etc., Co.*, 64 Fed. Rep. 125.

Exception to the Rule. — In *Hulsizer v. Opdyke*, (N. J. 1888) 14 Atl. Rep. 644, a rehearing was granted where it appeared that certain evidence had been omitted at the hearing on account of a misapprehension by the complainant's counsel of a ruling of the court excluding other evidence of a somewhat similar character.

2. **Abandonment of Case by Counsel.** — A rehearing will not be granted on the ground that counsel for the defendant abandoned the case after hearing the opening argument for the adverse party, unless it can be shown that such abandonment amounted to a violation of duty on the part of the counsel, or that he clearly mistook either the law or the facts of the case. *Decarters v. La Farge*, 1 Paige (N. Y.) 574.

3. Where the absence was purely accidental, and a sufficient excuse is offered, a rehearing may be had. *Townsend v. Smith*, 12 N. J. Eq. 350. But not where the failure to attend arose from a mistake as to the time when the cause would be heard. *Read v. Walker*, 18 Ala. 323. Nor where the party, who was his own solicitor, was obliged to go to another court, and was absent from the hearing. *Whitman v. Brotherton*, 2 Tenn. Ch. 393.

In *Foy v. Foy*, 25 Miss. 207, a petition for a rehearing was refused although it alleged that the testimony on which the original decree was rendered was false; that the petitioner had no personal notice of the time and place of taking the testimony; that his solicitor upon whom notice was served was ignorant of his post-office address, and could not find it out in time to give him the information; and that the complainant was confined to his house by illness, and was prevented from notifying his counsel to put the cause on trial, and from giving him facts showing the falsity of the testimony in question.

4. *Voorhees v. Thorne*, 21 N. J. L. 77. And see in general article DIVISION OF OPINION, vol. 7, p. 44.

5. *Hurlburd v. Freelove*, 3 Wis. 537. See article BILLS TO IMPEACH DECREES AND JUDGMENTS, vol. 3, p. 607.

6. *Gould v. Sternberg*, 128 Ill. 510.

3. By Whom Rehearing May Be Had — Person Not a Party. — A rehearing may sometimes be had by a person who is not a party to the original suit, but whose interests are affected thereby.¹ In such cases, however, the petition cannot be filed as of course.²

Where Some of the Parties Presenting a Petition Are Not Entitled to a Rehearing, the petition may be amended by striking out their names, and the application will then be granted or refused in accordance with the merits of the case.³

Assignee. — It has been held that assignees cannot petition for a rehearing.⁴

4. To Whom Application Should Be Made. — A petition for a rehearing should be addressed to the judge who originally heard the case.⁵

After Cause Has Been Removed or Appealed. — As a general rule, the court in which the hearing was had cannot grant a rehearing after the cause has been removed to a higher court by appeal,⁶ nor

1. *Morris v. Landon*, 2 L. J. Ch. 140; *Hughes v. Turner*, 4 L. J. Ch. 141; *Jopp v. Wood*, 33 Beav. 372; *Leete v. Jenkins*, 14 W. R. 489; *Hamilton v. Manby*, 6 Bro. P. C. (Toml. ed.) 347.

Assignor of Claim. — In *Daily v. Warren*, 80 Va. 512, a party filed a petition in a pending cause to assert his claim as assignee of a certain debt reported therein. The assignor of the debt was not made a party to the petition, nor summoned to answer, but a decree was rendered directing payment of the debt to the petitioning assignee. Thereafter a rehearing was granted upon application by the assignor.

A New Plaintiff Who Has Filed a Supplemental Bill may impeach a decree upon a rehearing which has been granted on the petition of other persons who were parties to the suit. *Hill v. Chapman*, 1 Ves. Jr. 405.

A Party Made a Defendant by Supplemental Bill after decree, and who has appeared to the bill, may present a petition for a rehearing if he has filed an answer, but not otherwise. *Atty.-Gen. v. Stamford*, 6 Jur. 117.

Party Having No Interest in Decree. — Where, in accordance with the prayer of a bill in chancery, a decree is made ordering the sale of certain lands belonging to infants, and the decree further orders the sale of other lands not mentioned in the bill, the complainant cannot have a rehearing of the latter part of the decree, where he is in no way interested in the proceeds of the lands last mentioned, and did not ask for their sale in his original bill. *Hinton v. Hinton*, 70 N. Car. 730.

2. According to the English Practice a person who is not a party must first apply for leave to file his petition for a rehearing, and cannot file it as of course without leave granted. *Berry v. Atty.-Gen.*, 2 Macn. & G. 16; *Gwynne v. Edwards*, 9 Beav. 22.

In Virginia the person desiring a rehearing must intervene by petition to be made a party to the suit, after which a petition to rehear may be filed. *Armstead v. Bailey*, 83 Va. 242; *Heermans v. Montague*, (Va. 1890) 20 S. E. Rep. 899.

3. *Atty.-Gen. v. Stamford*, 6 Jur. 117.

4. *Armstead v. Bailey*, 83 Va. 242.

5. "Where cases have been heard by the circuit judge sitting alone I do not myself hear applications in them for a rehearing, * * * except by his request." *Per* Field, C. J., in *Giant Powder Co. v. California Vigorit Powder Co.*, 5 Fed. Rep. 197.

In Simpson v. Downs, 5 Rich. Eq. (S. Car.) 421, it was held that since the Court of Appeals had only appellate jurisdiction, an application could not be entertained in that court to rehear a circuit decree which was not appealable.

The Chancellor Will Not, in Ordinary Cases, rehear a decree advised or made by a vice-chancellor. The application for a rehearing should be made to the same vice-chancellor who rendered the decree, and if the petition is granted the reargument should also be had before him, and not before the chancellor. *Pullen v. Pullen*, 41 N. J. Eq. 417; *Rusling v. Bray*, 38 N. J. Eq. 398.

6. *Tant v. Guess*, 37 S. Car. 489; *Elgin Lumber Co. v. Langman*, 23 Ill.

after the appeal has been decided and the case remanded,¹ but rehearings have sometimes been allowed under these circumstances, in exceptional cases.²

5. Time of Making Application — *a.* BEFORE ENROLMENT OR ENTRY OF RECORD. — As previously stated a petition for a rehearing does not lie after enrolment of the decree,³ or after

App. 250. And see *infra*, I. 5. *Time of Making Application.*

When a case comes up for review and a point is made which was overlooked in the lower court, and which could not be obviated in that court by proof or amendment, the appellate court will take cognizance of the point and decide it, and will not send the case back to the lower court for a rehearing. Woodward v. Bullock, 27 N. J. Eq. 507.

1. *Ex p.* Knox, 17 S. Car. 207.

An Interlocutory Decree Which Has Been Affirmed by the Court of Appeals cannot be reheard in the lower court. And this rule applies where an appeal from the decree has been dismissed for failure to have the record printed, as such dismissal is, in effect, an affirmance of the decree appealed from. Woodson v. Leyburn, 83 Va. 843.

Application for Leave to Apply to Lower Court. — After the Supreme Court has affirmed an order on appeal, it will not grant a petition for leave to apply to the lower court for a rehearing, especially where the application is made on the ground of newly discovered evidence, and it appears that the party's failure to procure the evidence sooner was due to laches. Sherwood v. Central Michigan Sav. Bank, 104 Mich. 65.

2. Affirmance Without Prejudice to Rehearing Below. — Where an order or decree which does not reserve the right to apply for a modification thereof upon a new state of facts is made by the chancellor, and is affirmed on appeal, the appellant, if he desires a rehearing in the lower court, must ask the appellate court to make the affirmance without prejudice to an application for a rehearing below. Lyon v. Merritt, 6 Paige (N. Y.) 473.

Interlocutory Decree Entered in Accordance with Mandate. — Where a decree has been reversed in the appellate court, and the case remanded with directions for further proceedings, the decree entered in accordance with the mandate may be reheard in the court below, provided it is interlocutory and

not final. Potts v. Creager, 71 Fed. Rep. 574.

Vermont. — In Canerdy v. Baker, 55 Vt. 578, the court said: "Probably the Supreme Court would hear a motion to correct apparent error if made at the term and before the cause was remanded, but this ordinarily would not be a very practicable remedy, because decisions are not rendered until the end of the term, or in vacation as of the term. In view of this, and of the fact that a bill of review is not generally available, under the restrictions of our statute, to correct errors appropriate for correction upon rehearing, we think it would be more consonant to the liberal spirit pervading the practice in the English chancery to guard against apparent error, to hold that a chancellor might rehear a cause remanded from the appellate court, when based upon proper grounds and seasonably filed and certified as our rules require."

In the Federal Courts an application to rehear a decree should be made to the court by which the decree was rendered, and not to the appellate court. If the application is properly made to the court below during the term, such court may request the Supreme Court to return the record filed above, and such a request may be granted in proper cases and under proper restrictions. Roemer v. Simon, 91 U. S. 149.

3. Chetwynd v. Fleetwood, 1 Bro. P. C. (Toml. ed.) 306; Ollerenshaw v. Harrop, L. R. 9 Ch. 480; Groom v. Stinton, 11 Jur. 895; Gore v. Purdon, 1 Sch. & Lef. 234; Atty.-Gen. v. Stamford, 6 Jur. 117. And see *supra*, I. 1. *In General.*

"The well-settled rule of chancery practice is that after a decree has been enrolled, that is, after it has become matter of record, there can be no rehearing, either on motion or petition. * * * There are, however, exceptions to this rule. Cases do not come within it where some clerical errors, mistakes in computation, or irregularities in making up the record have occurred, or where a final decree has been made on default of a party

entry of record by any process corresponding to enrolment.¹

b. BEFORE END OF TERM. — Since, in the United States, decrees and orders are considered to be enrolled as of the term at which the final decree was rendered, a petition for a rehearing cannot be filed after the end of the term,² except in cases provided for by statute or by rule of the court.³

through the negligence or mistake of his solicitor, or by reason of want of notice to him of the pendency of the suit." *Per* Bigelow, C. J., in *Thompson v. Goulding*, 5 Allen (Mass.) 81, citing *Clapp v. Thaxter*, 7 Gray (Mass.) 384; *Kemp v. Squire*, 1 Ves. 205; *Beekman v. Peck*, 3 Johns. Ch. (N. Y.) 415; *Clark v. Hall*, 7 Paige (N. Y.) 382; *Millspaugh v. McBride*, 7 Paige (N. Y.) 509; and 2 Dan. Ch. Pr. 1230, 1235.

Enrolment of Order Subsequent to Decree. — It seems that the enrolment of an order subsequent to a decree is not *per se* an enrolment of the decree, but it has been held that it equally prevents a rehearing of the decree, at least in a case where the latter cannot be varied without being made inconsistent with the order. *M'Dermott v. Kealy*, 7 Jur. 163.

Petition Asking for Rehearing or Bill of Review. — After a decree has been enrolled, a petition framed in the alternative asking for a rehearing or bill of review is bad for uncertainty. *Hyde v. Donne*, 2 Anstr. 551.

Exception in Favor of Minor Defendant. — In *Jackson v. Welsh*, 1 Dr. & Wal. 255, the court, on the application of a minor defendant, who had attained his full age subsequently to the enrolment of the decree, reheard the cause as to a particular matter appearing on the face of the master's report, although the decree had been enrolled before the application for a rehearing was made.

1. *Radge v. Berner*, 30 Ill. App. 182; *Campbell v. Jacobson*, 44 Ill. App. 238; *Thompson v. Goulding*, 5 Allen (Mass.) 81.

For a Contrary Practice Prevailing in Rhode Island, see *infra*, I. 5. *d. Time Prescribed by Statute.*

In Delaware a decree cannot be reheard on petition after it has been entered and signed; the only remedy is by an appeal or a bill of review. But if the decree has been entered, but not signed, it must be reheard on petition or on a supplemental bill in the nature of a bill of review. *Cochran v. Couper*, 2 Del. Ch. 27.

In *Crockett v. Green*, 3 Del. Ch. 466,

18 Encyc. Pl. & Pr. — 2

a reargument was permitted after the opinion of the court had been read, but before decree had been entered.

In Massachusetts, where a cause in equity has been continued *nisi* from a law term for advisement, and a judgment dismissing the bill has been entered, by order of the court, as of the last term in the county where the suit was pending, this is equivalent to an enrolment of the decree, and prevents a subsequent rehearing. *Clapp v. Thaxter*, 7 Gray (Mass.) 384.

In North Carolina a petition for a rehearing was refused where the decree had been signed and passed. *Robinson v. Lewis*, 2 Jones Eq. (N. Car.) 25.

2. *Gardner v. Dwelling House Ins. Co.*, 44 Ill. App. 156; *Robertson v. Maclin*, 4 Hayw. (Tenn.) 53; *Haywood v. Marsh*, 6 Yerg. (Tenn.) 69; *Hodges v. Davis*, 4 Hen. & M. (Va.) 400; *Roemer v. Simon*, 91 U. S. 149; *Platts-mouth First Nat. Bank v. Woodrum*, 86 Fed. Rep. 1004; *Scott v. Hore*, 1 Hughes (U. S.) 163; *Code Tenn.* (1896), p. 1784 (Chancery Rule 15), see also section 4847.

3. In Alabama, when a decree is rendered in vacation, the time of applying for a rehearing is extended by rule of court, and in such a case an application made by the second day of term following is in time. *Ex p. Gresham*, 82 Ala. 359.

In the District of Columbia, equity rule 86, which is similar to rule 88 of the United States Supreme Court, provides that nonappealable orders may be reheard at any time before the end of the term next succeeding that at which a final decree is ordered and recorded. *Meloy v. Central Nat. Bank*, 6 Mackey (D. C.) 444.

In Iowa it seems that by statute a decree may be reheard after the end of the term. *McGregor v. Gardner*, 16 Iowa 538.

United States District Court for Southern District of New York. — In *Petty v. Merrill*, 12 Blatchf. (U. S.) 11, the court said: "Conformably to the generally recognized power of courts over their own judgments and decrees, while in

c. BEFORE DECREE ACTED UPON OR TIME TO APPEAL PASSED.—After the parties to a suit have acted upon a decree, and rights have been created thereby,¹ or where the time within which an appeal might have been taken has passed, it is too late to apply for a rehearing.²

d. TIME PRESCRIBED BY STATUTE.—Aside from the general principles just stated, special rules exist in some jurisdictions by which the time of application is limited to a definite period;³

paper or during the same term, the 155th rule of the District Court for the Southern District of New York provides for a rehearing, or, more literally, it limits, in precise terms, the time within which a rehearing may be granted. That rule is as follows: 'A rehearing will not be granted in any matter in which a decree has been rendered, unless application is made at the term when the decree is pronounced, or there is a stay of proceedings by order of the judge.' That rule contemplates, I think, a stay in the enrolment or final entry of the decree on the record, although pronounced in form by the court, and not a stay to enable the respondent to try the experiment of an appeal to the Supreme Court, where that court has no jurisdiction to review the decree. Although the decree has been pronounced, yet, while it has not been properly drawn up, settled, and entered, this rule seems to allow an application for a rehearing, if a stay of such entry is procured, though the term at which a decision was announced has passed."

United States Supreme Court Rule.—Rule 88 of the United States Supreme Court rules in equity provides that "no rehearing shall be granted after the term at which the final decree of the court shall have been entered and recorded, if an appeal lies to the Supreme Court; but if no appeal lies the petition may be admitted at any time before the end of the next term of the court, in the discretion of the court." *Easton v. Houston*, etc., R. Co., 44 Fed. Rep. 7; *Newman v. Moody*, 19 Fed. Rep. 858. See also *Moelle v. Sherwood*, 148 U. S. 21.

But an application for a rehearing of a nonappealable decree filed after the end of the second term is too late. *Glenn v. Noonan*, 43 Fed. Rep. 403.

1. *Coster v. Clarke*, 3 Edw. (N. Y.) 405; *Horne v. Barton*, 8 De G. M. & G. 587.

But in Philadelphia, etc., R. Co. v.

Philadelphia, etc., Pass. R. Co., 6 Pa. Dist. 487, a decree under which a railroad company was authorized to lay certain tracks was allowed to be reheard on application of the adverse party, although such application was not made until the railroad company had acted under the decree and laid its tracks.

And in an English case it was held that the fact that a party had acted under a decree did not bar his right to a rehearing. *Brophy v. Holmes*, 2 Molloy 1.

2. *Hitch v. Davis*, 8 Md. 524; *Craig v. Buchanan*, 1 Yerg. (Tenn.) 141.

Contra.—In *Benedict v. Thompson*, Walk. (Mich.) 446, decided in 1844, it was held that under rule 105 in force at that time (now rule 101) a rehearing could not be granted after the time to appeal had elapsed. But this rule having been subsequently amended by the addition of the words "unless upon reasons satisfactory to the court," it has been held in later cases that where a satisfactory excuse is presented a rehearing will be allowed after the expiration of the time to appeal. *Barnes v. Grove*, 97 Mich. 212. See also *Warner v. Juif*, 38 Mich. 662.

3. In *Rhode Island* the entry of a decree, although corresponding to enrolment in England, is no bar to an application for a rehearing. In that state the jurisdiction of the Supreme Court in equity cases is original, and since there is no manner of correcting a decree without a rehearing or a bill of review, the same time has been adopted by rule as in cases of an application for a new trial, and a petition for a rehearing may be filed at any time within one year from the date of the final decree. *Hodges v. New England Screw Co.*, 3 R. I. 9.

In *Vermont*, under rule 24 in chancery, a petition for a rehearing must be filed and notice served on the adverse party within twenty days from the rising of the court which rendered the decree.

and a longer time is generally allowed where a decree is rendered against a nonresident defendant on publication only than in other cases.¹

Petitions Filed After the Statutory Time Has Expired, or after long delay, aside from any statutory limitation, are not regarded with favor, and will not be granted as of right.²

French v. Chittenden, 10 Vt. 127; *Canerdy v. Baker*, 55 Vt. 578.

1. **Nonresident Defendants.**—*Colomb v. Branch Bank*, 18 Ala. 454.

In *Mississippi* it was provided by an early statute that nonresidents against whom decrees had been rendered on publication only might file petitions for rehearing within five years after the decree was rendered. *Head v. Wash*, 31 Miss. 358. The same period was prescribed by the Code of 1857; but by the Code of 1871 the time was changed to two years after decree rendered. Under the enactment last named it was held that the defendant was not deprived of his right to a rehearing by the fact that he had full notice of the proceedings, but failed to appear, plead, answer, or demur. *Jacks v. Bridewell*, 51 Miss. 881. And it was also held that said limitation of two years applied to decrees in proceedings to confirm tax titles to land, *Belcher v. Wilkerson*, 54 Miss. 677; but not to cases where the Court of Chancery acted as a court of probate, and where the decree was made at the instance of a guardian to sell his ward's interest in land, *Rodney v. Seelye*, 54 Miss. 537. And while section 519 of the Code of 1892 prescribes a limitation of two years in such cases, it has been held that this section does not apply in a case where a decree has been made holding an infant as trustee of lands, and decreeing their conveyance, and where it is shown that one of the defendants has appeared, and that the infant's rights have been fully represented by his father, who acted as his foreign guardian. *Hebron v. Kelly*, (Miss. 1898) 23 So. Rep. 641.

In *Virginia* it was provided by statute (Code 1873, c. 166, § 16) that "any unknown party, or other defendant, who was not served with process, and did not appear in the case before the date of the judgment, decree, or order, or the representative of any such, may, within five years from that date, if he be not served with a copy of such judgment, decree, or order more than a year before the end of the said five

years, and if he be so served, then within one year from the time of such service, petition to have the case reheard, and may plead or answer, and have any injustice in the proceedings corrected." A rehearing was granted under this statute in a case where the defendant was a nonresident corporation, which was sued on a contract made without the state, and where the petition set forth all the facts necessary to bring the case within the statute. *Smith v. Life Assoc. of America*, 76 Va. 380. But in a case where the application was not made until more than six years after the date of the decree, a rehearing was refused, and it was also held that an order granting leave to file a petition does not stop the running of the statute; the petition must be actually filed within the statutory period. *Woodson v. Leyburn*, 83 Va. 843.

For the present statutory provision in Virginia see Code Va. (1887), § 3233.

2. *Ex p.* *Dunovant*, 16 S. Car. 299.

Petition Filed in Vacation.—It is erroneous for the court to give leave to file a petition for a rehearing in vacation, after the end of the term, and to reverse its decree at the next term of the court. *Parker v. Logan*, (Va. 1887) 4 S. E. Rep. 613. But if a rehearing is had under such circumstances the order made thereon will be allowed to stand, provided it is substantially the same as the original decree. *Roanoke Nat. Bank v. Farmers' Nat. Bank*, 84 Va. 603.

Period Prescribed by Order of the Court.—Where the court in rendering a decree also makes an order that it be kept open for a rehearing at the next term, on a point reserved, but that execution of the decree be not stayed, and that if a rehearing is not had at the next term the order shall not have any effect whatever, if a rehearing is not had within the prescribed period it cannot be had afterwards. *Campbell v. Rice*, 10 Yerg. (Tenn.) 199.

Circumstances Excusing Laches.—Where error is apparent on the face of the decree it seems that there may be

Petitions to Rehear Interlocutory Decrees are not limited by any statutory bar,¹ but they may be refused, in the discretion of the court, where they are presented after long acquiescence in the decree.²

e. **SUBSEQUENT ACTION ON PETITION FILED WITHIN STATUTORY PERIOD.** — By the weight of authority the court has no power to act upon a petition after the statutory time for making the application has passed, even though it was filed within the required period.³

6. How Application Is Made — *a.* **IN GENERAL.** — A rehearing must be applied for by petition, and not by motion.⁴ But where

a rehearing even though the party has been guilty of laches in making the application. *Ackland v. Braddick*, 3 Jur. 39.

And likewise it has been held that a case may be reheard although the application is not made until several years after decree rendered, where it appears that the decree was made against a person who was not a party or privy to the suit, and that he had no notice thereof until shortly before he filed his petition. *Hamilton v. Manby*, 6 Bro. P. C. (Toml. ed.) 347.

Rehearing Granted on Terms. — In *Consequa v. Fanning*, 3 Johns. Ch. (N. Y.) 364, it was held that the court might grant a rehearing although the application was not made in due time, but that in such a case the order granting the rehearing might impose terms on the petitioner if it appeared that the application had been unreasonably delayed.

1. Interlocutory Decrees. — *Craig v. Buchanan*, 1 Yerg. (Tenn.) 141; *Wright v. Strother*, 76 Va. 857; *Staples v. Staples*, 85 Va. 76; *Noel v. Noel*, 86 Va. 109; *Fowler v. Lewis*, 36 W. Va. 112.

While a bill of review to a final decree cannot be brought after three years, a petition to rehear an interlocutory decree is not limited by any statutory bar. Instances may be found in which the court has reheard a case at the distance of eighteen years from the time the decree complained of was pronounced. In one case the court refused to discharge an order for a rehearing though at a distance of twenty-five years. *Kendrick v. Whitney*, 28 Gratt. (Va.) 646.

2. Rawlins v. Rawlins, 75 Va. 76.

3. In the Federal Courts. — In *Glenn v. Dimmock*, 43 Fed. Rep. 550, it was held that the word "admitted," as used in the second part of rule 88 of the United States Supreme Court, means the same as the word "granted"

in the first part of that rule, and, therefore, that a rehearing of a nonappealable order cannot be granted after the end of the second term, even though the petition is filed within the statutory time; and it was also held that an order made on a petition after the expiration of the statutory period is utterly void, and that such order is not invalidated, or in any manner affected, by the fact that the adverse party has subsequently obtained leave to plead. *Distinguishing Clarke v. Threlkeld*, 2 Cranch (C. C.) 408; *Giant Powder Co. v. California Vigorit Powder Co.*, 5 Fed. Rep. 197. And to the effect that orders made after the statutory period are void, see also *Sheffey v. Lewisburg Bank*, 33 Fed. Rep. 315; *Glenn v. Noonan*, 43 Fed. Rep. 403.

4. Boucher v. Boucher, 3 MacArthur (D. C.) 453; *Throckmorton v. Stout*, 3 Iowa 580; *Hughes v. Jones*, 2 Md. Ch. 289; *Galloway v. Dunnington*, 10 Lea (Tenn.) 216; *Harman v. Lewis*, 24 Fed. Rep. 530; *Ex p. Cunningham*, 3 Deac. & C. 70. See in general article PETITIONS, vol. 16, p. 500.

In *New York*, under the chancery practice, it was held that an application would not be treated as a petition for a rehearing unless it was made in due form and according to the practice of the court. *Gardner v. Dering*, 2 Edw. (N. Y.) 131.

An Application by Motion Supported by Affidavits is irregular, and it is not error for the chancellor to refuse a rehearing on the sole ground that it was applied for in this improper manner. The application must be by petition, as prescribed by the rules of chancery practice. *Frazier v. Tubb*, 2 Heisk. (Tenn.) 662.

Waiver of Objection to Irregularity of Application. — The application should be by petition, but if it is made by motion, and the adverse party does not object thereto in the lower court, the

a decree is interlocutory, and where the application embraces all the requisites of a petition, it will sometimes be treated as such, although not formally so styled.¹

b. FORM AND CONTENTS OF PETITION. — In general form petitions for a rehearing resemble other petitions in equity.² The grounds on which the rehearing is asked must be fully stated;³ signature by counsel is required; and all facts alleged in

objection is waived. The irregularity of the procedure by motion cannot be objected to for the first time in the appellate court. *Peck v. Spencer*, 26 Fla. 23.

1. In Virginia an application will be treated as a petition for a rehearing when the decree which is attacked is interlocutory, although such application is styled a bill of review, and is filed as such. *Laidley v. Merrifield*, 7 Leigh (Va.) 346; *Ambrouse v. Keller*, 22 Gratt. (Va.) 769. And *vice versa*, a petition for a rehearing may be treated as a bill of review when the decree is final. *Summers v. Darne*, 31 Gratt. (Va.) 791; *Heermans v. Montague*, (Va. 1890) 20 S. E. Rep. 899.

Bill of Review Treated as Petition for Rehearing. — In *Sands v. Lynham*, 27 Gratt. (Va.) 291, H., a foreigner, having died intestate and without known heirs, his real property escheated to the state; G., a creditor, having recovered a judgment against the estate, obtained a decree for the sale of the lands in satisfaction thereof, and upon the sale S. purchased the lands. An inquisition of escheat was executed after the death of H., and the lands were advertised for sale as escheated property. S. thereupon obtained an injunction forbidding the sale of the land, which injunction was made perpetual by a decree rendered against the escheator by default. Under these circumstances, and in view of a rule of practice prescribing that when a decree is by default the party aggrieved must proceed by motion or by a petition for a rehearing, it was held that a bill of review subsequently filed by the escheator might be treated as a petition for a rehearing.

Motion to Reverse Decree. — In *Kendrick v. Whitney*, 28 Gratt. (Va.) 646, it was held that a motion under Code 1860, c. 181, § 5, to reverse for error an interlocutory decree rendered by default, might be treated as a petition for a rehearing where it contained all the elements essential to such a peti-

tion, and where it could not prevail as a motion under the code because filed after expiration of the statutory time.

Answer Treated as Petition for Rehearing. — In a suit for the settlement of a decedent's estate, where a claim against the estate, consisting of a judgment confirmed by an interlocutory decree, was filed by an intervener more than four years after the rendition of the decree, it was held that the answer to said claim filed by the executor of the decedent might be treated as a petition for a rehearing of the decree confirming the judgment. *Staples v. Staples*, 85 Va. 76.

In North Carolina, where the error complained of is one of fact, in making an interlocutory order of reference, and in confirming the report made by the referee, an application for reargument of the cause is not, strictly speaking, a petition for a rehearing, but it may be treated as such, or as a motion to set aside the order of reference, the order confirming the report, and the decree pursuant thereto. *Eason v. Billups*, 65 N. Car. 216.

2. For the General Form of Petitions in Equity see article PETITIONS, vol. 16, p. 500.

3. Wiser v. Blachly, 2 Johns. Ch. (N. Y.) 488; *Johnson v. Britton*, Dudley Eq. (S. Car.) 24; *Vermont Equity Rule 24*, 11 Vt. 695; *Allis v. Stowell*, 85 Fed. Rep. 481; *Giffard v. Hort*, 1 Sch. & Lef. 398.

In Virginia the petition must state by whom it is presented, and must also set forth the interest of the petitioner, the material facts upon which the decree is founded, and the relief sought by the rehearing; it must be filed by leave of the court. *Heermans v. Montague*, (Va. 1890) 20 S. E. Rep. 899.

When Filed by a Nonresident against whom a decree has been rendered on publication only, it seems that the petition need not state specifically the grounds on which a rehearing is sought. In such a case it must set forth the proceedings in the cause or

the petition which are not apparent on the record must be verified by oath.¹

Newly Discovered Evidence. — When a rehearing is sought on the ground of newly discovered facts or evidence, the application must be in the form of a petition for leave to file a supplemental bill in the nature of a bill of review (or, if the decree is interlocutory, for leave to file a supplemental bill) and for a rehearing of the cause at the time when such bill is ready to be heard.² The

refer to them in such manner as will show its condition, and must state the nonresidence of the petitioner and that the application is made within the statutory time. *Colomb v. Branch Bank*, 18 Ala. 454.

1. United States Supreme Court Equity Rule 88; Tennessee Chancery Rule 15. And see Alabama Chancery Rule 82 (Code Ala. 1896, p. 1220); *Ex p. Gresham*, 82 Ala. 359; *Meloy v. Central Nat. Bank*, 6 Mackey (D. C.) 444.

Rule 88 of the United States Supreme Court Rules in Equity provides that "every petition for a rehearing shall contain the special matter or cause on which such rehearing is applied for, shall be signed by counsel, and the facts therein stated, if not apparent on the record, shall be verified by the oath of the party or by some other person."

Signature of Counsel Dispensed With — Exceptional Case. — In *Leete v. Jenkins*, 14 W. R. 489, where an order had been made by a vice-chancellor on a cause petition, leave was given to a person who was not a party to the cause, and who had not been served with the petition, to present a petition for a rehearing, without the signature of counsel.

2. *Fennimore v. Rahow*, 1 Del. Ch. 88; *Owens v. Love*, 9 Fla. 325; *Finlayson v. Lipscomb*, 15 Fla. 558; *Simpson v. Downs*, 5 Rich. Eq. (S. Car.) 421; *Mead v. Arms*, 3 Vt. 148; *Baker v. Whiting*, 1 Story (U. S.) 218; *Jenkins v. Eldredge*, 3 Story (U. S.) 299; *Head v. Godlee*, 6 Jur. N. S. 495.

In *Reeves v. Keystone Bridge Co.*, 11 Phila. (Pa.) 498, 33 Leg. Int. (Pa.) 149, the court, in considering this practice, said: "But it remains to consider in what mode the rehearing prayed for must be applied for. In reference to this the practice seems to be well settled. It is by petition to the court for leave to file a supplemental bill, setting forth the newly discovered evidence, and for a rehearing of the cause at the

time when the supplemental bill may be ready for hearing. This practice seems to have been long observed in England, and is said by Mr. Justice Story in *Baker v. Whiting*, 1 Story (U. S.) 233, to have been sanctioned by Chancellor Kent in *Wiser v. Blachly*, 2 Johns. Ch. (N. Y.) 488, and *Livingston v. Hubbs*, 3 Johns. Ch. (N. Y.) 124, and by the Circuit Court in *Rhode Island in Dexter v. Arnold*, 5 Mason (U. S.) 303. In *Jenkins v. Eldredge*, 3 Story (U. S.) 302, where a decree similar to the one entered here had been made, the same eminent judge thus strongly states the rule: 'The present application, if maintainable at all, should properly, in its prayer, be for leave to file a supplemental bill to bring forward the new evidence, and for a rehearing of the cause at the time when the supplemental bill should be ready for hearing. In my judgment it would be against the settled principles and practice of courts of equity to allow the new evidence to be brought forward by a mere order on the petition, and, indeed, in this stage of the cause, wholly irregular to admit it, except upon a supplemental bill, where testimony could be taken on both sides to meet the new exigencies of the case.'

And in *Finlayson v. Lipscomb*, 15 Fla. 558, it was said: "The general rule is that if the final decree has not been signed and enrolled, or if, as is the case here, it has been signed and pronounced, but not recorded and entered (as required by rules 3 and 87 of equity practice), and it is sought to be reheard upon error apparent on the face of the proceedings (not being a clerical mistake or error arising from any accidental slip or omission, rule 87), or upon such facts, not appearing upon the face of the proceedings, as may be proven upon a rehearing — such as evidence duly taken in chief and omitted to be read, or evidence constituting new matter relating only to

petition must allege affirmatively that the matter sought to be introduced is new matter which has been discovered since the rendition of the decree, and that it could not have been obtained in time for the hearing if the petitioner had used all due diligence in obtaining it; and these averments must be verified by affidavit.¹

papers since found, and which may be proved *viva voce* at the hearing, or to testimony going to show the incompetency of a witness in a former deposition. *Dale v. Roosevelt*, 6 Johns. Ch. (N. Y.) 255; *Wendell v. Lewis*, 6 Paige (N. Y.) 233; *Hill v. Chapman*, 1 Ves. Jr. 405—then the petition for rehearing, authorized by the statute, is available for this purpose. If, however, a final decree signed and pronounced, but not recorded and entered, is sought to be reheard on new facts, or facts discovered since publication passed, the remedy is by a supplemental bill, in the nature of a bill of review."

1. *Boucher v. Boucher*, 3 MacArthur (D. C.) 453; *Walsn v. Smyth*, 3 Bland (Md.) 9; *Dennett v. Dennett*, 44 N. H. 531; *McDowell v. Perrine*, 36 N. J. Eq. 632; *Reeves v. Keystone Bridge Co.*, 11 Phila. (Pa.) 408, 33 Leg. Int. (Pa.) 149; *Ex p. Dunovant*, 16 S. Car. 299; *Corey v. Moore*, 86 Va. 721; *Summers v. Darne*, 31 Gratt. (Va.) 791; *Armstead v. Bailey*, 83 Va. 242; *Hicks v. Otto*, 85 Fed. Rep. 728; *Rintoul v. New York Cent., etc., R. Co.*, 20 Fed. Rep. 313.

The Materiality of the New Evidence Must Be Shown by stating the nature of the testimony, and stating precisely what it will be when taken. It must be shown that the testimony really exists and can be produced, and that the applicant has not been guilty of culpable negligence. *Scales v. Nichols*, 2 Verg. (Tenn.) 140.

The Petition Should Be Accompanied by Affidavits of the witnesses relied on. *Mays v. Wherry*, 3 Tenn. Ch. 219.

Averments Must Be Specific.—The new matter must be so stated that the court may see on inspecting it that if it had been brought forward it would probably have changed the character of the decree; and it must be so set forth that the adverse party can answer it understandingly, and thus present a direct issue to the court. It is not sufficient to allege that the petitioner expects to prove certain facts; he must state the evidence distinctly and file affidavits of witnesses in support of his averments. *Whitten v. Saunders*, 75 Va. 563.

Affidavit of Due Diligence.—In *Virginia* the fact that the evidence was not discovered until after rendition of the decree must be alleged in the petition itself, but the averment that it could not have been procured sooner by the exercise of due diligence is contained in a separate affidavit filed in support of the petition. *Trevelyan v. Loft*, 83 Va. 141; *Armstead v. Bailey*, 83 Va. 242.

In *Maryland* it is not enough to allege or show that the matter was not discovered until after decree rendered. It must be matter which could not have been discovered until after a decree, and the petition must allege that it could not have been so discovered by the use of reasonable diligence. *Hughes v. Jones*, 2 Md. Ch. 289.

In *New Hampshire* it was held that while in England it is enough to show that the facts or matters of evidence were unknown at the time of publication, here, from the difference of the practice, it must be shown that they were unknown at the hearing, since, upon application, leave would be granted to take further evidence until the hearing, in any case where the want of the evidence would justify a rehearing. *Dennett v. Dennett*, 44 N. H. 531.

In the *Federal Courts* it has been held that a general averment of due diligence is not sufficient; the facts and circumstances constituting such diligence must be stated specifically. *Gillette v. Bate Refrigerating Co.*, 12 Fed. Rep. 108.

An averment in general terms that the petitioner has been eager to collect all material evidence and that he has made great exertion and every reasonable effort to defend the suit is insufficient. *Hicks v. Otto*, 85 Fed. Rep. 728.

The facts to be proved and the witnesses to be called must be set out in the petition, and a general averment that certain facts were not known at the time of the hearing is defective. *McLeod v. New Albany*, 66 Fed. Rep. 378.

The petition must state fully, inde-

c. CERTIFICATE OF COUNSEL. — In the English Court of Chancery the petition was accompanied by a certificate of two counsel stating that in their opinion the decree was erroneous and ought to be reheard.¹ Such a certificate is required in some of the equity courts of this country.²

d. NOTICE OF THE APPLICATION. — In modern chancery practice the application for a rehearing is not an *ex parte* proceeding, and notice thereof should be given to the adverse party, who may thereupon file an answer to the petition, upon which petition and answer the application is heard.³

pendently of the accompanying affidavits, the nature of the new evidence relied on, and also the time when it first came to the knowledge of the petitioner. The affidavits accompanying the application should by distinct and positive allegations be made part of the petition. Neither the petition nor the affidavits in its support should be verified before a notary public who is also counsel for the petitioner. *Allis v. Stowell*, 85 Fed. Rep. 481.

Verification by the petitioner's solicitor to the effect that the petition is true to his best knowledge, information, and belief is not sufficient. *Page v. Holmes Burglar Alarm Tel. Co.*, 2 Fed. Rep. 330.

1. *Cunyngham v. Cunyngham*, *Ambl.* 89; *Buckeridge v. Whalley*, 8 *Jur. N. S.* 473.

It was not necessary that the counsel making the certificate should have been engaged in the case at the former hearing. *Malone v. Geraghty*, 3 *Dr. & War.* 252.

And in *Re Midland Counties Ben. Bldg. Soc.*, 4 *N. R.* 415, a petition for winding up a company which had been argued by one counsel only in the court below was allowed to be reheard upon the certificate of that counsel alone.

2. *Hughes v. Jones*, 2 *Md. Ch.* 289; *Handy v. Andrews*, 52 *Miss.* 626; *Ex p. Terry*, *Rice Eq. (S. Car.)* 1; *Johnson v. Britton*, *Dudley Eq. (S. Car.)* 24; *Vermont Chancery Rule* 24, 11 *Vt.* 695.

3. *Throckmorton v. Stout*, 3 *Iowa* 580; *Dennett v. Dennett*, 44 *N. H.* 531; *Burch v. Newberry*, (*Supm. Ct. Gen. T.*) 3 *How. Pr. (N. Y.)* 271; *Sheldon v. Barnard*, (*Ct. App.*) 3 *How. Pr. (N. Y.)* 423; *Giant Powder Co. v. California Vigorit Powder Co.*, 5 *Fed. Rep.* 197; *Brandon v. Brandon*, 2 *Jur. N. S.* 981; *French v. Chittenden*, 10 *Vt.* 127.

Notice of Appeal Cannot Be Converted into notice of a rehearing. *Wilson v.*

Onderdonk, (*Supm. Ct. Spec. T.*) 3 *How. Pr. (N. Y.)* 319. But the adverse party may waive this objection by failing to raise it in time. *Dempsey v. Tylee*, (*Supm. Ct. Gen. T.*) 1 *Code Rep. N. S. (N. Y.)* 360.

Practice in the Federal Courts. — In *Giant Powder Co. v. California Vigorit Powder Co.*, 5 *Fed. Rep.* 197, it was held that an application for a rehearing in an equity court of original jurisdiction was not an *ex parte* proceeding, rehearings in such cases being entirely different from rehearings of appeals. The proper course of procedure in such cases was said to be for the complainant to file a petition with the clerk of the Circuit Court, and obtain from the court or circuit judge an order upon the defendants to show cause on the following rule day, or some other day mentioned, why its prayer should not be granted. The defendants may then answer the petition, and the application will be heard upon such petition and answer. In the case at bar the hearing was had before a justice of the Supreme Court while holding the Circuit Court for the District of California in the city of San Francisco, and a decree was entered dismissing the complainant's bill. In view of the proper practice as above stated, it was held that a rehearing could not be had *ex parte* before the justice at Washington; but that after the petition had been properly filed in the Circuit Court of San Francisco the clerk of that court would forward the petition and answer to the circuit judge at Washington, with the briefs filed by counsel, and the application would then be taken up and disposed of and the judgment of the justice sent to the Circuit Court and there entered.

Contra — Notice Unnecessary. — In the former Court of Chancery of *New York* a rehearing under the 70th rule was a matter of course, and notice of the

e. **SECURITY FOR COSTS.** — In some jurisdictions the applicant is required to give security for the costs of the proceeding.¹

7. Motion to Take Petition from Files. — A petition which is defective in form, or which is filed in violation of a rule of the court, will be taken from the files on motion by the adverse party.²

8. Practice on Rehearing — *a.* **HOW FAR CASE IS OPEN.** — It is generally held that a rehearing, when granted, opens the whole case to the respondent, but that for the petitioner it is open only as to the points complained of in the petition.³ But where the order is for a rehearing generally, and is granted on the entire merits, the whole case is opened as to all parties.⁴

petition was unnecessary. *Harrison v. Hull, Hopk. (N. Y.) 112.* And in *Johnson v. Britton, Dudley Eq. (S. Car.) 24,* it was held that a petition for a rehearing would be decided without argument.

Process Unnecessary in Virginia. — In *Virginia*, while leave will always be given to any party to answer or deny an allegation of a petition, it is not usual to require service of process, for matters requiring such service should be presented by the regular pleadings. Where all of the parties have already been served with process, or are before the court, there is no good reason for further process, and the practice in this respect is the same as prevails as to supplemental bills. This rule, however, applies only to petitions to rehear interlocutory decrees. *Heermans v. Montague, (Va. 1890) 20 S. E. Rep. 899.*

1. Schermerhorn v. New York, (Supm. Ct. Gen. T.) 3 How. Pr. (N. Y.) 254; Ex p. Terry, Rice Eq. (S. Car.) 1; Atty.-Gen. v. Brooke, 18 Ves. Jr. 496; Vowles v. Young, 9 Ves. Jr. 173.

The English rule was to grant a rehearing upon payment of costs accrued, and security given for further costs. In the old Superior Court of Chancery of *Mississippi* there was no provision as to costs, either accrued or future, but according to the present practice security for future costs is required. *Handy v. Andrews, 52 Miss. 626.*

2. Moss v. Baldock, 6 Jur. 403; Wood v. Griffith, 19 Ves. Jr. 550.

3. Consequa v. Fanning, 3 Johns. Ch. (N. Y.) 587; Dale v. Roosevelt, 6 Johns. Ch. (N. Y.) 255; Ferguson v. Kimball, 3 Barb. Ch. (N. Y.) 616; Malone v. Geraghty, 5 Ir. R. Eq. 549; Colchester v. Colchester, Sel. Ch. Cas. 13.

An Appeal in Equity Is Substantially a Rehearing of the cause, and opens the

whole case to the respondent; the court will therefore examine questions which may have passed *sub silentio* at the hearing before the chancellor, if raised by the pleadings and proofs. *Southern L. Ins., etc., Co. v. Cole, 4 Fla. 359; Smith v. Croom, 7 Fla. 180.*

Dependent on Terms of Order Granting Rehearing. — The order for the rehearing generally specifies the points which are to be reheard, and where it does so specify the case will not be opened as to other points. *White v. Carpenter, 2 Paige (N. Y.) 217.*

4. Glover v. Hedges, 1 N. J. Eq. 113; Sparhawk v. Buell, 9 Vt. 41.

A Question of Fact Is Not Reviewable on a rehearing of a decree advised by the vice-chancellor unless he certifies that it should be reheard upon the evidence. *Swallow v. Swallow, 27 N. J. Eq. 278.*

Rehearing Granted, under Statute, to Nonresident Defendant. — Where a rehearing has been granted, under the *Mississippi* statute, to a nonresident defendant against whom a decree has been rendered on publication only, it is not necessary for such defendant to file an answer to the original appeal within the time limited by the statute for applying for a rehearing. Such answer may be filed after the rehearing has been granted, even though the statutory period limited for the application has expired. *Head v. Wash, 31 Miss. 358.*

A defendant who has brought his case within the provision of the statute, and to whom a rehearing has been granted, may make his answer in the form of a cross-bill under Code 1871, § 1030 (Code 1892, § 536). After the application is granted the case is a pending suit, and the complainant may dismiss his original bill. *Belcher v. Wilkerson, 54 Miss. 677.*

b. WHAT EVIDENCE MAY BE INTRODUCED. — Evidence duly taken in chief, but the reading of which at the hearing was omitted through negligence or other cause, may be read on the rehearing;¹ and so may new evidence consisting of papers since found, and which may be proved *viva voce* at the hearing;² also evidence going to show the incompetency of a witness who testified on the hearing, as for instance, that he has since been convicted of perjury, or has admitted that he received a bribe.³ It seems that a document put in evidence on the hearing may be withdrawn on the rehearing.⁴ It is doubtful whether new evidence to the merits can be introduced in any case,⁵ and this certainly cannot be done unless a supplemental bill has been filed.⁶

c. ORDER OF ARGUMENT. — On a rehearing the petitioner is entitled to open and close the argument.⁷

9. Relief Granted. — If upon a rehearing the court is satisfied that the decree is erroneous it may be corrected in accordance with the prayer of the petition.⁸ But if the order for rehearing is dismissed, or discharged by agreement of the parties, and no

1. *Dale v. Roosevelt*, 6 Johns. Ch. (N. Y.) 255; *Jenkins v. Eldredge*, 3 Story (U. S.) 306; *Herring v. Cloberry*, Cr. & Ph. 251; *Cragg v. Alexander*, 16 W. R. 961; *Cunyngham v. Cunyngham*, Ambl. 90; *Williams v. Goodchild*, 2 Russ. 91.

2. *Dale v. Roosevelt*, 6 Johns. Ch. (N. Y.) 255; *Higgins v. Mills*, 5 Russ. 287.

When New Evidence Is Documentary. — New evidence may be admitted where it consists of documents that cannot have been tampered with, but fresh affidavits made by persons who have given evidence on the original hearing cannot be read on the rehearing. *Glover v. Daubeney*, 9 Jur. N. S. 90.

3. *Needham v. Smith*, 2 Vern. 463. And see *Sheldon v. Hawes*, 15 Mich. 519.

4. *Ogle v. Morgan*, 1 De G. M. & G. 359. But see *Whitman v. Brotherton*, 2 Tenn. Ch. 396.

5. *Dale v. Roosevelt*, 6 Johns. Ch. (N. Y.) 255; *Lambe v. Orton*, 33 L. J. Ch. 81.

New Evidence to the Merits May Be Admitted on a Rehearing for the purpose of proving matters which were in issue on the original hearing, and a petition for a rehearing may be amended to state the discovery of such new evidence. *Wyld v. Ward*, 2 V. & J. 381; *White v. Fussell*, 1 Ves. & B. 153.

Extrinsic Facts Verified by Affidavit. — While a petition for a rehearing must be confined to the case made by the

record, extrinsic facts may be presented and considered when they are pertinent to the case and are verified by affidavit. *Ex p. Gresham*, 82 Ala. 359.

In Tennessee Newly Discovered Evidence May Be Taken and used on the rehearing, and so may evidence in rebuttal, or evidence explanatory of the testimony offered on the hearing when the latter testimony acted as a surprise to the petitioner; but the court must be satisfied by affidavit of the materiality of the evidence. *Scales v. Nichols*, 2 Yerg. (Tenn.) 140; *Whitman v. Brotherton*, 2 Tenn. Ch. 396.

6. *Jenkins v. Eldredge*, 3 Story (U. S.) 299.

7. *Sills v. Brown*, 1 Johns. Ch. (N. Y.) 444; *Ex p. Cunyngham*, 3 Deac. & C. 73.

8. In *Philadelphia, etc., R. Co. v. Philadelphia, etc., Pass. R. Co.*, 6 Pa. Dist. 487, permission was given by a decree to the defendant, a railroad company, to lay its tracks on a certain side of the street, and relief was denied to the complainant, but on a rehearing, obtained by the complainant, it was shown that the railroad company had laid its tracks on the other side of the street from that prescribed by the decree, and accordingly a decree was made ordering the company to reconstruct its tracks as ordered by the original decree.

If the Defendant Does Not Appear the complainant must take such decree as he can abide by. *M'Cann v. O'Connor*, 2 Dr. & War. 42.

rehearing is had, the original decree stands without alteration.¹ As previously stated, the whole case is open to the respondent, and in a proper case more extensive relief than that granted by the original decree may be given to him.²

10. Effect on Original Decree — a. OF PETITION FILED. — By the weight of authority the filing of a petition does not suspend the decree or extend the time for taking an appeal unless an express order of suspension is made by the court.³

b. OF PETITION ENTERTAINED BY COURT. — In the federal courts, however, a petition which is entertained by the court and set down for hearing at a definite time suspends the time limited for an appeal or writ of error until the application is finally disposed of.⁴

c. OF ORDER GRANTING REHEARING. — An order granting a rehearing does not, of itself, vacate the decree, but further proceedings under the decree are usually suspended by express direction of the court.⁵

11. Subsequent Rehearings. — A second rehearing may be had under special circumstances, but it will not be granted as a matter of right,⁶ and a special application for leave to file the

1. *Lockwood v. Bates*, 1 Del. Ch. 435.

2. *Sullivan v. Jacob*, 1 Molloy 473.

3. *Jacobs v. Bealmear*, 41 Md. 484; *Wilcox v. Wilcox*, 1 Ired. Eq. (N. Car.) 36.

Time for Entering Appeal Suspended. — In *Meloy v. Central Nat. Bank*, 6 Mackey (D. C.) 444, the court said: "We think therefore that the motion for rehearing suspends the time for entering an appeal from the decree until that motion is disposed of; when disposed of, the right of appeal remains, and the twenty days run from the date of the disposition of the petition for the rehearing." *Citing Mercer v. Mercer*, 1 MacArthur (D. C.) 659.

Appeal and Petition for Rehearing Pending at Same Time. — Where there is an appeal, and also a petition for a rehearing of the decree appealed from, the argument on the appeal will stand until the petition can be disposed of. *Tomlinson v. Tomlinson*, 10 Rich. Eq. (S. Car.) 300.

4. *Aspen Min., etc., Co. v. Billings*, 150 U. S. 31; *Goddard v. Ordway*, 101 U. S. 745.

Where the court has ordered a petition to be heard and fixed a time for the hearing, it will suspend the execution of the decree until the hearing is had, at least in a case where it might involve large expense to proceed under the decree, and where the time which must elapse before the hearing can be

had is short. *Rogers v. Marshall*, 12 Fed. Rep. 614.

In *Voorhees v. John T. Noye Mfg. Co.*, 151 U. S. 135, an entry was made in the Circuit Court allowing an appeal to the United States Supreme Court, but a petition for a rehearing was filed, and entertained by the court, and it was afterwards held that the action of the court in entertaining the petition operated to keep the cause within the court's jurisdiction; and since, pending the consideration of the application, an act had been passed giving to the Circuit Court of Appeals jurisdiction in cases similar to the one at bar, it was further held that upon the dismissal of the petition a new appeal must be taken.

5. *Lockwood v. Bates*, 1 Del. Ch. 435; *Vose v. Internal Imp. Fund*, 2 Woods (U. S.) 647; *Platt v. Howland*, 10 Leigh (Va.) 531.

When a Rehearing Is Granted on the Record, and the court thinks that the decree was not justified by the proof as it stood, the decree should be set aside until the rehearing is had; but this is not the proper practice where a rehearing is had in order to allow additional proof; in such a case the decree should stand pending the rehearing. *Rogers v. Marshall*, 15 Fed. Rep. 193.

6. *Wilcox v. Wilkinson*, 1 Murph. (N. Car.) 11; *Deerhurst v. St. Alban's*, 2

petition is necessary.¹

When the Second Petition Is Presented by the Same Party who applied for the first rehearing it will be regarded with less favor than when presented by the adverse party.²

II. REHEARING OF APPEALS — 1. In General — a. POWER TO GRANT. — While rehearings were allowed almost as a matter of course in the English Court of Chancery, which was a court of original jurisdiction, they have never been allowed with the same liberality in the English courts of appeal,³ and in the United States, likewise, a distinction has obtained in this matter between equity courts of original jurisdiction and courts of appellate jurisdiction only. In the former rehearings are allowed with considerable liberality, though not generally as a matter of course, but in the latter they are almost uniformly refused.⁴ However, while the power to rehear appeals is seldom exercised, the appellate courts in most of the states undoubtedly have jurisdiction to grant such rehearings, and will do so under proper circumstances.⁵

Russ. & M. 702; *Mousley v. Carr*, 3 Myl. & K. 205.

A Second Petition for a Rehearing Will Be Refused where the objection to the decree is not raised, and the opinion of the chancellor is not called thereto, until after a decision has been rendered, and a petition for a rehearing on other grounds has been overruled, and the parties by mutual agreement have compromised the matter in litigation. *Jeter v. Jeter*, 36 Ala. 391.

Where the application is based solely on evidence which is already before the court, and which has been passed upon adversely on the former rehearing, and where no manifest error is shown, a second rehearing cannot be granted. *Rogers v. Riessner*, 34 Fed. Rep. 270.

Second Petition for Rehearing of Original and Supplemental Causes. — In *Fuller v. Willis*, 11 Jur. 233, where a petition for a second rehearing of an original and of a supplemental cause was presented after the lapse of fifteen years, the court granted the application in regard to the supplemental cause, since there was an evident error in the decree, but refused to rehear again the original cause.

1. *Moss v. Baldock*, 6 Jur. 403; *Matter of Direct Exeter, etc., R. Co.*, 3 Macn. & G. 237. And see *Maybery v. Brooking*, 2 Jur. N. S. 76.

2. *Land v. Wickham*, 1 Paige (N. Y.) 256.

Petition by Administrator. — In a suit

for the construction of a will, the administrator of one of the devisees is not prevented from filing a petition for a rehearing by the fact that the devisee himself has previously filed and withdrawn such a petition. *Noel v. Noel*, 86 Va. 109.

3. **After Final Judgment in the House of Lords**, or in the Judicial Committee of the Privy Council, no rehearing is allowed, unless for the purpose of correcting mistakes in the form of the decree. *Winchester v. Winchester*, 121 Mass. 127, citing *Broughton v. Delves*, 1 Ridg. P. C. 514; *Stewart v. Agnew*, 1 Shaw 413; *Tommey v. White*, 3 H. L. Cas. 49, 4 H. L. Cas. 313; *Rajundernarain Rae v. Bijai Govind Sing*, 1 Moo. P. C. 117; *The Singapore v. The Hebe*, L. R. 1. P. C. 388.

4. *Internal Imp. Fund v. Bailey*, 10 Fla. 238; *Longworth v. Sturges*, 2 Ohio St. 104.

"It is true, no courts are infallible, but the usual mode allowed by law for correcting their errors is by appeal; and it is only in courts of last resort, where there is no other remedy for an oversight or mistake, that rearguments are permitted, unless in extraordinary cases, and then only upon the failure to present or notice an important legal question, or a recent statute or decision." *Per* Robertson, C. J., in *Newell v. Wheeler*, 4 Robt. (N. Y.) 190.

5. In California the Supreme Court has power to grant rehearings in cases on appeal. *Niles v. Edwards*, 95 Cal.

The Rule in the United States Supreme Court is that no reargument will be granted unless some member of the court who concurred in the judgment doubts the correctness of the opinion and desires a further argument on the subject, and not then unless the proposi-

41. This power is derived from the constitution (art. 6, § 4), and it cannot be abridged by legislative enactment. Thus it has been held that article 6, § 2, of the constitution, providing that a decision on appeal in one of the departments of the Supreme Court shall be conclusive only where a rehearing in bank is not ordered, does not by implication prohibit a rehearing in bank of a case which has been decided in bank in the first instance, and has never been heard in department; and further it has been held that section 45 of the Code of Civil Procedure, providing that where there has been no decision in one of the departments, an order granting a rehearing after judgment in bank must be in writing signed by five justices is unconstitutional, being in conflict with article 6, § 2, of the constitution, which provides that a majority of the court, to wit, four justices, may decide any matter within the jurisdiction of the court. *Matter of Jessup*, 81 Cal. 408, citing *Lux v. Haggins*, 69 Cal. 255; *Bull v. Coe*, 77 Cal. 54, and *distinguishing* *Hegard v. California Ins. Co.*, 72 Cal. 535. In the Superior Court, however, rehearings are unknown. *Fabretti v. Santa Clara County*, 77 Cal. 305.

In Florida rehearings in the Supreme Court are authorized by rule of court, but are seldom allowed. The right being thus derived solely from rule of court, it follows that an act of the legislature directing a rehearing is improper, being the exercise of a power belonging exclusively to the judicial department. *Internal Imp. Fund v. Bailey*, 10 Fla. 238.

In Illinois a party who has been defeated in the appellate court may either apply for a rehearing or pray for a certificate of importance to enable him to appeal to the Supreme Court. These are alternative remedies, and the party cannot ordinarily have both, unless it be in a case where the petition for a rehearing can be disposed of before the time limited by statute within which to apply for a certificate of importance has elapsed. *Oberne v. Bunn*, 39 Ill. App. 122. And a rehearing is the only method by which the Supreme Court

can review its decisions after the term has elapsed. *Hollowbush v. McConnell*, 12 Ill. 203; *Cook v. Norton*, 61 Ill. 285.

In Indiana a rehearing may be had in the general term of the Supreme Court, if applied for at the proper time and in the proper manner, although rehearings on appeal were unknown at common law. The Revised Statutes do not expressly provide for rehearings in such cases, but the power to grant them is implied therein, and the proceedings on the rehearing are governed by the general rules of the Civil Code. *Terrell v. Butterfield*, 92 Ind. 1.

In Massachusetts it is not the practice of the Supreme Judicial Court to rehear appeals in ordinary cases, but the full court may grant a rehearing, in its discretion, in exceptional cases. *Nashua, etc., R. Corp. v. Boston, etc., R. Corp.*, 169 Mass. 157. But where, on appeal to the full court, a decree of a single justice determining a defendant's liability and ordering the case to be sent to a master to state the account between the parties is affirmed, the full court will not grant a rehearing on the question of the defendant's liability, when the application is made on a second appeal from a decree of the single justice ordering judgment in accordance with the master's report. *Lincoln v. Eaton*, 132 Mass. 63.

In Montana a rehearing may be had to reverse errors in a decision of the Supreme Court. *Barkley v. Tieleke*, 2 Mont. 433.

In New Hampshire the Supreme Court has jurisdiction to grant rehearings of its own judgments on appeal. *Russell v. Dyer*, 43 N. H. 396; *Weare v. Deering*, 60 N. H. 56.

In New Jersey it has been said that the power to grant rehearings of appeals should be exercised only in extraordinary cases, especially when not suggested by the court. *Murphy v. Farr*, 11 N. J. L. 186; *King v. Ruckman*, 22 N. J. Eq. 551; *Cassedy v. Bigelow*, 27 N. J. Eq. 505.

In New York the former Court of Common Pleas had jurisdiction to order a rehearing of judgments in cases on appeal from the District Court. *St.*

tion receives the support of the majority of the court ; but under these conditions the court will order a reargument without waiting for the application of counsel.¹ This rule has been adopted by appellate courts in several of the states.²

b. WHAT DECISIONS MAY BE REHEARD — Decisions Which Are Final. — A rehearing will be more readily granted where the decision of the appellate court is final than in cases where the judgment of the lower court is reversed and the case remanded.³

Michael's Protestant Episcopal Church *v.* Behrens, (C. Pl. Gen. T.) 10 Civ. Pro. (N. Y.) 181; *McAveney v. Brush*, (C. Pl.) 35 N. Y. Supp. 1110. By the constitution, art. 2, §§ 2, 5, this jurisdiction of the Court of Common Pleas has been transferred to the appellate division of the Supreme Court, and that court now has jurisdiction to rehear appeals. *Hopkins v. Clark*, 149 N. Y. 329. And in *Slocum v. Fairchild*, 7 Hill (N. Y.) 292, it was held that the Supreme Court might rehear a judgment which it had rendered, ordering a new trial.

In North Carolina judgments of the Supreme Court may be set aside on rehearing, but every presumption is in favor of such judgments, and alleged errors therein must be clearly pointed out. *Weisel v. Cobb*, 122 N. Car. 67.

In Ohio rehearings, as known in the English Court of Chancery and in other equity courts of original jurisdiction, are not recognized in the Supreme Court, the remedy by petition therefor, authorized by section 56 of the Act of 1831, having been abolished by the Code of Civil Procedure. *Myres v. Myres*, 6 Ohio St. 221; *Longworth v. Sturges*, 2 Ohio St. 104; *Corry v. Campbell*, 34 Ohio St. 204. Rehearings in the Supreme Court, therefore, are purely statutory, and the petition will be refused unless it comes within the provisions of section 542 of the code; nor can such a petition be granted after the term at which the judgment was entered unless the case is within the provisions of the code above referred to. *Zink v. Grant*, 26 Ohio St. 378. In *Maud v. Maud*, 34 Ohio St. 540, it was held that the Supreme Court had no power to rehear a case decided by the Supreme Court commission.

In South Carolina judgments rendered by the Supreme Court after full argument will not be reheard except for the strongest reasons. *Ex p. Dial*, 14 S. Car. 584; *Burn v. Poaug*, 3 Desaus. (S. Car.) 596.

In Virginia it was held in an early case that the Court of Appeals, with the consent of the parties to the suit, might review its own decisions by means of a rehearing. *Bogle v. Fitzhugh*, 2 Wash. (Va.) 213. And in a later case it has been held that the Circuit Court, after affirming a decree of the County Court, may grant a rehearing not only of its own decree of affirmance but also of the original decree of the County Court. *Summers v. Darne*, 31 Gratt. (Va.) 791.

For further authorities as to the power of appellate courts in the various states to grant rehearings see *infra*, II. 2. *Grounds*.

1. *Washington Bridge Co. v. Stewart*, 3 How. (U. S.) 413; *Brown v. Aspden*, 14 How. (U. S.) 25; *Ambler v. Whipple*, 23 Wall. (U. S.) 278; *U. S. v. Knight*, 1 Black (U. S.) 488.

The rule applies even where the case is a suit in equity and where the decision was rendered by a divided court. *Brown v. Aspden*, 14 How. (U. S.) 25.

In the Court of Claims a similar rule has been adopted, to wit, that a rehearing will not be granted where there has been no oversight or misapprehension in the nature of mistake of fact, unless one of the judges who concurred in the judgment desires a reargument after examining the grounds on which a rehearing is asked. *Fendall's Case*, 12 Ct. of Cl. 305.

2. **The United States Supreme Court Rule Has Been Adopted** by the Court of Appeals in *Maryland*. *Kent v. Waters*, 18 Md. 53; *Johns v. Johns*, 20 Md. 58; *Roman v. Mali*, 42 Md. 513. And also by the Supreme Judicial Court of *Massachusetts*. *Winchester v. Winchester*, 121 Mass. 127.

3. *Tunstall v. Walker*, 2 Smed. & M. (Miss.) 638.

In Louisiana a rehearing will not be granted where a decree rendered by the Supreme Court is interlocutory, as, for instance, a decree overruling a motion

In Cases Involving Fraudulent Transactions. — Rehearings will not be granted for the purpose of considering gains or losses between parties engaged in an enterprise of aiding or abetting fraudulent transactions.¹

In Criminal Cases. — In jurisdictions where the courts have power to rehear appeals it is generally held that this power extends to criminal cases.²

c. ALLOWANCE OF REHEARING — Discretion of the Court. — An application for a rehearing of an appeal addresses itself to the discretion of the court, and its decision in the matter is final.³

2. Grounds — **a. ERROR IN THE DECISION — IN GENERAL —**
(1) *Error of Law or Misapprehension of Facts.* — A rehearing may be had for a clear mistake of law in the decision,⁴ or where

to dismiss an appeal. *Edwards's Succession*, 34 La. Ann. 216.

1. *Reeg v. Burnham*, 55 Mich. 39.

In *Holloway v. Stevens*, (Supm. Ct. Gen. T.) 48 How. Pr. (N. Y.) 129, an agent, without the knowledge of his principal, entered into an agreement with a third person providing that the principal's property was to be sold on execution issued in favor of said third person, and bought in by the agent, and that the proceeds of the sale were not to be returned in case the judgment was reversed. This agreement was executed by the parties, but the judgment having subsequently been reversed, an order was made directing restitution of the proceeds of the sale to the principal. This order was affirmed on appeal, and a petition for a rehearing of the order of affirmance was refused on the ground that the court would not reconsider the agreement, as it was against public policy.

2. In Iowa the provisions of the code concerning rehearings are applicable in criminal cases, and in favor of the state as well as of the defendant. *State v. Jones*, 64 Iowa 349.

In Texas it was stated in *Garner v. State*, 36 Tex. 693, to be doubtful whether the Supreme Court had authority to grant rehearings in criminal cases. But in *Drake v. State*, 29 Tex. App. 265, it was held that the Supreme Court might grant a rehearing in a criminal case, during the same term, after judgment of conviction had been reversed and the case remanded.

In North Carolina the Supreme Court has no power to entertain a petition for a rehearing in a criminal case. In such cases the court does not pass judgment, but simply gives its opinion,

which is certified to the court below. *State v. Jones*, 69 N. Car. 16.

When the Application Is Made for Delay, and the grounds urged are frivolous, a rehearing of a criminal appeal will be denied. *People v. Jugigo*, (N. Y. 1890) 25 N. E. Rep. 317.

3. *Center Tp. v. Marion County*, 110 Ind. 579; *Prettyman v. Barnard*, 37 Ill. 105; *Summers v. Darne*, 31 Gratt. (Va.) 791; *Blair v. Dillaye*, (Ct. App.) 3 How. Pr. (N. Y.) 422.

The action of the highest court of the state in granting or refusing a rehearing of an appeal is not reviewable by appeal to the United States Supreme Court. *Steines v. Franklin County*, 14 Wall. (U. S.) 15.

A petition for a rehearing of a case decided by the full court is addressed exclusively to the discretion of the court, and will not be granted, nor its arguing permitted, unless upon inspection of the petition the court so orders. *Lincoln v. Eaton*, 132 Mass. 63; *Winchester v. Winchester*, 121 Mass. 127.

Exceptions to the Rule. — In *Louisiana* it seems that counsel are entitled as a matter of right to a rehearing of a case on appeal where the Supreme Court is unable to make up its judgment within the period limited by law. *Morgan v. Livingston*, 6 Mart. (La.) 19. And they are also entitled to three judicial days after the decision of an appeal in which to apply for a rehearing and in a case where this right is denied, it may be enforced by mandamus. *State v. Judges*, 48 La. Ann. 1079.

4. *Arizona Prince Copper Co. v. Copper Queen Copper Co.*, (Ariz. 1886) 11 Pac. Rep. 396; *Hintrager v. Hennessy*, 46 Iowa 600; *Smith v. Walker*, 57 Mich. 457; *Lewis v. Rountree*, 81 N. Car. 20;

it appears that the appellate court misapprehended the record, and was mistaken as to facts occurring on the trial of the cause in the court below.¹ But in order to be available such error or misapprehension must be in a matter materially affecting the correctness of the decision.²

Weathersbee v. Farrar, 98 N. Car. 255.

In *Lawrence v. Metropolitan El. R. Co.*, (C. Pl.) 10 N. Y. Supp. 743, which was an action for an injunction, judgment for the plaintiff was reversed on appeal on the ground that the trial court had admitted incompetent testimony in behalf of the plaintiff. But a rehearing of the appeal was afterwards granted, since it appeared that the admission of the testimony in question simply affected the amount of damages, and did not affect the plaintiff's right to the injunction.

The General Purpose of a Rehearing is to have corrected some error of the Supreme Court in passing on errors of law assigned in the record on appeal, arising from misapprehension of the law or misapplication of the law to pertinent facts appearing in the record in connection with the errors assigned, and the Supreme Court will not grant a rehearing on the ground of mistake or error of fact. *Weathersbee v. Farrar*, 98 N. Car. 255, *citing* *Wilson v. Lineberger*, 90 N. Car. 180; *Lockhart v. Bell*, 90 N. Car. 502; *Barcroft v. Roberts*, 92 N. Car. 249.

1. *Arizona Prince Copper Co. v. Copper Queen Copper Co.*, (Ariz. 1886) 11 Pac. Rep. 396; *Derby v. Gallup*, 5 Minn. 119. *Contra*, *Ft. Worth Pub. Co. v. Hitson*, 80 Tex. 216; *Rust v. Garmany*, 36 Ga. 257.

Illustrations of Rule. — Where the appellate court reverses a judgment on the mistaken supposition that all the evidence in regard to a particular point was excluded in the trial court, and on the ground that such exclusion was erroneous, a rehearing will be granted if it is shown that similar evidence to that excluded was in fact admitted without objection, and that the excluded evidence was merely cumulative. *Doyle v. Manhattan R. Co.*, (C. Pl.) 11 N. Y. Supp. 65.

And, on the other hand, if the appellate court has reversed a judgment on the mistaken supposition that certain evidence received in the court below was inadmissible, a rehearing will be granted if it is shown that the evidence,

under the circumstances of the case, was admissible. *Hooper v. Beecher*, (Supm. Ct.) 7 N. Y. St. Rep. 405.

In an Action of Replevin, where it was made to appear that in a former action between the same parties the Supreme Court had misunderstood the facts of the case, and had wrongfully dismissed an appeal, a rehearing was granted both of that appeal and of the appeal in the replevin case. *Gravenstine v. Feger*, (Pa. 1886) 4 Atl. Rep. 917.

2. *Baker v. Gausin*, 76 Ind. 317; *Teaz v. Chrystie*, 2 E. D. Smith (N. Y.) 635; *Blackwell v. Wright*, 74 N. Car. 733; *San Antonio v. Grandjean*, 91 Tex. 430; *Torrent v. Duluth Lumber Co.*, 32 Fed. Rep. 229.

Errors Held to Be Immaterial. — A rehearing will not be granted for a mistake of the appellate court in holding that a certain contract is a conveyance in fee, where the determination of this question does not materially affect the correctness of the decision, *Genet v. Delaware, etc., Canal Co.*, 137 N. Y. 626, 51 N. Y. St. Rep. 206; nor for a mistake of the court concerning the nature of a warranty in a deed, *Christy v. Burch*, 25 Fla. 978; nor on account of the fact that the opinion of the appellate court declares certain securities to be valueless, whereas a referee has refused so to find, where it appears that such expression of opinion will not prejudice the party on a new trial, *Griggs v. Day*, 137 N. Y. 542, 50 N. Y. St. Rep. 87.

Immaterial Misapprehension of Facts. — A rehearing cannot be had on the ground that the appellate court was mistaken in assuming that a certain question was submitted to the jury on the trial where such mistaken assumption is immaterial. *Cobbs v. Philadelphia F. Assoc.*, 68 Mich. 465. Nor will it be granted for a mistaken assumption to the effect that a certain witness was in attendance at the trial, and could have been called to contradict the testimony of one of the parties, where it is shown that the evidence of such witness would have been merely cumulative. *Ritter v. Phillips*, 35 N. Y. Super. Ct. 388.

Where the Determination of the Case Is Substantially Correct, applications for reargument based on immaterial mistakes, such, for instance, as a slight error in the amount of money allowed by the judgment, are not regarded with favor;¹ and a rehearing will never be granted where it is clear that it would be ineffectual, and that the original decision would remain unaltered.²

1. *Simpkinson v. Sanders*, (Ky. 1888) 7 S. W. Rep. 613; *Macauley v. Elrod*, (Ky. 1895) 29 S. W. Rep. 734; *May v. Kellar*, 1 Mo. App. 381; *Goodman v. Cohen*, (C. Pl.) 11 N. Y. Supp. 65; *Newell v. Wheeler*, (N. Y. Super. Ct. Gen. T.) 2 Abb. Pr. N. S. (N. Y.) 134.

Slight Error in Amount of Verdict or Judgment.—A rehearing will not be granted for a slight error in the amount of the verdict where it is not claimed that such verdict exceeds the amount of damages claimed in the petition, and where no assignment of error has been made on this ground, nor reference made thereto in the motion for a new trial in the lower court, *Weir Plow Co. v. Armentrout*, 9 Tex. Civ. App. 117; nor because it is conceded that the interest was computed from a wrong date, and that, as a result, the judgment is too large by a small amount, especially where the successful party offers to remit the excess, *Gere v. Council Bluffs Ins. Co.*, 67 Iowa 272.

Failure of Special Verdict to Find Facts.—A rehearing cannot be had on the ground that the special verdict did not find the facts on which the judgment rests, where it is conceded that the judgment, as modified on appeal, allows the plaintiff all that she is entitled to under the averments of her complaint. *Evans v. Bentley*, 9 Tex. Civ. App. 112.

Mere Technical Mistrial.—On a trial at the circuit, the court directed a verdict for the plaintiff subject to the opinion of the court at general term, but the latter court set aside the verdict on the ground that the plaintiff was not legally entitled to recover. On a motion for a reargument it was held that this was simply a mistrial and that the proper course for the general term would have been to review the proceedings and order a new trial, but since the former decision accomplished the same end, and substantial justice had been done, the motion for a rehearing was denied. *Coogan v. New York*, 2 Thomp. & C. (N. Y.) 667.

2. **Where Rehearing Would Be Ineffectual.**—*Clark v. Roots*, 50 Ark. 188;

People v. Moran, (Cal. 1892) 31 Pac. Rep. 853; *Humphreys v. Allen*, 100 Ill. 511; *Tecumseh Nat. Bank v. Saunders*, 51 Neb. 801; *State v. Woodbury*, 17 Nev. 337; *Wallace v. Dinniny*, (C. Pl. Gen. T.) 12 Misc. (N. Y.) 635; *Fisher v. Merwin*, (C. Pl.) 25 How. Pr. (N. Y.) 284.

In *Powell v. Bunker*, 91 Ind. 64, the appellate court reversed a judgment in favor of the plaintiff rendered by the trial court. In a petition for a rehearing it was shown that the complaint was in two paragraphs, setting up distinct causes of action, and the petitioner contended that even though the appellate court was correct in holding that the trial court erred in overruling a demurrer to the second paragraph, yet it should have reversed the judgment only so far as it was based upon that paragraph, and should have affirmed it as the cause of the action stated in the first paragraph. But it was held that the error of the trial court in overruling the demurrer to the second paragraph was carried into the verdict and judgment; that it would have been improper, while the verdict was permitted to stand, to set aside the judgment merely as to a portion of the relief granted and to affirm it as to the remainder; and that a rehearing could not be granted for the purpose of altering the judgment in this manner.

Act of Legislature Authorizing Rehearing.—The court will not grant a rehearing where it would be ineffectual, even in a case where the legislature by a special act authorizes it to review certain judgments rendered at a previous term. Such an act is probably invalid, as it is the exercise of a power properly belonging to the judicial department; but conceding that it is valid, it will be treated as permissive merely, and not as mandatory. *Dorsey v. Gary*, 37 Md. 64.

Exception to Rule.—In *Fenstermaker v. Tribune Pub. Co.*, 13 Utah 532, a rehearing was granted although it was conceded that the original judgment must remain substantially unaltered, since it appeared that one of the

(2) *Erroneous Reasons for Correct Decision.* — Where the decision is admittedly correct a reargument will not be allowed on the ground that the reasons assigned by the court in its opinion are erroneous, or that stress is laid upon an immaterial fact;¹ and a judgment based on several grounds will not be reviewed as long as it appears that any one of the grounds assigned is valid.²

(3) *Decision Based on Points Not Raised Below.* — Where the decision of the appellate court is based on points which were not considered in the court below, or on the hearing of the appeal,³ or where a judgment is affirmed on a theory totally different from that on which it was rendered by the trial court, a rehearing may be had.⁴

udges, being disqualified, did not sit on the hearing, that the concurrence of one of the two judges who did sit was limited to the result, that the opinion overlooked a material point raised on the hearing, and that it announced rules of law which required modification and explanation to prevent their misapplication upon a new trial.

1. *Wilson v. Vance*, 55 Ind. 584; *Johnston v. Davis*, 61 Mich. 278; *Earp v. Richardson*, 81 N. Car. 5; *Thompson v. Huron Lumber Co.*, 4 Wash. 600.

Where an examination of the record shows that the judgment appealed from would necessarily be affirmed on the evidence, a rehearing will not be granted, although the court based its affirmance of the judgment on the ground that the bill of exceptions was not filed within the required time, and the petition for a rehearing shows that the time was extended by stipulation. *Anderson v. Anderson*, 141 Ind. 567.

When the court has dismissed an appeal, basing its decision on the incompleteness of the transcript, and an application for a rehearing is made, it may sustain its previous ruling for the additional reasons that the judgment appealed from was not signed, and that the application for an appeal was therefore premature. *Smith v. Orleans R. Co.*, 34 La. Ann. 1160.

2. *Judgment Based on Several Grounds.* — *Hahn v. St. Clair Sav., etc., Co.*, 50 Ill. 526; *Case v. Johnson*, 70 Ind. 31; *Garrett v. Ashcraft*, (Ky. 1895) 30 S. W. Rep. 625; *Butler-Ryan Co. v. Silvey*, (Minn. 1897) 73 N. W. Rep. 510; *Tallman v. Ely*, 8 Wis. 218.

In an Action for Personal Injuries, where the judgment of the lower court has been reversed for an error in the charge of the court as to the measure

of damages, a rehearing will be denied although it appears that the other grounds for reversal stated in the opinion of the appellate court are erroneous. The erroneous charge of the lower court having been duly assigned as error, the Supreme Court cannot speculate as to its effect on the judgment and grant a rehearing in order to review and sustain such judgment. *Taylor, etc., R. Co. v. Warner*, 84 Tex. 122.

3. *Caldwell v. Western M. & F. Ins. Co.*, 19 La. 48; *Derby v. Gallup*, 5 Minn. 119; *Van Etten v. Newton*, 15 Daly (N. Y.) 538.

The rule does not apply where the points in question were suggested by the facts in evidence, and the attention of the counsel was called to them at the hearing, and where no objection was then made that they had not been raised in the trial court. *Oliver v. French*, (Supm. Ct.) 32 N. Y. Supp. 576; *Davis v. Bonn*, (Supm. Ct. App. T.) 16 Misc. (N. Y.) 365.

4. *Illustration of Rule.* — In *Miller v. King*, 88 Hun (N. Y.) 181, the case was tried and judgment was rendered in the trial court on the theory of a breach of contract in ejecting a passenger from a railroad train before he had reached his destination. Conceding that this theory was correct, the plaintiff was entitled only to actual damages, which in this case would have amounted simply to nominal damages (since he was within a very short distance of his destination when ejected), and it was apparent therefore that the damages allowed by the lower court were excessive. At the general term, however, the case was tried and judgment was affirmed on a totally different theory, to wit, that the action of the

6. MATERIAL POINT OVERLOOKED — CONFLICT WITH STATUTE OR CONTROLLING DECISION — (1) *In General.* — A rehearing will be granted where it is shown that some question decisive of the case and duly submitted by counsel has been overlooked by the court, or that the decision is in conflict with a statute or a controlling decision to which the attention of the court was not drawn, through the neglect or inadvertence of counsel.¹ A peti-

conductor in ejecting the passenger amounted to a tort. In view of these circumstances a rehearing of the appeal was allowed.

Qualification of Rule. — In *Jones v. Castor*, 96 Ind. 307, a rehearing was claimed by the appellant on the ground that the brief of the appellee, as originally prepared, contained no statement of one of the points on which the decision of the court was based, and that this point was "surreptitiously inserted in the brief and pressed upon the court." The application, however, was refused, the court saying: "It is not unusual to file an additional brief or to add new matter to an existing brief, and under rule 16 of this court, as it stood prior to May 14, 1884, the appellee had the right to file a brief at any time before the cause was taken up for consideration. But whether an objection be made in the brief of the appellee or not, if the record shows the defect, this court is not required to disregard it because the appellants' counsel was not aware of it. The rule is that if there are points in the record not suggested by counsel nor perceived by the court, such points will not be considered on a petition for a rehearing, but the court cannot refuse to consider points of which it is made aware either by the suggestions of counsel or by its own examination of the record." Citing *Martin v. Martin*, 74 Ind. 207.

1. *Iowa.* — *Hasted v. Dodge*, (Iowa 1888) 39 N. W. Rep. 668; *Hintrager v. Hennessy*, 46 Iowa 600.

Kansas. — *State v. Eaton*, 6 Kan. App. 94.

Kentucky. — *Gray v. Dickinson*, (Ky. 1890) 13 S. W. Rep. 209.

Michigan. — *Smith v. Walker*, 57 Mich. 457.

Minnesota. — *Derby v. Gallup*, 5 Minn. 119.

Missouri. — Supreme Court Rule 20, 116 Mo., Appendix, p. iv.

Montana. — *Columbia Min. Co. v. Holter*, 1 Mont. 429; *Davis v. Clark*, 2 Mont. 395.

New York. — *Mount v. Mitchell*, 32 N. Y. 702; *Marine Nat. Bank v. National City Bank*, 59 N. Y. 67; *Fosdick v. Hempstead*, 126 N. Y. 651; *Curley v. Tomlinson*, 5 Daly (N. Y.) 283; *Banks v. Carter*, 7 Daly (N. Y.) 417; *Bolles v. Duff*, 56 Barb. (N. Y.) 567; *Newell v. Wheeler*, 4 Robt. (N. Y.) 190; *Myers v. Dean*, (C. Pl. Gen. T.) 10 Misc. (N. Y.) 402; *Duncan v. Root*, (C. Pl.) 4 N. Y. Supp. 613; *Mahon v. Sewell*, (C. Pl.) 7 N. Y. Supp. 600; *Sadler v. Riggs*, 15 Daly (N. Y.) 522; *Eagle Tube Co. v. Edward Barr Co.*, 16 Daly (N. Y.) 212; *Martine v. Huyilar*, (Supm. Ct.) 12 N. Y. Supp. 66; *Compton v. Heissenbuttel*, (C. Pl.) 18 N. Y. Supp. 952; *Barnum v. Fitz Patrick*, (C. Pl.) 18 N. Y. Supp. 951; *People v. Purroy*, (C. Pl.) 18 N. Y. Supp. 953; *Cornelius v. Reiser*, (C. Pl.) 18 N. Y. Supp. 304; *Nette v. New York El. R. Co.*, (C. Pl. Gen. T.) 2 Misc. (N. Y.) 62; *Dietlin v. Egan*, (C. Pl. Gen. T.) 2 Misc. (N. Y.) 52; *Kelly v. Partridge*, (C. Pl.) 25 N. Y. Supp. 1143; *Siegman v. Keeler*, (C. Pl.) 25 N. Y. Supp. 1148; *Hand v. Rogers*, (Supm. Ct. App. T.) 16 Misc. (N. Y.) 364; *Irvine v. F. H. Palmer Mfg. Co.*, 3 N. Y. App. Div. 385.

North Carolina. — *Weathersbee v. Farrar*, 98 N. Car. 255.

South Dakota. — *Kirby v. Western Union Tel. Co.*, 4 S. Dak. 439.

Tennessee. — *Hubbard v. Fravell*, 80 Tenn. 304.

United States. — *Railway Register Mfg. Co. v. North Hudson County R. Co.*, 26 Fed. Rep. 411.

In *New York* the rule stated in the text prevails in the Court of Appeals. *Mount v. Mitchell*, 32 N. Y. 702. And it has been generally adopted by the other appellate courts of the state. But the point which it is alleged that the court overlooked must be one which presents a fair question for discussion, and it must appear that the court did not consider such point at all. *Guidet v. New York*, 37 N. Y. Super. Ct. 124. Thus, in a case where the only issue raised in regard to the use of a ma-

tion to rehear will also be granted when it clearly appears that the former decision resulted from overlooking material admissions in the pleadings of the prevailing party,¹ or that the court has failed to consider certain exceptions which were properly before it;² but not where the sole ground alleged is that the appellate court has failed to pass on the sufficiency of the petitioner's pleadings in the lower court.³

Where All of the Facts Presented Have in Fact Been Duly Considered by the court, and where the application presents no new facts, but simply reiterates the arguments made on the hearing, and is in effect an appeal to the court to review its decision on points and authorities already determined, a rehearing will be refused.⁴

chine was whether the part produced in court was in fact defective, and where the petition for a rehearing alleged that the court had misconstrued the evidence as to the time when an inspector examined the machine, it was held that this alleged misconception by the court did not amount to the oversight of a decisive question, and that the rule did not apply. *Irvine v. F. H. Palmer Mfg. Co.*, 3 N. Y. App. Div. 385.

The fact that some of the judges rendering a decision have misconstrued a recent decision in a similar case is no ground for a reargument, where it appears that the other judges who joined in the opinion construed the same decision correctly. *Smith v. Miller*, (N. Y. Super. Ct. Gen. T.) 6 Abb. Pr. N. S. (N. Y.) 234.

In North Carolina it has been held that the weightiest considerations make it the duty of the court to adhere to its decisions, and that no case ought to be reversed upon a petition to rehear unless it was decided hastily, and some material point was overlooked, or some direct authority was not called to the attention of the court. *Watson v. Dodd*, 72 N. Car. 240; *Devereux v. Devereux*, 81 N. Car. 12; *Ashe v. Gray*, 90 N. Car. 137; *Fry v. Currie*, 103 N. Car. 203; *Emry v. Raleigh, etc., R. Co.*, 105 N. Car. 44, 45; *Haywood v. Daves*, 81 N. Car. 8; *Hudson v. Jordan*, 110 N. Car. 250.

In South Carolina a rehearing will be refused unless it appears that the court has overlooked some material fact or important principle of law. *Frost v. Weathersbee*, 23 S. Car. 370; *Claflin v. Iseman*, 23 S. Car. 427; *Columbia, etc., R. Co. v. Gibbs*, 24 S. Car. 60; *Clark v. Wright*, 24 S. Car. 526; *State v. Scheper*, (S. Car. 1891) 12 S. E. Rep.

816; *Fisher v. Fair*, (S. Car. 1891) 13 S. E. Rep. 853; *Harris v. Bratton*, (S. Car. 1891) 13 S. E. Rep. 899; *Hardin v. Melton*, 28 S. Car. 38; *Williams v. Bennet*, 35 S. Car. 598, (S. Car. 1891) 14 S. E. Rep. 288; *Land, etc., Co. v. Williams*, (S. Car. 1892) 15 S. E. Rep. 453; *Munro v. Long*, (S. Car. 1892) 15 S. E. Rep. 553; *Witte v. Weinberg*, 40 S. Car. 545, (S. Car. 1893) 18 S. E. Rep. 886; *Sloan v. Latimer*, 41 S. Car. 217.

In Utah an appeal may be reheard where the court is convinced that it has failed to consider some material point in the case, or that it erred in its conclusions, or that some matter has been discovered which was unknown at the time of the hearing, but not otherwise. *Brown v. Pickard*, 4 Utah 292; *Venard v. Green*, 4 Utah 67; *In re McKnight*, 4 Utah 237.

Failure to Pass on Rejection of Evidence. — Failure of the appellate court to pass upon the rejection of certain evidence by the trial court is no ground for a rehearing where it appears that the facts sought to be proven by the said evidence have been previously set up as a defense, and determined adversely to the petitioner, in another suit involving the same subject-matter. *Main v. Field*, 13 Ind. App. 401.

Where It Appears that Substantial Justice Has Been Done a rehearing will not be granted on the ground that a recent statute has been overlooked by the court and by both parties. *Walsh v. Brown*, (Supm. Ct.) 24 N. Y. St. Rep. 722.

1. *Mason v. Pelletier*, 80 N. Car. 66.
2. *Covar v. Sallat*, 24 S. Car. 137.
3. *Case v. Johnson*, 70 Ind. 31.
4. *Colorado*. — *Parks v. Wilcox*, 6 Colo. 600.

Florida. — *Hart v. Stribling*, 25 Fla. 435.

(2) *Points in Record Not Called to Court's Attention.*—The mere fact that the court has overlooked a certain point presented by the record is not sufficient to authorize a rehearing, however, unless it further appears that its attention was called to the point in question by the briefs or arguments of counsel.¹

Michigan.—Nichols v. Marsh, 62 Mich. 439; Seymour v. Detroit Copper, etc., Rolling Mills, 56 Mich. 117; Kraft v. Rath, 45 Mich. 20; Taylor v. Boardman, 24 Mich. 287.

Minnesota.—Derby v. Gallup, 5 Minn. 119; Fish v. Heinlin, 8 Minn. 540.

New Hampshire.—Russell v. Dyer, 43 N. H. 396.

New York.—Atlantic, etc., Tel. Co. v. Barnes, 39 N. Y. Super. Ct. 357; Dollner v. Lintz, 9 Daly (N. Y.) 17.

North Carolina.—Hannon v. Grizzard, 99 N. Car. 161; Moore v. Beaman, 112 N. Car. 558; Gay v. Grant, 105 N. Car. 478; Dupree v. Virginia Home Ins. Co., 93 N. Car. 237.

Utah.—People v. Olson, 5 Utah 87; Ducheneau v. House, 4 Utah 483; Jones v. House, 4 Utah 484.

Wyoming.—Chadron Bank v. Anderson, (Wyoming 1897) 49 Pac. Rep. 406.

United States.—Williams v. U. S. Bank, 2 Pet. (U. S.) 96.

In Chicago, etc., R. Co. v. Abilene Town-Site Co., 42 Kan. 97, an appeal was assigned by the Supreme Court to the commission of appeals, and judgment was confirmed by the opinion of the commission. Thereafter one of the parties, presenting a petition for a rehearing, alleged that the act creating the commission of appeals was unconstitutional and void, and that by the assignment of the appeal to said commission he had been deprived of his right to be heard before a duly constituted and legal court. On consideration of this petition it appeared that the party had submitted briefs to the Supreme Court, that a full oral argument had been had before the commission, and that afterwards, on a motion for a rehearing, printed briefs had been filed and a full oral argument had been made to the court upon all of the questions involved. It was held therefore that the party had been given as full a hearing by the Supreme Court as if the case had been originally heard by it; and on this ground a rehearing was refused.

A Petition Which Merely Joins Issue

with the Court as to the correctness of its former decision upon the law and facts as presented at the first hearing will be refused. Steele v. State, 33 Fla. 354; Pendleton v. Lord, 34 N. Y. Super. Ct. 301. Thus a rehearing will not be granted on a petition which merely alleges in a general form that the petitioner can satisfy the court upon reargument that its former decision was erroneous. Grigsby v. Minnehaha County, 7 S. Dak. 421. Nor will a rehearing be granted where the petition simply attacks the judgment of the appellate court upon the merits, alleging that its action in reversing judgment for the defendant, on the ground that the trial court improperly excluded certain evidence, was erroneous. Welsh v. New York El. R. Co., (C. Pl.) 16 N. Y. Supp. 174.

Petition Directed Merely to Sympathy of Court.—A petition which fails to call the attention of the court to any point alleged to have been overlooked, and which is directed merely to the sympathy of the court, will be denied. *In re Henderson*, 88 Tenn. 531.

Rule Extends to All Questions Necessarily Involved.—Where the decision is one which involves no serious injury to general rights, and when the questions presented have been thoroughly considered, such decision must be deemed the settled law of the case, and a rehearing will be refused. And the above rule extends not merely to questions actually presented by counsel, but to all questions existing in the record and necessarily involved in the decision. *Headley v. Challiss*, 15 Kan. 602.

Unless There Is Some Very Peculiar Assumption or Oversight on the original hearing, by which the court and the parties have been misled, a rehearing cannot be had on the same facts and legal controversy. *Brown v. Brown*, 64 Mich. 82.

1. Martin v. Martin, 74 Ind. 210; Jones v. Castor, 96 Ind. 307; Funk v. Rentchler, 134 Ind. 68; Murdock v. Gurley, 5 Rob. (La.) 467; Hutchins v. Kimmell, 31 Mich. 126; Wilcox v. Toledo, etc., R. Co., 45 Mich. 280; Moss

(3) *Points Not Directly Referred to in Opinion.* — A rehearing will not be granted on the sole ground that points presented on the argument are not referred to by the opinion of the court in express terms, since it does not necessarily follow that such points escaped the court's attention;¹ and this is particularly true where the determination of other points, which are referred to therein, necessarily involves the determination of the matters presented by the petition.²

(4) *What Decisions Are Controlling.* — A rehearing will be granted where the decision is in conflict with a case previously decided by the highest court of the state, or where the latter court renders such an adverse decision pending the determination of the case at bar, or immediately after it has been decided;³

v. State, (Tex. Crim. App. 1898) 44 S. W. Rep. 832.

"If parties appealing to this court do not take the trouble to call attention to the points upon which they rely, they cannot reasonably expect us * * * to order rehearings for the purpose of considering them by piecemeal." *Whitby v. Rowell*, 82 Cal. 635.

1. *Topeka v. Tuttle*, 5 Kan. 425; *Thompson v. Jarvis*, 40 Mich. 526; *Weston v. Ketchum*, 39 N. Y. Super. Ct. 552; *Ernst v. Estey Wire Works Co.*, (Supm. Ct. App. T.) 21 Misc. (N. Y.) 68; *Colonial City Traction Co. v. Kingston City R. Co.*, 154 N. Y. 493; *Dammert v. Osborn*, (N. Y. 1894) 35 N. E. Rep. 1088; *Moore v. Beaman*, 112 N. Car. 558; *People v. Olson*, 5 Utah 87.

The fact that in a decision which sanctions a former decision the court does not expressly notice and discuss a supposed distinction between the two cases is no ground for a rehearing. *Terry v. Wait*, 56 N. Y. 91.

Failure to Notice Errors Assigned on Cross-appeal. — If an appeal is affirmed in favor of an appellee on the whole case he cannot have a rehearing on the ground that his exceptions on a cross-appeal have been overlooked. If an appellee seeks a reversal of the judgment, or other relief than that which was granted him below, a cross-appeal is proper; but where he merely seeks an affirmance of the judgment, the fact that he obtains it on grounds other than those urged in his assignment of cross-errors does not entitle him to a review of the judgment. *Dudley v. Goddard*, (Ky. 1889) 12 S. W. Rep. 382. And this is especially true where material questions presented by an assignment of cross-errors have been passed upon either directly or inferentially by

the arguments and illustrations used in, on the conclusions reached by, the original opinion. In such a case it cannot be claimed that injustice has been done to the appellee by not specifically noticing his assignment of cross-errors, and his petition for a rehearing based on this ground must be refused. *Thomas v. Simmons*, 103 Ind. 538.

2. *State v. Barnes*, 25 Fla. 86; *English v. State*, 31 Fla. 356; *Meinhard v. Youngblood*, 37 S. Car. 231; *Guidet v. New York*, 37 N. Y. Super. Ct. 124.

3. **In New York** a case decided by the general term of the Supreme Court will be reheard where a decision of the Court of Appeals adverse to that of the general term is announced pending the decision, *Taylor v. Grant*, 36 N. Y. Super. Ct. 259; *Hayner v. American Popular L. Ins. Co.*, 36 N. Y. Super. Ct. 211; or where it appears from a decision of the Court of Appeals in dismissing an appeal from a judgment of the general term that the case appealed from was not properly before the general term, *Produce Bank v. Morton*, 42 N. Y. Super. Ct. 124; or where, immediately after the decision by the appellate term, the Court of Appeals or the appellate division decides the precise question adversely, *Hand v. Rogers*, (Supm. Ct. App. T.) 16 Misc. (N. Y.) 364; or where a decided case on which the decision is partly based is subsequently reversed by the Court of Appeals, *Freeman v. Falconer*, 44 N. Y. Super. Ct. 579; or where the general term, in rendering its decision, relies upon a certain authority, and there appears to be doubt whether later authorities have been applied in deciding the case, *Hackett v. Stanley*, 14 Daly (N. Y.) 210.

but the decision of the higher court must be clearly in point,¹ and it must be shown that it is the last controlling decision.²

Adverse Decision by Higher Court, but Without Opinion. — A party is not entitled to a rehearing of a judgment on appeal simply because since its rendition a higher court has rendered an adverse decision in another action involving the same facts, but without any written opinion or any assignment of its reasons.³

(5) *Enactment of Statute After Submission of Cause.* — The fact that a statute is enacted after the submission of a case on appeal is not sufficient to authorize a rehearing, unless such statute directly affects the validity of the original judgment, or is inconsistent with the decision rendered on appeal.⁴

c. POINTS NOT CONSIDERED ON HEARING — (1) *In General.* — As a general rule a rehearing will not be granted on grounds

1. *Coleman v. Livingston*, 36 N. Y. Super. Ct. 231; *Heywood v. Kingman*, (Supm. Ct. Gen. T.) 29 Abb. N. Cas. (N. Y.) 75; *Trinity Church v. Higgins*, 4 Robt. (N. Y.) 372.

A previous judgment in the same case made through a misapprehension of the record cannot be regarded as a controlling decision, and a rehearing will not be granted on the ground that the judgment is in conflict therewith. *Doggett v. Jordan*, 4 Fla. 121.

Dicta in Opinion of Higher Court. — A motion for leave to issue execution on a judgment was granted by the special term, but the order granting leave was reversed by the general term. The Court of Appeals, in dismissing an appeal from the decision of the general term, held that the decision of the motion rested entirely in the discretion of the court below, but on the basis of certain dicta in the opinion of the Court of Appeals the plaintiff moved in the general term for a reargument. It was held that such dicta did not bind the general term to grant a rehearing. *Van Rensselaer v. Wright*, (Supm. Ct.) 12 N. Y. Supp. 330.

2. *Dobyns v. Meyer*, 20 Mo. App. 66.

3. In *Butterfield v. Radde*, 40 N. Y. Super. Ct. 169, the court said: "In *Hayner v. American Popular L. Ins. Co.*, 36 N. Y. Super. Ct. 211, having followed and relied on a case which was reversed by the Court of Appeals, this court granted a reargument on the ground that that decision should be regarded as *stare decisis*. In that case, however, no judgment or order had been entered in this court, the decision having been merely announced; and

besides, the decision of the Court of Appeals had actually been made, although not known, at the time of the argument of the appeal in this court. In the *Hayner* case, the court had before it the opinion of the Court of Appeals in the other case, and was able to see the grounds of the decision; and they found them to cover all the questions in the case in this court. In the case before us we have not been furnished with any opinion of the appellate court. Indeed, it is stated that no opinion was filed or written. Nor are we apprised of the ground or grounds upon which that court has placed its decision. It may have been upon a purely technical ground, not disturbing the general law of the case, as determined by this court, and not affecting the real merits of the controversy, or it may even have been a reversal by the default of the party. * * * If reasons had been assigned by the higher court, and they showed that the law of this court has been disturbed and reversed, we must and would regard the decision as authoritatively binding upon us. But if no reasons are given, this court would have a perfect right to adhere to its own opinions of the law, and the mere reversal by the appellate court would and could have no influence upon it."

4. *Dutcher v. Culver*, 24 Minn. 584. Where a petition for a rehearing has been granted, and, pending the rehearing of the case, a statute is passed invalidating the original decision, and where judgment has not yet been rendered on such decision, it will be reversed. *Iowa R. Land Co. v. Sac County*, 39 Iowa 124.

which were not urged or considered on the hearing,¹ and this rule will be departed from only in cases where the refusal of the application would work manifest injustice.²

Matters Proper to Be Raised on Hearing or in Trial Court. — The reasons against granting a rehearing in such cases apply with particular force where the matters suggested are such as might have been raised on the original hearing in the appellate court,³ or where

1. *Alabama.* — *Henderson v. Huey*, 45 Ala. 275; *Robinson v. Allison*, 97 Ala. 596.

California. — *Grogan v. Ruckle*, 1 Cal. 193; *Kellogg v. Cochran*, 87 Cal. 192; *San Francisco v. Pacific Bank*, 89 Cal. 23.

Illinois. — *Marthaler v. Druiding*, 58 Ill. App. 336; *West Chicago Park Com'rs v. Kincaide*, 64 Ill. App. 113; *Munger v. Supancicz*, 64 Ill. App. 661; *Hime v. Klasey*, 9 Ill. App. 190.

Indiana. — *Leffler v. Watson*, 13 Ind. App. 176; *Louisville, etc., Consol. R. Co. v. Hicks*, 11 Ind. App. 588; *Blough v. Parry*, 144 Ind. 463; *State v. Halter*, (Ind. 1898) 49 N. E. Rep. 7; *Brooks v. Harris*, 42 Ind. 177; *Thomas v. Mathis*, 92 Ind. 560; *Yates v. Mullen*, 24 Ind. 277; *Union School Tp. v. Crawfordsville First Nat. Bank*, 102 Ind. 464; *Fleetwood v. Brown*, 109 Ind. 567; *Scanlin v. Stewart*, 138 Ind. 574.

Iowa. — *Hintrager v. Hennessy*, 46 Iowa 600; *Mann v. Sioux City, etc.*, R. Co., 46 Iowa 637.

Kansas. — *Western News Co. v. Wilmarth*, 34 Kan. 254.

Louisiana. — *McFarland v. White*, 13 La. Ann. 394; *Rightor v. Phelps*, 1 Rob. (La.) 330; *Caldwell v. Western M. & F. Ins. Co.*, 19 La. 48; *Garland v. Holmes*, 1 La. Ann. 404.

Michigan. — *Ryerson v. Eldred*, 18 Mich. 490.

Nevada. — *Beck v. Thompson*, 22 Nev. 419.

New York. — *Central Park Baptist Church v. Patterson*, (C. Pl. Gen. T.) 12 Misc. (N. Y.) 636; *People v. Thirty-First Ward*, 91 Hun (N. Y.) 206.

North Carolina. — *Weathersbee v. Farrar*, 98 N. Car. 255.

Ohio. — *Cincinnati v. Cameron*, 33 Ohio St. 336.

South Carolina. — *Knox v. South Carolina R. Co.*, 5 S. Car. 73; *Presnell v. Garrison*, 122 N. Car. 595.

South Dakota. — *John A. Tolman Co. v. Bowerman*, 6 S. Dak. 206.

Utah. — *Farrell v. Pingree*, 5 Utah 530.

Washington. — *Lybarger v. State*, 2 Wash. 552.

United States. — *U. S. v. Hall*, 63 Fed. Rep. 472.

When the sufficiency of a showing in favor of an infant's right to prosecute as a poor person, without a next friend, is not questioned by the adverse party on the hearing it cannot be urged as a ground for granting a rehearing. *Hood v. Pearson*, 67 Ind. 368.

In *Louisiana*, by a rule of the Supreme Court, parties are obliged to file with the clerk a note of their points and authorities before the case is argued on appeal, and a rehearing will not be granted on a point not furnished in compliance with this rule. *Sorbé v. Merchants' Ins. Co.*, 6 La. 185; *Mitchel v. Gervais*, 2 Mart. N. S. (La.) 570.

2. *Fuller v. Little*, 61 Ill. 21; *State v. Sexton*, (S. Dak. 1898) 75 N. W. Rep. 895.

It Rests in the Discretion of the Court upon a motion for a rehearing to examine into new questions, and upon them to modify or revise its decision; but it is purely a matter of discretion, and not of legal right, and the court will seldom examine beyond the questions presented on the original hearing. *Headley v. Challiss*, 15 Kan. 602.

Manifest Errors in Referee's Report. — In *Groth v. Kersting*, 23 Colo. 213, a rehearing was granted where it appeared that there was a manifest error in a referee's report, although the court's attention was not called to this error by the arguments or briefs prior to the decision, and the point was first raised in the petition for a rehearing.

3. *Hein v. Pungs*, 9 App. Cas. (D. C.) 492; *Humphreys v. Allen*, 100 Ill. 511; *Emerson v. Opp*, 9 Ind. App. 581; *Liberty Tp. Draining Assoc. v. Watkins*, 72 Ind. 459; *Johnson v. Jones*, 79 Ind. 141; *Evansville v. Senhenn*, 151 Ind. 42.

Illustrations of Rule. — Refusal of the trial court to give an instruction, *Payne v. Treadwell*, 16 Cal. 221; or error in

they ought to have been urged in the trial court before the appeal was taken.¹

Regularity of the Appeal. — The court will not consider whether the original judgment was appealable,² nor whether the appeal was properly perfected,³ nor whether the parties have complied with

overruling a motion in arrest of judgment, *Siberry v. State*, 149 Ind. 684; or an allegation that the evidence was insufficient to sustain a verdict against a defense of limitations, *Cook v. Carroll Land, etc., Co.*, (Tex. Civ. App. 1897) 39 S. W. Rep. 1006, will not be considered when raised for the first time by a petition for rehearing in the appellate court. Nor will a claim of right under an Act of Congress be considered when it is made for the first time on a motion for a rehearing in the Court of Appeals. *Chappell v. Bradshaw*, (Md. 1888) 15 Atl. Rep. 762.

In *Danenhoffer v. State*, 79 Ind. 75, the trial court refused to allow the defendant to answer certain questions asked him by his attorney, and this refusal was assigned as error, and the appeal was heard on the general question as to whether or not the evidence in question was admissible. Thereafter the defendant applied for a rehearing, and in his petition, for the first time, raised the objection that the defendant, by omitting to state to the court the fact which he expected to prove by the answer of the witness, had failed to save the error of the court in the record in such a manner as to make it available on appeal. It was held that this objection would have been good if raised on the hearing, but that it furnished no ground for a rehearing.

1. *Auley v. Osterman*, 65 Wis. 118.

Illustrations of Rule. — Questions as to the sufficiency of the pleadings in the court below, *Rikhoff v. Brown's Rotary Shuttle Sewing Mach. Co.*, 68 Ind. 388; or questions as to the sufficiency of the service of process on minor defendants, *Micou v. Tallassee Bridge Co.*, 47 Ala. 652; or special defenses, such as the statute of limitations, *Allen v. Buisson*, 35 La. Ann. 108; or questions as to the competency of witnesses, where no exception has been taken below to the reading of their depositions, *Birdsong v. Birdsong*, 2 Head (Tenn.) 289, cannot be raised for the first time by a petition for a rehearing.

Omission of Indispensable Party. — A rehearing may be had where an indis-

pensable party to the action has been left out, even though the objection is raised for the first time on a petition for a rehearing; but the rule is otherwise when the party omitted is merely a necessary and not an indispensable party. *Weightman v. Washington Critic Co.*, 4 App. Cas. (D. C.) 136.

2. *Uhler v. Ryer*, (C. Pl.) 4 N. Y. Supp. 834.

3. *Kenner v. Their Creditors*, 8 Mart. N. S. (La.) 54.

That Judgment Appealed From Had Not Been Entered. — Where the return of the lower court states that "judgment was in due form entered," a rehearing cannot be had on the ground that the judgment appealed from had not been entered when the appeal was taken, although the return does not set out the judgment *in extenso*, since, although defective in this respect, it might have been amended on proper application, and the defect was waived by failure to amend on the hearing. *Gates v. Williams*, (C. Pl. Gen. T.) 10 Misc. (N. Y.) 403.

That Right to Appeal Was Waived. — Objection to an appeal on the ground that the appellant has waived the error on which it was based cannot be raised for the first time in a petition for a rehearing. *Herod v. State*, 15 Ind. App. 648.

That the Writ of Error Was Not Issued until after a forthcoming bond had been taken and forfeited, and the execution returned satisfied, cannot be considered by the court where it is raised for the first time in the petition for a rehearing. *Hatto v. Brooks*, 33 Miss. 575.

Where the Name of a Necessary Appellee Is Omitted, by a mistake, from the assignment of errors, the appeal may be dismissed if the objection is raised at the proper time and in the proper manner; but where counsel appear for all of the appellees, and the case is decided on the merits, the objection cannot subsequently be raised in a petition for a rehearing. *Bennett v. Seibert*, 10 Ind. App. 369.

Notice of the Appeal and Proof of Service thereof should be contained in the

the rules of practice prescribed by the court, when these questions are presented for the first time by the petition for a rehearing.¹

(2) *Grounds Not Involved in Any Issue Determined by Judgment.* — The purpose of a rehearing is to correct a decision which is erroneous in regard to matters already considered, and not to raise new issues under new pleas; and where the grounds presented by the petition are not involved in any issue determined by the judgment the application will be refused.²

(3) *Grounds Inconsistent with Position Assumed on Hearing.* — When an action has been tried on a certain theory, a rehearing cannot be had on grounds inconsistent with that theory,³ nor on

abstract, but the mere fact that these matters are omitted therefrom does not constitute ground for a rehearing, unless the objection is raised on the original hearing. *Hintrager v. Hennessy*, 46 Iowa 600.

Objections to the Court's Entertaining a Second Appeal must be raised by motion to dismiss, or at least at the time when the case is first heard on appeal, and they cannot be raised for the first time in a petition for a rehearing. *Ellis v. Sisson*, 96 Ill. 105.

1. *Whitehead v. Tulane*, 11 La. Ann. 302.

In *Day v. Burnham*, (Ky. 1889) 12 S. W. Rep. 148, a rehearing was applied for on the ground that the appeal had been prosecuted in the name of one of the alleged appellants without his consent, but since it appeared that fourteen months elapsed between the granting of the appeal and the submission of the case thereon, the court held that the party in question must be presumed to have received notice, and a rehearing was refused.

2. *Stark v. Burke*, 9 La. Ann. 344; *Kent v. Sibley*, (C. Pl.) 7 N. Y. Supp. 80; *Glover v. Farr*, 23 S. Car. 489.

Where an Action for Divorce Is Prosecuted in the ordinary form, under the *Kansas* statute, and the relief granted is in accordance with the provisions of the code, the Supreme Court will not consider on a petition for a rehearing whether the District Court, as a court of equity independent of statute, might have granted relief in the case and compelled the husband to make some provision for his wife out of his estate. *Birdzell v. Birdzell*, 35 Kan. 638.

In an **Action upon an Account** a claim to uncollected assets not embraced in the account as sued upon cannot be considered when presented for the first

time by a petition for a rehearing. *Wilson v. Lineberger*, 90 N. Car. 180.

To Obviate Unfortunate Results of Judgment. — A rehearing cannot be had for the purpose of obviating certain unfortunate results which may follow under the terms of the original judgment and opinion. *Mann v. Poole*, 40 S. Car. 1.

3. Grounds Inconsistent with Theory on Which Case Was Tried. — *Jacksonville*, etc., R. Co. v. *Peninsular Land*, etc., Co., 27 Fla. 1, 157; *McDonald v. Carson*, 95 N. Car. 377; *Merriman v. Chicago*, etc., R. Co., 66 Fed. Rep. 663.

Where on the hearing the plaintiff has proceeded on the theory that a certain allegation in the petition is denied by the defendant, he cannot have a rehearing for the purpose of showing that the averment in question was not denied by the adverse party, and must therefore be taken as admitted. *McClanahan v. McKinley*, 52 Iowa 222.

Where it is urged on the original hearing that all the credits for payment of interest on a note, allowed by the court, are erroneous, it cannot be contended on a petition for a rehearing that certain specific credits only should not have been allowed. *Stotsenburg v. Fordice*, 142 Ind. 490.

Where an Action of Negligence has been tried on the theory that a servant was guilty of contributory negligence, a petition for a rehearing will not be considered which is based on the grounds that the master was negligent, and that the servant assumed the risk of employment. *Louisville*, etc., *Consol. R. Co. v. Berry*, 9 Ind. App. 63.

Points Which Have Been Waived on the Hearing, either expressly or by implication, will not be considered upon a petition for a rehearing. *People v. Northey*, 77 Cal. 618. Thus, where

grounds which are contradictory of admissions made on the hearing,¹ nor for the purpose of admitting evidence which the petitioner has previously treated as inadmissible,² nor to consider certain evidence in a light different from that in which it was considered before.³

d. IMPERFECT PRESENTATION OF CASE ON HEARING — (1) Important Point Not Argued. — A rehearing will not be granted on the ground that the petitioner has failed to argue an important point on the hearing. All points relied upon in support of the case must be presented by the briefs and arguments on appeal, and the practice of reserving certain points to be urged subsequently, in the event of an adverse decision, is condemned by the courts.⁴ The reasons for refusing a rehearing are stronger still

counsel for both parties admit, on the hearing, that the case presents only one point for the determination of the court, a rehearing will not be granted to allow the defeated party to present other points for decision. *Gaines v. Williams*, 146 Ill. 450. And where all issues of fact have been waived on the hearing, and the appeal has been tried upon questions of law only, a petition for a rehearing based upon questions of fact will be refused. *Atherton v. San Mateo County*, 48 Cal. 157; *Cudahy v. Rhinehardt*, (N. Y. 1892) 31 N. E. Rep. 444.

1. Grounds Contradictory of Admissions. — *Ohio, etc., R. Co. v. Stein*, 133 Ind. 243.

Where certain facts had been admitted on the hearing a rehearing cannot be had on the ground that the admissions in question were made only for the purpose of argument, and were not intended to be binding upon the petitioners. *Smith v. St. Paul*, 69 Minn. 281.

Facts Admitted to Be in Issue. — Where on the hearing a party has argued certain facts at length, and has treated said facts as being within the issues, he cannot afterwards petition for a rehearing on the ground that the facts in question were not within the issues. *Emerson v. Opp*, 9 Ind. App. 581.

The Validity of a Decree Having Been Admitted on the hearing, it cannot be denied on a petition for a rehearing. *Water Supply, etc., Co. v. Tenney*, 24 Colo. 344.

Where the Equitable Jurisdiction of the Court has been admitted on the hearing, a petition for a rehearing on the ground that the court had no jurisdiction in equity must be refused. *Garard v. Garard*, 135 Ind. 15.

2. Where counsel refuses to accede to a proposal by the adverse party looking to the admission of certain evidence, under the belief that the evidence is adverse to his client's interests, but afterwards learns that the evidence in question is favorable to his client, he cannot have a rehearing for the purpose of considering such evidence. *Cleland v. Gray*, 1 Bibb (Ky.) 38.

3. In *Davis v. Gibson*, 70 Ill. App. 273, evidence which was admissible for the purpose of impeaching a certain witness was offered as evidence generally, as a defense alone, and not specifically for the purpose of impeachment, and was rejected. Thereafter, the appellate court having intimated that the rejected evidence would have been admissible if it had been offered specifically for the purpose of impeachment, the appellant moved for a rehearing on that ground; but it was held that since the point was not made in the original brief of counsel it could not be raised on a rehearing.

4. *Andrews v. Mokelumne Hill Co.*, 7 Cal. 330; *Dougherty v. Henarie*, 49 Cal. 686; *Weil v. Nevitt*, 18 Colo. 10; *Ramsey v. Barbaro*, 12 Smed. & M. (Miss.) 293; *Hunt v. Church*, 73 N. Y. 615; *Rogers v. Laytin*, 81 N. Y. 642.

Additional Brief to Support Point Omitted from Transcript. — Where a part of the record is omitted from the transcript, and an appellant files his brief in ignorance of this fact, and the transcript is subsequently corrected by certiorari, and judgment is rendered against the appellant, a rehearing will not be granted to enable the appellant to file an additional brief in support of the point omitted from the transcript. *Schrichte v. Stites*, 127 Ind. 472.

where through laches a party has totally failed to file briefs or argue the case on the hearing.¹ Nor is it a sufficient reason for a reargument that the case was submitted on the hearing instead of being argued orally;² but the rule is otherwise where the court has decided a case against a party without affording him sufficient opportunity to answer the briefs of the adverse party.³

Where Court Intimates that Argument Is Unnecessary.—In *Derby v. Gallup*, 5 Minn. 119, a rehearing was denied where the application was based upon the ground that counsel had failed to argue an important point on the hearing, supposing that the court did not desire an argument thereon. But it was said that if the court, on the argument of a particular point, were to intimate or state to counsel that it was so well satisfied with the correctness of his view that no further argument was desired, and counsel abstained from further argument thereon, and the case was decided adversely on that particular point, a rehearing might perhaps be granted.

And in *Martin v. Cole*, 38 Iowa 141, a rehearing was granted where the petition alleged that counsel, from expressions found in the opinion of the court in prior cases, had been led into the belief that the main point involved in the case had been determined otherwise by the court, and that they understood counsel for the adverse party to admit this fact, and as a result of this misapprehension had failed to argue the point in question.

Right to Argument Waived by Delay.—In *Marshall Silver Min. Co. v. Kirtley*, 12 Colo. 410, an appeal was assigned to the commission of appeals, and a date was set for oral argument. Thereafter argument was several times postponed by stipulation between the parties, and after a long delay the Supreme Court ordered the commissioners, who were about to go out of office, to report an opinion deciding the appeal. The opinion having been reported, a motion for a rehearing was made, but the court held that by long delay in making argument, and by failure to excuse such delay, the parties had waived their right to an oral argument, and a rehearing was refused.

1. *Bitting v. Ten Eyck*, 82 Ind. 421; *Lawrence County v. Hall*, 70 Ind. 469; *Wachendorf v. Lancaster*, 61 Iowa 509.

As to the effect of failure to file briefs generally, see article BRIEFS, vol. 3, p. 726.

Where Good Excuse for Default Is Given.—A rehearing may be granted even though the petitioner did not appear on the original hearing, if a good excuse is given for the default; but even in such a case the application will be refused if it is apparent that the original judgment would not be altered on reargument. *Bishop v. Glassen*, (Cal. 1886) 12 Pac. Rep. 258.

In *Waters v. Travis*, 8 Johns. (N. Y.) 566, judgment by default had been rendered against the respondent, but the court granted him a rehearing, since his application was supported by affidavits alleging that he was poor and unable to employ counsel, that no rule or order of the court had been served upon him, and that he had received no notice of the proceedings on the part of the appellant.

In *Purdie v. Jones*, 32 Gratt. (Va.) 827, a rehearing was granted upon a petition which alleged that the decree sought to be reviewed was made without the knowledge of the petitioner, where an affidavit to the same effect made by a party who had been counsel for all parties, was filed with the petition.

Rehearing Ordered by Court of Its Own Motion.—Although a rehearing will not be granted upon the application of a party who has failed to file or make an argument when the cause was submitted, the court of its own motion may order a rehearing under such circumstances. *Wachendorf v. Lancaster*, 61 Iowa 509.

2. *Weldon v. De Lisle*, 8 N. Y. App. Div. 610.

Two Appeals Argued Together.—A rehearing may be granted where two appeals which are totally different in character have been set down and argued together, and where it appears that the court may have been misled by this method of procedure. *Moore v. S. C. Forsaith Mach. Co.*, 38 S. Car. 319.

3. Violation of Provision in Order of Submission.—Where a provision that the respondents shall have an extension of the regular time for answering the

(2) *Surprise, Accident, or Mistake.*—A party may have a rehearing on the ground of surprise where the adverse party has suggested new points to the court after submission of the case, or has violated an agreement as to the filing of evidence, and thus obtained a favorable decision by unfair means.¹

Petitioner Must Be Without Fault.—But accident or mistake will not be considered as ground for granting a petition unless it occurred entirely without fault on the part of the petitioner.²

(3) *Misconduct, Absence, or Negligence of Counsel.*—A rehearing cannot be had on account of the misconduct³ or mistaken advice of counsel,⁴ or his absence from the hearing,⁵ or his failure

briefs of the adverse party is inserted in the order of submission, and the court decides the case adversely to the respondent, without any brief on his part, a rehearing will be granted without reference to the merits of the case; but if this provision as to extension of time does not appear in the record it cannot be shown *aliunde*, and the petition for rehearing will be denied. *Patterson v. Ely*, 19 Cal. 28.

Immaterial Irregularity Waived — Rehearing Refused.—In *Rich v. State Nat. Bank*, 7 Neb. 201, there was an oral agreement out of court between the parties as to the time when the cause should be heard, and as a result of this agreement the defendants failed to file any brief within the regular time. When the case was reached on the docket the court refused to recognize this oral agreement, and judgment was rendered without argument or brief by the defendant. Thereafter a motion for leave to file a petition for a rehearing was refused, since it was apparent that, notwithstanding the irregular practice on the hearing, the court had not overlooked any question of law or fact in deciding the case.

1. *Champomier v. Washington*, 2 La. Ann. 1014, *Hankins v. Mutual Ben. L. Ins. Co.*, 4 Ill. App. 130.

Facts Insufficient to Constitute Surprise.—Where an appeal is dismissed on the ground that the order appealed from is not appealable, a rehearing will not be granted on the ground of surprise as to this point, where it appears that the question of appealability was raised in the printed brief of the adverse party, that the decision of the court was made after a full hearing, and that the question was also argued on a motion to resettle the order dismissing the appeal. *Bush v. Abrahams*, 15 Daly (N. Y.) 168.

2. Where an Appeal Has Been Aban-

doned by the appellant, a rehearing will not be granted on a petition which alleges that it was abandoned because the chancellor's notes of the evidence below were not forthcoming, having been lost, and that counsel therefore found it impossible to proceed with the case. *Bennett v. Bell*, 10 Rich. Eq. (S. Car.) 461.

Controlling Facts Admitted by Accident or Mistake.—The Supreme Court will not grant a rehearing on the ground that controlling facts have been admitted by accident or mistake on the trial of the cause in the court below. *Morrill v. Taylor*, 6 Neb. 236.

Mistake Due to Parties' Own Negligence.—Where the contestants of a will have entered a decree refusing it probate in the surrogate's court, without findings of fact, as required by the code, they cannot properly argue a subsequent appeal by the proponents on the merits, as though it were an appeal upon the facts, and if they adopt this irregular practice they cannot afterwards have a reargument on the ground that findings of fact were necessary. *In re Patterson*, (Supm. Ct.) 16 N. Y. Supp. 146.

3. *Baird v. George*, 30 Mo. App. 505.

4. *Brant v. Gallup*, 117 Ill. 640.

5. Conflicting Engagements in Different Courts.—A rehearing will be denied when it is applied for on the ground that an engagement of counsel in an inferior court prevented his attendance in the Supreme Court. In such a case it is the duty of the counsel to attend the higher court. *Helena v. Brule*, 15 Mont. 429.

Absence Due to Negligence.—In *King v. Fraser*, 23 S. Car. 543, counsel were absent from the hearing because they did not expect that the case would be reached. Thereafter they applied to the court to have a time appointed for

to present the case to the court with sufficient clearness.¹

e. THAT RECORD BEFORE COURT ON APPEAL WAS ERRONEOUS. — As a general rule a rehearing will not be granted on the ground that the transcript of the record made by the clerk of the trial court was erroneous,² or that the bill of exceptions did not contain all the evidence,³ or that the record before the appellate court on the hearing was erroneous or defective in any other respect.⁴

oral argument. This application was refused, but leave was granted to file printed arguments. An application for a rehearing made upon the ground that the court erred in refusing to set a time for oral argument was refused, since it appeared that no material fact or principle had been overlooked by the court, and that the attorney's absence from the hearing was caused by his own negligence.

1. *Drucker v. Patterson*, 2 Hilt. (N. Y.) 135; *Krom v. Levy*, 6 Thomp. & C. (N. Y.) 253.

The fact that counsel omitted on the hearing to call the court's attention to the alleged fact that the defendant's appeal had been waived and dismissed by the clerk does not authorize the granting of a rehearing, especially where the petition for a rehearing shows that contrary statements, made by the adverse party on the hearing, were suffered to remain uncontradicted. *Coleman v. Keels*, (S. Car. 1889) 9 S. E. Rep. 735.

2. *McPherson v. Nelson*, 44 Ill. 124. In this case the transcript filed in the appellate court stated that the judge was requested to seal his bill of exceptions "containing the said several matters so produced, and on the evidence given in the trial of said cause." The appellant moved for a rehearing on the ground that the original bill of exceptions contained the word "all" instead of "on," but it was held that the motion must be denied.

Where a Defendant Has Been Convicted of Theft in the trial court, and appeals, and the indictment as copied in the transcript omits an essential averment, and the state's attorney, knowing this fact, submits the cause to the court, and judgment is reversed, a rehearing will not be granted on the ground of diminution of the record. *Garner v. State*, 36 Tex. 693.

3. *Knoth v. Barclay*, 8 Colo. 305; *Underwood v. Sample*, 70 Ind. 446.

Unwarranted Alteration or Amendment of Bill of Exceptions. — In *Topeka v.*

Myers, 35 Kan. 554, a motion for a rehearing was made on the ground that the bill of exceptions had been altered after it was allowed and signed by the trial judge, but since the evidence did not show any such alteration the application was refused.

In *Steinfeld v. Taylor*, 51 Ill. App. 399, the appellee filed an additional record, by stipulation with the appellant. Thereafter the appellant moved for a rehearing of the appeal on the ground that the additional record thus filed was not as agreed upon by stipulation, and that it was an unwarranted amendment of the bill of exceptions, but it was held that the objection came too late, and that the application must be refused.

4. *District of Columbia*. — *Otterback v. Patch*, 5 App. Cas. (D. C.) 69.

Illinois. — *Millard v. Cooper*, 10 Ill. App. 47; *Boynton v. Champlin*, 40 Ill. 63.

Indiana. — *Phenix Ins. Co. v. Lorenz*, 7 Ind. App. 266; *Warner v. Campbell*, 39 Ind. 409; *Pittsburgh, etc., R. Co. v. Van Houten*, 48 Ind. 90; *Cole v. Allen*, 51 Ind. 122; *State v. Terre Haute, etc., R. Co.*, 64 Ind. 297; *Lawrence County v. Hall*, 70 Ind. 469; *Porter v. Choen*, 60 Ind. 338; *Merrifield v. Weston*, 68 Ind. 70; *Mansur v. Churchman*, 84 Ind. 573; *Burgett v. Bothwell*, 86 Ind. 153; *Robbins v. Magee*, 96 Ind. 174; *State v. Dixon*, 97 Ind. 125; *Westfield Bank v. Inman*, 8 Ind. App. 239; *Miller v. Evansville, etc., R. Co.*, 143 Ind. 570; *Smith v. Goetz*, 20 Ind. App. 142.

Iowa. — *McDermott v. Iowa Falls, etc., R. Co.*, 85 Iowa 180; *Barber v. Scott*, 92 Iowa 52.

Kansas. — *State v. Coulter*, 40 Kan. 673.

Kentucky. — *Gwinn v. Duvall*, 9 Ky. L. Rep. 684; *Christopher v. Searcy*, 75 Ky. 171; *Stanaford v. Parker*, (Ky. 1891) 16 S. W. Rep. 268; *Long v. Kerrigan*, (Ky. 1891) 17 S. W. Rep. 441.

Louisiana. — *State v. Pierre*, 49 La.

Exceptions to Rule. — And while the court, of its own motion, may order a rehearing in a case where the record is manifestly and fatally defective,¹ the general rule above stated will not be disregarded on the application of a party unless very special circumstances are shown and a sufficient excuse is given for failure to correct the record before submission of the case.²

Ann. 1159; *Broom's Succession*, 14 La. Ann. 67.

Maryland. — *Colvin v. Warford*, 18 Md. 273.

Minnesota. — *Smith v. St. Paul*, 69 Minn. 281.

New York. — *New York Cable Co. v. New York*, 104 N. Y. 1.

Tennessee. — *Chesapeake, etc., R. Co. v. Hendricks*, 88 Tenn. 710.

Texas. — *Hilburn v. Harris*, 2 Tex. Civ. App. 395; *Ross v. McGowen*, 58 Tex. 603.

United States. — *U. S. v. Adams*, 9 Wall. (U. S.) 554.

Where an appeal has been decided adversely to a receiver, on the ground that the copy of the record of the court by which he was appointed did not show any decree dissolving the corporation, he cannot afterwards have a rehearing to show that this record was defective, and that a decree dissolving the corporation had in fact been passed. *Taylor v. Columbian Ins. Co.*, 14 Allen (Mass.) 353.

Amendment of the Record may perhaps be allowed after a rehearing is granted, but a rehearing will not be allowed for the sole purpose of amending the record. *State v. Eaton*, 6 Kan. App. 94.

Bill of Exceptions Omitted from Record. — A rehearing will not be granted on the ground that the bill of exceptions was omitted from the record. *Bedford v. Neal*, 143 Ind. 425.

Failure to Correct Abstract Due to Sickness. — Where a respondent has submitted his case on a defective abstract, without objection, he cannot afterwards have a rehearing on a corrected abstract, on the ground that he was prevented by sickness from submitting a corrected abstract before the determination of the case. And this is especially true where the party is entitled to a new trial, and the decision of the appeal does not finally settle the merits of the case. *Harrison v. Chicago, etc., R. Co.*, 6 S. Dak. 572.

Immaterial Error Not Affecting Decision. — A rehearing will not be granted on the ground that the record was defective or erroneous, when it is apparent

that such defect or error was immaterial, and did not affect the decision of the case. *Godwin v. Hooper*, 45 Ala. 613; *Shipherd v. Cohu*, (Super. Ct.) 5 N. Y. Supp. 187; *Robinson Consol. Min. Co. v. Craig*, (Supm. Ct.) 4 N. Y. St. Rep. 478; *Kessler v. Levy*, (C. Pl. Gen. T.) 12 Misc. (N. Y.) 116; *Burt v. Oneida Community*, 138 N. Y. 649.

1. *Linahan v. Barley*, 124 Mo. 560.

2. *Allen v. Le Moyne*, 101 Ill. 655; *Fowler v. Atkinson*, 6 Minn. 578; *Ayers, etc., Co. v. Sundback*, 5 S. Dak. 362; *Merchants' Nat. Bank v. McKinney*, 6 S. Dak. 58.

Circumstances Held Sufficient to Authorize Rehearing. — Where it is shown that a hearing has been had on an imperfect record, that a large part of the matter which was before the court below has been omitted in the transcript certified to the Supreme Court, that there was no inexcusable laches or neglect in failing to examine and perfect the record before the hearing, and that the omissions were material, a strong case for reargument is presented. *Ambler v. Whipple*, 23 Wall. (U. S.) 278.

In *Pearl v. Wellman*, 9 Ill. 395, judgment for the plaintiff was reversed on appeal because a plea of payment was unanswered on the record, but a rehearing was afterwards granted, since it was shown that the plaintiff's replication to the plea had been filed in the court below, but inadvertently omitted from the record on appeal.

In *Munger v. Jacobson*, 100 Ill. 468, on a motion for a rehearing the parties agreed by stipulation to incorporate the record of a different branch of the case in the record as previously used on the hearing, and as different questions were presented by the record as thus amended a rehearing was granted.

In *Krakowski v. North New York Co-operative Bldg., etc., Assoc.*, (C. Pl.) 24 N. Y. Supp. 1138, a rehearing was granted since it appeared that certain papers received in evidence in the trial court and on which both parties to the appeal based their rights had not been returned in the record sent to the appellate court.

f. IMPORTANCE OF QUESTION INVOLVED. — Where a question of great importance is involved in the determination of a case and it appears to have been decided without due consideration the court may grant a reargument;¹ and the same course is sometimes pursued where the decision in the case at bar is likely to affect the result in other cases which are pending at the same time, and which involve the same question.²

Cases Involving Constitutional Questions may be reargued when the justices hearing the argument are divided in opinion, and for that reason do not deliver any judgment.³ But when a question concerning the constitutionality of a law has been waived by failure to raise it on the argument, a rehearing for the purpose of pre-

In *Stafford v. Perker*, Dall. (Tex.) 380, a reargument was granted because the record was so vague and uncertain that the Supreme Court could neither affirm nor reverse the judgment nor render the judgment which should have been rendered below.

In *Allerding v. Cross*, 15 Wis. 530, the case was tried before a jury, and after argument, the jury, by consent of the parties, found a formal verdict for the plaintiff, upon which judgment was to be entered for the plaintiff if the court should be of the opinion that it should stand; otherwise the verdict was to be set aside and judgment entered for the defendants for costs. The plaintiff moved for judgment; the court denied the motion and gave judgment for the defendants, to which the plaintiff excepted generally. On appeal the judgment was affirmed for the reason that the exceptions were not taken in such a manner as to present the questions discussed by counsel, but a rehearing was afterwards granted to allow the appellant to apply to the lower court to amend the record so as to show the facts properly.

1. In *Morrow v. Weed*, 4 Iowa 77, a rehearing was granted since it appeared that the questions involved were very important, that the pressure of business had rendered it necessary to make the opinion of the court too brief, not entering into a detailed exposition of the questions involved with sufficient clearness, that rules were announced but their application left to the mind of the reader, and that counsel appeared to have misapprehended the reasoning of the court.

In *Lenoir v. Valley River Min. Co.*, 104 N. Car. 490, the court said: "We have examined the record in this case

with considerable scrutiny. It is voluminous and confused. The assignments of error in several important respects are indefinite and scarcely intelligible, as we see them. We are unable so far to interpret them satisfactorily. The elaborate brief of the appellant has reference to only a part of the errors assigned, and the counsel present did little more than read it. The case was not argued at all for the appellee. It seems to be of considerable importance, and merits to be thoroughly argued. Indeed, we think it due to the parties to direct that it be reargued for the appellant, and argued also for the appellee, at the next term. To that end the case must be continued."

Additional Reasons Generally Essential. — In *Derby v. Gallup*, 5 Minn. 119, it was said that a rehearing would be granted in a case where great public interests were involved, and where it appeared that the case had not been fully argued, but even in such a case strong additional reasons must be urged to show that the court has erred in its rulings. And see *Bradley v. Gamelle*, 7 Minn. 331.

In the United States Circuit Court of Appeals rehearings will not be granted on the ground that the case is of great importance unless there is also a suggestion that some controlling authority has been overlooked; and this is especially true where the decision is subject to review by the Supreme Court. *Camfield v. U. S.*, 67 Fed. Rep. 17.

2. *Kirby v. Western Union Tel. Co.*, 4 S. Dak. 439. But see *Butler v. Walker*, 80 Ill. 345.

3. *Briscoe v. Commonwealth's Bank*, 8 Pet. (U. S.) 118.

sending the same question, and thereby ousting the court of its jurisdiction, will not be granted.¹

g. DECISION RENDERED BY DIVIDED COURT.—Where the judges of the appellate court are divided in opinion a reargument of the case is usually allowed, especially in cases where the judgment is affirmed by operation of law, and the decision is final in its nature, and other methods of review are not open to the petitioner, or where the division of the court results from the absence of one or more of the judges.² But where a case has been twice deliberately heard and considered, and the same result has been reached at both hearings, and the judgment has been entered of record, a rehearing will not be granted merely because some members of the court have since changed their opinion on the law of the case.³

1. *In re Pittsburgh, etc., R. Co.*, 147 Ind. 697; *Haas v. Evansville*, (Ind. 1898) 51 N. E. Rep. 105.

Question as to Constitutionality Not Essential.—A rehearing will not be granted where the question as to the constitutionality of the law is not essential to the determination of the case, and does not affect the decision of the court. *Vallier v. Brakke*, 7 S. Dak. 551.

2. *Colley v. Duncan*, 47 Ga. 668; *Summerbell v. Summerbell*, 36 N. J. Eq. 293; *Burrows v. Guest*, 4 Utah 121. And see in general article DIVISION OF OPINION, vol. 7, p. 44.

Judgment Affirmed by Operation of Law.—In *Iowa* the code provides that when the court is equally divided in opinion there shall be a reargument if it appears that one of the judges was absent but not disqualified, but if he was disqualified the judgment shall stand affirmed. In a case where one of the judges was disqualified, and the two judges who heard the case differed in opinion, it was claimed by the appellee that his right to an affirmance of the judgment was fixed by law, independent of the decision of the appellate court, and therefore that a rehearing could not be ordered, but the court held that a judgment thus affirmed by operation of law was as much subject to reargument as any other judgment. *Zeigler v. Vance*, 3 Iowa 528.

Judgment of Lower Court Reversed by Mistake.—Where a rule of the Supreme Court provides that the judgment of the court below shall be affirmed if the judges are equally divided in opinion, a rehearing will be granted if it appears that in such a case the judgment has been errone-

ously reversed, and that the decision has since been vacated. *Case v. Hoffman*, 100 Wis. 314.

When a Judgment Is Not Final a reargument will be refused although it was rendered by a divided court. *Texas, etc., R. Co. v. Gentry*, 57 Fed. Rep. 422.

Thus in an action to recover real property an appellant is not entitled to a reargument of the judgment on appeal where the statute provides for a second trial on compliance with certain conditions. *Great Northern R. Co. v. Stewart*, 65 Minn. 514.

In New York.—In *People v. New York*, 25 Wend. (N. Y.) 252, it was held that the court of errors would not grant a rehearing after final judgment on the merits of the case had been pronounced, drawn up, settled, and entered of record, although the court was equally divided, and the judgment of the court below was affirmed by operation of law.

And in *Mason v. Jones*, 3 N. Y. 375, it was held that where the judges of the Court of Appeals in consultation were equally divided in opinion, a judgment of affirmance would be rendered in conformity with the former practice of the court of errors, and that when this judgment of affirmance has been pronounced in open court with no public expression of dissent a rehearing will not be granted.

In the Federal Courts.—A rehearing will not be granted on the ground that the case was decided by a divided court unless important constitutional questions are involved. *Shreveport v. Holmes*, 125 U. S. 694. And see *Brown v. Aspdon*, 14 How. (U. S.) 25.

3. *Blatchford v. Newberry*, 100 Ill.

h. PROBABLE ALTERATION OF DECISION ON REARGUMENT BEFORE COURT DIFFERENTLY CONSTITUTED — (1) *Change in Membership of Court.* — That a change in the membership of the court is about to take place, or has already occurred, is not in itself sufficient reason for granting a rehearing.¹

(2) *Death of Judge.* — Nor does the death of one of the judges who heard the argument, occurring before the decision was rendered, necessitate a review thereof, where the surviving judges constitute a majority of the court, and are agreed in opinion.²

(3) *Court Not Legally Constituted.* — A petition for a rehearing does not lie on the ground that the court which rendered the decision was not legally constituted.³

i. DEATH OF A PARTY TO THE ACTION. — The death of a party to an action, after submission but before decision of the case on appeal, cannot be urged as a ground for reargument.⁴

484. And see *Newberry v. Blatchford*, 106 Ill. 584.

1. *Peoples v. Evening News Assoc.*, 51 Mich. 11; *Woodbury v. Dorman*, 15 Minn. 341; *Ayer v. Stewart*, 16 Minn. 89.

A reargument will not be ordered for the mere reason that the decision of one general term does not meet the approval of the judges composing a second general term. *Stearns v. Hemmens*, (C. Pl.) 3 N. Y. Supp. 16.

Thus in *Newell v. Wheeler*, 4 Robt. (N. Y.) 190, where one general term was requested to review a decision by a previous general term the application was refused and the court said: "Such an application is rather a novel experiment in correcting judicial errors by bringing the opinion of one general term before another differently constituted for the purpose of criticising the soundness of its views upon the facts which the evidence before it tended to establish. Such a mode of review, whatever deference may be paid or felt for the action of the former general term, would be very apt to lead to disrespectful comments upon the conduct of the court, and at least to reflections on the diligence with which the case has been examined on the first occasion. For this reason, it seems to me both just and proper that the moving party should secure, from the prior court, some acknowledgment of oversight or error, in order to make such a proceeding very decorous."

In Construing the Intention of a Testator it is very probable that one court will differ from another since it is largely a matter of opinion, and therefore a rehearing should seldom be al-

lowed in a case which involves this question unless there is a palpable error in the first decree. *Devereux v. Devereux*, 81 N. Car. 12.

2. *State v. Sioux Falls Brewing Co.*, 5 S. Dak. 360; *Aultman v. Utsey*, 35 S. Car. 596.

3. *Williams v. Benet*, 35 S. Car. 598, (S. Car. 1891) 14 S. E. Rep. 288; *Hubbard v. Fravell*, 80 Tenn. 304.

Where the legal right of a certain member of the court to sit at the hearing is not disputed on the original hearing the question will not be considered on a petition for a rehearing. *People v. Tidwell*, 5 Utah 88.

Relationship of Judge to Attorney. — In *Maclean v. Scripps*, 52 Mich. 215, a son of the judge who wrote the opinion belonged to a firm who were the attorneys of record for one of the parties when the suit was brought, but since it appeared that the firm did not manage the case, and did not appear in the appellate court, a petition for a rehearing alleging the disqualification of the judge on account of this relationship was refused.

4. *Moore v. Taylor*, 81 Md. 644; *Aultman v. Utsey*, (S. Car. 1891) 14 S. E. Rep. 289.

Irregularity Waived Where Substantial Justice Is Done. — Where a party dies pending an appeal, a hearing had before his administrator has been substituted is irregular since the code provides that in such cases the appeal cannot be heard until after substitution, but a rehearing will not be granted on the ground of this irregularity where it appears that the hearing has been thorough and exhaustive, and that

j. NEWLY DISCOVERED EVIDENCE. — In the absence of statute providing therefor cases on appeal will not be reheard on the ground of newly discovered evidence.¹

k. JUDGMENT OBTAINED BY FRAUD. — Where it is sought to impeach a judgment on the ground of fraud an independent action setting up the fraud is necessary and a petition for a rehearing does not lie.²

3. By Whom Rehearing May Be Had. — Strangers to the suit cannot have a rehearing where their application is based on facts extraneous to the record,³ and in all cases it must appear that the party by whom application is made is a person whose interests are affected by the judgment.⁴

substantial justice has been done. *Blake v. Griswold*, 104 N. Y. 613.

1. *Zuver v. Lyons*, 40 Iowa 510; *Breaux v. Negrotto*, 43 La. Ann. 426; *Cutler v. The Steamship Columbia*, 1 Oregon 101; *Nessley v. Ladd*, 30 Oregon 564; *McMeen v. Com.*, (Pa. 1887) 10 Atl. Rep. 785; *Ex p. Dunovant*, 16 S. Car. 299; *McKenzie v. Sifford*, 52 S. Car. 394; *International, etc., R. Co. v. Anderson County*, 59 Tex. 654; *U. S. v. Maxwell Land-Grant Case*, 122 U. S. 365; *Flower v. Lloyd*, 46 L. J. Ch. 838. 6 Ch. D. 297, 35 L. T. N. S. 454, 25 W. R. 793.

In *Michigan an Appeal May Be Reheard* on the ground of newly discovered evidence. *Thompson v. Jarvis*, 40 Mich. 526.

But where the statement of the proposed new evidence is very vague, and indicates nothing more than cumulative testimony upon a subject on which several witnesses have been examined, and where it appears that the evidence might have been obtained in time for the hearing by the exercise of reasonable diligence, a rehearing will be refused. *Case v. Case*, 26 Mich. 484.

In *North Carolina* rehearings on the ground of newly discovered evidence are authorized by Rule 12 of the Supreme Court. *Weathersbee v. Farrar*, 98 N. Car. 255.

2. So held in a case where the defendant claimed that there was an agreement between himself and the plaintiff whereby it was understood that the defendant would not resist the action but would suffer judgment to be entered for a certain amount, that judgment was entered for an amount in excess of that agreed upon, and that it would be a fraud to allow the plaintiff to enforce judgment for said amount. *Grant v. Edwards*, 88 N.

Car. 246. See article *BILLS TO IMPEACH DECREES AND JUDGMENTS*, vol. 3, p. 607.

3. *State v. Cowen*, (Md. 1897) 36 Atl. Rep. 434.

4. *McCreery v. Ghormley*, 9 N. Y. App. Div. 221. In this case an appeal was taken from an order granting inspection and discovery of books and papers belonging to several defendants, and on the hearing of the appeal it was urged that the documents in question contained incriminating evidence; but the court held that since the alleged crime was barred as to all the defendants by the statute of limitation, the production of the documents could not prejudice the defendants, and the order of the trial court was therefore sustained. Thereafter one of the defendants petitioned for a rehearing, admitting that as to his own case the judgment of the court was correct, but alleging that it was erroneous as to the other defendants, in that the crime was not barred in their case by the statute. It was held, however, that the petitioner could not have a rehearing, as the judgment did not prejudice his own rights.

Where the Attorney-General Appears on Behalf of the People he is not a party to the suit nor is he properly an intervenor. His position is rather that of *amicus curiæ*, and he cannot petition for a rehearing. Nor can an intervenor have a rehearing in a case where the decision does not affect his interests. *Parker v. State*, 133 Ind. 178.

Application of Amicus Curiae. — In *Louisiana* a rehearing may be had on the suggestion of an *amicus curiæ*; but in such case the application does not delay the finality of the judgment. *Life Assoc. of America v. Hall*, 33 La. Ann. 49.

A Petition by an Appellee, who seeks thereby to open a judgment as against a co-appellee, will not be entertained.¹

4. **To Whom Application Should Be Made.** — Application for a rehearing should be made to the court in which the appeal was decided;² and where such court is divided into several departments, good practice further requires that the petition be filed in the same department or division where the original hearing was had.³

After Appeal to Higher Court. — The court which rendered the decision has no power to grant a rehearing after the case has been removed to a higher court, or after its judgment has been affirmed on appeal.⁴ Nor can a higher court order an inferior court of appellate jurisdiction to grant a rehearing; but the judgment of the higher court may be made without prejudice to a subsequent application in the lower court.⁵

5. **Time of Making Application** — *a.* **BEFORE END OF TERM.** — **At Common Law**, as a general rule, the petition must be filed before the end of the term at which the case is decided, and in most jurisdictions a failure to make the application within this period is fatal, exceptions to the rule not being recognized by the courts.⁶ In a few of the states, however, applications made after

1. *Jamison v. Barelli*, 20 La. Ann. 452.

2. *Matter of Livingston*, (Ct. App.) 32 How. Pr. (N. Y.) 20.

3. In *New Hampshire* it has been held that where a case is decided at the law term a motion for a rehearing therein in regard to a question of law must also be made at the law term. *Bell v. Lamprey*, 58 N. H. 124; *Plaisted v. Holmes*, 58 N. H. 619.

But where a decision is rendered by a single judge, and questions of law are reserved for determination by the whole court, the question as to whether there shall be a rehearing in respect to the facts must be determined at the trial term by the judge who tried the case. *Raynes v. Raynes*, 54 N. H. 201.

In *New York* it was held that one division of the court of appeals would not grant a rehearing in a case decided by another division; especially where the judgment complained of was not final, a new trial below being ordered. *People v. Ballard*, 136 N. Y. 639.

And while it was held in *Bolles v. Duff*, 56 Barb. (N. Y.) 567, that one special term or one general term of the supreme court might rehear cases decided by a previous special or general term, it was also said that this power should very rarely be exercised.

And in later cases the practice of ap-

plying to one general term for a rehearing in a case decided by a previous general term has been condemned, and petitions for such rehearing have been refused. If the question at issue is one of law the proper remedy is by appeal. *McGarry v. Board of Supervisors*, 1 Sweeny (N. Y.) 217; *Taylor v. Grant*, 36 N. Y. Super. Ct. 259; *Newell v. Wheeler*, 4 Robt. (N. Y.) 194.

In *Ohio*, where the decision was rendered by the court in bank, it was held that a rehearing could only be allowed in open court in bank. *Carlisle v. McDonald*, 7 Ohio (pt. i.) 267.

4. In *re Citizens' Water-Works Co.*, (Supm. Ct.) 15 N. Y. Supp. 579; *Jung v. Keuffel*, (C. Pl. Gen. T.) 12 Misc. (N. Y.) 89.

5. *Matter of Ingraham*, 64 N. Y. 310. In *Jennings v. Parr*, 51 S. Car. 191, a petition for a rehearing was refused on the ground that it raised questions not considered by the Supreme Court on the hearing, but the order dismissing the petition was made without prejudice to the right of the petitioner to have the questions passed upon by the circuit court.

6. *Dakota*. — *Roberts v. Haggart*, 4 Dak. 210.

Florida. — *Horn v. Gartman*, 1 Fla. 230.

Georgia. — *Grant v. State*, 100 Ga. 67.

the end of the term will be considered where a rehearing is the only remedy available, and irremediable injury would otherwise result,¹ or where circumstances over which the petitioner has no control have prevented an application within the required period.²

b. BEFORE CASE HAS BEEN REMANDED. — After an appeal has been decided, and the case has been remanded, the appellate court has no jurisdiction to grant a rehearing.³

Illinois. — *People v. Pearson*, 4 Ill. 406; *Lampsett v. Whitney*, 4 Ill. 170; *Belleville Sav. Bank v. Reis*, 29 Ill. App. 622; *Delahay v. McConnel*, 5 Ill. 157.

Kansas. — *J. M. W. Jones Stationery, etc., Co. v. Hentig*, 31 Kan. 317.

Kentucky. — *Robertson v. Given*, 6 Ky. L. Rep. 214.

Louisiana. — *Brooks v. Dolard*, McGlin (La.) 279.

Mississippi. — *Foy v. Foy*, 25 Miss. 207.

Missouri. — *Gratiot v. Missouri Pac. R. Co.*, 116 Mo. 450.

Tennessee. — *Haywood v. Marsh*, 6 Yerg. (Tenn.) 69.

Texas. — *Chambers v. Hodges*, 23 Tex. 104; *Burr v. Lewis*, 6 Tex. 76.

Virginia. — *Towner v. Lane*, 9 Leigh (Va.) 262.

West Virginia. — *Hall v. Virginia Bank*, 15 W. Va. 323.

Wisconsin. — *Oakley v. Hibbard*, 2 Pin. (Wis.) 21.

United States. — *Lewisburg Bank v. Sheffey*, 140 U. S. 445; *Hudson v. Guestier*, 7 Cranch (U. S.) 1; *Brooks v. Burlington, etc., R. Co.*, 102 U. S. 107; *Bushnell v. Crooke Min., etc., Co.*, 150 U. S. 82.

Unless the Court Directs a Suspension of the Judgment by an order made at the same term at which the judgment is rendered, a petition filed after the end of the term is too late; nor does the filing of a motion for leave to present a petition for a rehearing thus suspend the judgment. *Ashley v. Hyde*, 6 Ark. 92.

The Legislature Cannot Confer Authority upon the Court to rehear judgments rendered at a previous term. *Griffin v. Cunningham*, 20 Gratt. (Va.) 31.

Thus in *Hall v. Virginia Bank*, 15 W. Va. 323, although an act had been passed by the legislature authorizing the rehearing of cases decided at a previous term, it was held that the enactment was permissive, and not mandatory, and that it provided simply for the correction of clerical errors in the

judgments in question, and not for rehearings in the proper sense of the term.

1. *Roberts v. Edmundson*, 4 Smed. & M. (Miss.) 730.

2. *Pearl v. Wellman*, 9 Ill. 395; *Selby v. Hutchinson*, 10 Ill. 261.

3. *California.* — *Grogan v. Ruckle*, 1 Cal. 193; *Mateer v. Brown*, 1 Cal. 231; *Durkee v. Garvey*, 84 Cal. 590.

Michigan. — *Ryerson v. Eldred*, 18 Mich. 490.

Minnesota. — *Caldwell v. Bruggerman*, 8 Minn. 286; *Rud v. Pope County*, 66 Minn. 358.

Montana. — *Columbia Min. Co. v. Holter*, 1 Mont. 429.

New Jersey. — *King v. Ruckman*, 22 N. J. Eq. 551.

New York. — *Mechanics', etc., Bank v. Dakin*, 54 N. Y. 681.

South Carolina. — *Sullivan v. Speights*, 14 S. Car. 358; *Ex p. Dial*, 14 S. Car. 584; *Whaley v. Charleston Bank*, 5 S. Car. 262.

Wisconsin. — *Ogilvie v. Richardson*, 14 Wis. 157.

United States. — *Peck v. Sanderson*, 18 How. (U. S.) 42; *Sibbald v. U. S.*, 12 Pet. (U. S.) 488; *Browder v. M'Arthur*, 7 Wheat. (U. S.) 58.

Appearance in the Lower Court, and participation in a hearing held therein, after the case has been remanded by the supreme court, is a waiver of any right which a party might have to move for a rehearing in the supreme court. *Bentley v. Fraley*, 1 Dak. 38.

Remittitur Issued but Not Yet Filed Below. — In *South Carolina* the power of the supreme court to grant a rehearing ceases when the remittitur is issued, and it makes no difference whether or not it has been filed below. *Ex p. Dunovant*, 16 S. Car. 299.

But in *New York* the issuance of the remittitur does not bar a rehearing as long as it has not been filed below, and at any time before it is so filed the appellate court, on a proper case made, will order the filing of the remittitur to be stayed. *Cushman v. Hadfield*, (Ct. App.) 15 Abb. Pr. N. S. (N. Y.) 109.

c. TIME PRESCRIBED BY STATUTE.—In many jurisdictions the time within which petitions may be filed is prescribed by statutes or court rules.¹

After the Time Thus Limited Has Expired a petition cannot be filed as of course, but a motion for leave to file it is essential. If such motion alleges a sufficient excuse for failure to comply with the rule, leave may be granted, but as a general rule the statutory period will not be extended.²

But after it has been filed a rehearing cannot be had unless the lower court see fit to vacate the filing and order thereof. *Wilmerdings v. Fowler*, (Ct. App.) 15 Abb. Pr. N. S. (N. Y.) 86.

In *Florida* the filing of the mandate below marks the limitation beyond which a rehearing cannot be had. *Merchants' Nat. Bank v. Grunthal*, 39 Fla. 388.

Remittitur Recalled.—In *Wynn v. Wyatt*, 11 Leigh (Va.) 612, the court of appeals granted a rehearing after the case had been remanded and a certificate of the judgment had been sent to the court below. By order of the court the certificate was revoked, and the lower court was ordered to surcease proceedings till further notice.

But a motion to recall the *remittitur* and grant a rehearing will be refused when the application is not made until a year after the case has been remanded, and when in the meantime a new trial has been had, and a second appeal taken. *McKenzie v. Sifford*, 52 S. Car. 394.

Procedendo Filed Before Application Is Barred by Statute.—If an application for a rehearing is made in the supreme court before the statutory time limited therefor has expired, it will be granted notwithstanding the fact that a writ of *procedendo* and a petition for removal to the United States Supreme Court have been filed in the court below. *Chicago, etc., R. Co. v. McKinley*, 99 U. S. 148.

In *Wisconsin* the clerk of the Supreme Court is required by statute to remit the papers in the case to the lower court within thirty days after judgment rendered, and after that period the court has no jurisdiction to grant a rehearing whether the papers have actually been remitted or not. *Pringle v. Dunn*, 39 Wis. 435.

And the same rule applies where a judgment is reversed, for nonappearance of the respondent, without a hearing, and a motion is thereafter made to vacate the judgment and re-

instate the appeal. Such a motion partakes of the nature of a petition for a rehearing, and is equally barred by lapse of the statutory period. *Bonin v. Green Bay, etc., R. Co.*, 43 Wis. 210.

1. See the following cases construing such statutes and rules:

California.—*Niles v. Edward*, 95 Cal. 41; *Durgin v. Neal*, 82 Cal. 595.

District of Columbia.—*Adriaans v. Lyon*, 8 App. Cas. (D. C.) 532.

Indiana.—*Huntington County v. Brown*, 14 Ind. 191; *Hutts v. Bowers*, 77 Ind. 211; *Fairbank v. Lorig*, 4 Ind. App. 451; *Pittsburgh, etc., R. Co. v. Mahoney*, 148 Ind. 196.

Iowa.—*Chicago, etc., R. Co. v. McKinley*, 99 U. S. 148, passing on the Iowa practice.

Louisiana.—*Chew v. Flint*, 10 La. 372; *State v. Judges*, 48 La. Ann. 1079.

North Carolina.—*Young v. Greenlee*, 85 N. Car. 593; *Strickland v. Draughan*, 91 N. Car. 103; *Barcroft v. Roberts*, 92 N. Car. 249; *Emery v. Raleigh, etc., R. Co.*, 102 N. Car. 234.

Oregon.—*Coyote Gold, etc., Min. Co. v. Ruble*, 9 Oregon 121.

South Carolina.—*Ex p. Smith*, 25 S. Car. 108.

South Dakota.—*Wright v. Sherman*, 3 S. Dak. 367.

Texas.—*Baldrige v. Scott*, 48 Tex. 178; *Franklin v. Hurlburt*, 1 Tex. App. Civ. Cas., § 203.

Wyoming.—*Chadron Bank v. Anderson*, (Wyo. 1897) 49 Pac. Rep. 406; *Cronkhite v. Bothwell*, 3 Wyo. 739.

United States Circuit Court of Appeals, Eighth Circuit.—*Crabtree v. McCurtain*, 66 Fed. Rep. 1.

2. *Sams v. Creager*, 85 Tex. 497; *Houston, etc., R. Co. v. Grigsby*, 13 Tex. Civ. App. 639; *Howard v. McKenzie*, 54 Tex. 171.

Motion for Leave to File Petition—Essential Averments.—A motion for leave to file a petition after the statutory time will be refused where it is based on affidavits which seek to convey the idea that the petitioner was

d. RIGHT WAIVED BY GROSS LACHES. — An application made after long delay, or after the occurrence of circumstances implying a waiver of the right to review, may be refused even though it is not barred by any statutory limitation.¹

e. SUBSEQUENT ACTION ON PETITION FILED WITHIN STATUTORY PERIOD. — By the weight of authority the court may take action on a petition after the time limited for making the application has expired, provided such petition was duly filed within the statutory period. But in order to justify this procedure something should be done during the term at which judgment was rendered, to keep the case within the jurisdiction of the court.²

inaccessible to his attorney on account of a contagious disease in his family, if it is shown that by the exercise of reasonable diligence he might have communicated with the attorney. *Gough v. Root*, 73 Wis. 32.

An application for leave to file a petition after the statutory time, on the ground that the petitioner was not notified of the rendition of the judgment in time to file such petition within the statutory period, must state the time when notice was received. This averment must be made directly, and not in the form of a mere conclusion, and the application must also allege that the party was within the state, and that the failure to receive notice was not due to his own fault. *Barnesville First Nat. Bank v. Yocum*, 12 Neb. 208.

The Statutory Period Will Not Be Extended on the ground that the last day fell on Sunday, *Adams v. Dohrmann*, 63 Cal. 417; nor because of the employment of new counsel after decision rendered, *Ferris v. Coover*, 10 Cal. 589; nor because counsel was not aware that any period was prescribed by the rules of the court, *Brant v. Gallup*, 117 Ill. 640; nor because he was too busy to make the motion within the required time, *Kneeland v. Miles*, (Tex. Civ. App. 1894) 25 S. W. Rep. 486; nor is it a good excuse that counsel, immediately on receiving notice of the decision, notified another attorney to file the petition, but that the latter was prevented from doing so by sickness, *Cowen v. Bloomberg*, 15 Tex. Civ. App. 364.

Stipulations Between the Parties looking to an extension of the time prescribed by the rules of the court are ineffectual. Such an extension, if allowable in any case, can only be obtained by order of the court on motion

made for that purpose. *Mills v. Lockwood*, 40 Ill. 130; *Bernhard v. Brown*, 31 Ill. App. 385; *Pierce v. Kelly*, 39 Wis. 568; *Diedrich v. Northwestern Union R. Co.*, 42 Wis. 248; *Ogilvie v. Richardson*, 14 Wis. 157.

Petition Lost in Transmission. — In *Hanson v. McCue*, 43 Cal. 178, it was held that the time for filing the petition could not be enlarged, or a failure to file it within the prescribed time excused, under the positive prohibition of a rule of the court. But in the case at bar a rehearing was granted since it appeared that the petition was placed in the office of an express company, duly addressed to the clerk, and in time, under ordinary circumstances, to have reached him within the statutory period (transmission by this means being the customary and most reliable method). And although the petition in this case did not actually reach the clerk, it was held that in contemplation of law it was in his hands within the time limited by the rule.

1. *Turner v. Com.*, 89 Ky. 78.

In New Hampshire questions of law decided by the law term will not be reheard when the party has subsequently proceeded to a trial upon the facts before presenting his petition. *Bell v. Woodward*, 48 N. H. 437; *Bell v. Lamprey*, 58 N. H. 124; *Preston v. Travelers' Ins. Co.*, 59 N. H. 49; *Amoskeag Mfg. Co. v. Head*, 59 N. H. 563.

2. *Lutt v. Grimont*, 17 Ill. App. 308; *Terrell v. Butterfield*, 92 Ind. 1; *Burr v. Lewis*, 6 Tex. 76; *Baldridge v. Scott*, 48 Tex. 178; *Goddard v. Ordway*, 101 U. S. 745.

Power of the Court in Vacation. — Although the court may have power to grant an application after the statutory period has expired, the order must be made in term time, and a petition can-

6. How Application Is Made — a. IN GENERAL. — Applications for the rehearing of appeals should be made by petition and not by motion supported by affidavits.¹

not be granted in vacation. *Blatchford v. Newberry*, 100 Ill. 484.

Additional Suggestions in favor of granting the application will not be received as of course after the time limited for filing the petition has expired. *Hawley v. Simmons*, 101 Ill. 654.

And for the same reason consideration of the application will not be postponed until another case involving the same question has been decided, since this would amount to the receiving of such additional suggestions by the court. *Furlong v. Riley*, 104 Ill. 97.

Where the Judges Cannot Agree concerning the disposition of the motion, it does not lapse because not decided within ten days after the adjournment of the term; and it may be disposed of at the ensuing term. *State v. Judges*, 48 La. Ann. 1079.

A General Order Continuing All Pending Motions operates to continue a motion for a rehearing which has been delivered to the clerk of the court of civil appeals for filing although it was not actually filed and docketed within the prescribed time. By delivery to the clerk such motion becomes a pending motion and it is not abandoned because the petitioner fails to call it to the attention of the court, or to have it specifically included in the general order of continuance. *Houston, etc., R. Co. v. Davis*, (Tex. Civ. App. 1895) 32 S. W. Rep. 163.

Motion Made and Prosecuted Within Statutory Period. — Not only must the petition be filed during the time limited by the rule, but it must also be prosecuted during said time, in order to justify its allowance after the end of the statutory period. *Pringle v. Dunn*, 39 Wis. 435.

Where Entire Term Has Passed Without Action. — An application will not be granted at a subsequent term in a case where an entire term of the court has been allowed to elapse after the filing of the petition, without any action being taken, unless good reason for the failure to act is shown. *McArthur v. Henry*, 34 Tex. 143.

Order Overruling Former Order Denying Application. — When a petition filed within the statutory time has been overruled the court cannot, at a subsequent term, set aside its former order

denying the application, and grant a rehearing of the cause. *Gratiot v. Missouri Pac. R. Co.*, 116 Mo. 450; *Prather v. Phelps*, 5 Ky. L. Rep. 763.

1. *Willson v. Broder*, 24 Cal. 190; *Internal Imp. Fund v. Bailey*, 10 Fla. 238; *Anonymous*, 40 Ill. 129; *Fertich v. Michener*, 111 Ind. 486; *Lacroix v. Camors*, 34 La. Ann. 639; *Armstrong v. Sandford*, 60 Hun (N. Y.) 356; *Ruffin v. Harrison*, 91 N. Car. 398; *Taylor v. Boyd*, 6 Heisk. (Tenn.) 611.

Where the court in general term has decided a certain question, and the case is subsequently brought before it for the purpose of determining other questions, the questions determined on the first hearing will not be reconsidered, but the parties will be left to seek their remedy by appeal unless an application has been regularly made and granted for a rehearing of the first decision, or unless the court requests a reargument of the matters formerly passed upon. *Wilkins v. Tobacco F. & M. Ins. Co.*, 2 Cinc. Super. Ct. 204; *Lovenberg v. National Bank*, 67 Tex. 440.

Cannot Be Obtained by Indirection. — A party who is not directly entitled to a rehearing cannot obtain the same by indirect methods, as, for instance, by taking testimony before the master on a reference, which, had it been submitted to the chancellor, would have produced a different decree. *Maury v. Lewis*, 10 Yerg. (Tenn.) 115.

By Motion to Vacate Order Dismissing Appeal. — Where an appeal has been dismissed a rehearing cannot be obtained by an application to vacate the order of dismissal. *Adams v. McPherson*, (Idaho 1894) 35 Pac. Rep. 690.

By Filing a Cross-bill. — Where a decree has been reversed and the case remanded with special directions, a rehearing cannot be obtained by introducing further evidence, or filing a cross-bill. *Norton v. Moshier*, 114 Ill. 146.

Practice in the Federal Courts. — Where one of the judges of the United States Supreme Court, who concurred in a judgment rendered by a divided bench, desires a reargument, the court will order one without waiting application by counsel; but where the court does not of its own motion order a reargument, if counsel desire to have the case

b. FORM AND CONTENTS OF PETITION.—The petition should set forth in full the grounds on which the application is based, and point out specifically the points in which the original decision is alleged to be erroneous.¹

Petition a Mere Argument.—In stating the facts the petition should not proceed to give further reasons in support of the case made in the original brief, and an application which is, in form, a mere argument or brief cannot be considered by the court.²

Conformity to Rules.—Nor can a petition be granted which fails in any respect to conform to the rules of the court in which it is filed.³

reheard, they should submit without argument a brief written or printed petition or suggestion of the points thought important, and if upon such petition or suggestion any judge who concurred in the decision thinks proper to move for a rehearing, the motion will be considered. If not so moved, the rehearing will be denied as of course. *St. Louis Public Schools v. Walker*, 9 Wall. (U. S.) 603.

1. *Arizona*.—*Arizona Prince Copper Co. v. Copper Queen Copper Co.*, (Ariz. 1896) 11 Pac. Rep. 396.

California.—*Willson v. Broder*, 24 Cal. 190.

Florida.—*Jacksonville, etc., R. Co. v. Peninsular Land, etc., Co.*, 27 Fla. 1, 157.

Indiana.—*Goodwin v. Goodwin*, 48 Ind. 584; *Western Union Tel. Co. v. Hamilton*, 50 Ind. 181; *Fertich v. Michener*, 111 Ind. 486, citing *Goodwin v. Goodwin*, 48 Ind. 589; *Western Union Tel. Co. v. Hamilton*, 50 Ind. 181; *Louisville, etc., R. Co. v. Carmon*, 20 Ind. App. 471.

Louisiana.—*Lacroix v. Camors*, 34 La. Ann. 639.

Maryland.—*Colvin v. Warford*, 18 Md. 273.

Massachusetts.—*Winchester v. Winchester*, 121 Mass. 127.

New York.—*Van Wagener v. Royce*, (Supm. Ct.) 21 N. Y. Supp. 191.

Texas.—*Hurt v. Evans*, 49 Tex. 311; *Alvord v. Waggoner*, (Tex. Civ. App. 1895) 29 S. W. Rep. 797.

Indefinite Petition.—A petition which asks for a rehearing "upon the grounds stated in the brief for a rehearing, and substantiated by the additional portion of the record, both herewith filed," is too indefinite in its averments, and will not be granted. *Spencer v. Thistle*, 14 Neb. 21.

Mistake in Record.—Where the appli-

cation is made on the ground that the transcript of the record made by the clerk of the lower court is erroneous, a certified copy of that part of the original record which is alleged to have been incorrectly copied must be attached to the petition, so that the court may see that the mistake was due to the error of the clerk in transcribing the record; an affidavit by the clerk stating that the transcript was erroneous is not sufficient. *Cannady v. State*, 37 Tex. Crim. Rep. 123.

An Objection Which Is Not Raised in the Petition cannot be made in a rejoinder to the respondent's reply to the petition. *Walker v. Missouri Pac. R. Co.*, 68 Mo. App. 465.

A Petition Which Incorrectly States the Record on appeal will not be considered by the court. *Berry v. Smith*, 2 Okla. 351.

2. *Jones v. Fox*, 23 Fla. 462; *Sauls v. Freeman*, 24 Fla. 225; *Finley v. Cathcart*, 149 Ind. 470; *Reed v. Kalfsbeck*, 147 Ind. 148; *The Dago*, 63 Fed. Rep. 182.

3. *Kervick v. Mitchell*, 68 Iowa 273.

Reasonableness of Rule.—A rule adopted by the court that petitions for a rehearing must be signed by two counsel and indorsed by a judge who concurred in the decision, to the effect that a rehearing is advisable, is a reasonable rule and will be enforced. *Herndon v. Imperial F. Ins. Co.*, 111 N. Car. 384.

In Texas it is provided that when a party is not represented by counsel on the hearing a petition for a rehearing presented by the adverse party must state the name and residence of the first named party in order that a copy of the petition may be served upon him. In accordance with this rule it has been held that a petition which does not contain the name and residence of the

c. BRIEFS AND CITATIONS OF AUTHORITIES. — In some jurisdictions the petition must be accompanied by briefs, and citations of the authorities relied upon,¹ while in others this practice is condemned as tending to encourage argument on the merits of the original case which should be reserved for the rehearing itself.²

Affidavits Explanatory or Amendatory of the Record or for the purpose of proving facts not in issue on the original hearing should not be filed with the petition, and if filed they will not be considered by the court.³

d. CERTIFICATE OF COUNSEL. — Petitions for the rehearing of appeals are generally accompanied by a certificate of counsel, but this certificate is not allowed the same weight as in English chancery practice.⁴

adverse party will not be considered. *Howard v. McKenzie*, 54 Tex. 171.

But the defect is not jurisdictional, and if the clerk obtains the information from other sources, and the petition is duly served upon the adverse party, a motion to dismiss will be denied. *Houston, etc., R. Co. v. Davis*, (Tex. Civ. App. 1895) 32 S. W. Rep. 163.

Signature. — A petition which is signed by a person who is not a party, and which does not show in any manner that the person signed it as attorney for a party, will not be considered. *Apple v. Atkinson*, 34 Ind. 518.

1. *Spencer v. Thistle*, 14 Neb. 21.

When the Petition Is Filed by an Intervener it must be supported by brief. *Parker v. State*, 133 Ind. 178.

Petition Accompanied by Case on Appeal. — Where the petition is based on the ground that there are expressions in the opinion of the court which may embarrass the parties on a new trial, it must be accompanied by the case on appeal containing the opinion complained of. *Anderson v. Continental Ins. Co.*, (N. Y. 1887) 12 N. E. Rep. 793.

In Louisiana the petition must be accompanied by a printed statement of all the points and authorities on which the party founds his application, and additional time for elaborating arguments on such points and authorities may be granted upon a proper showing, if made before the statutory period expires. *Lacroix v. Camors*, 34 La. Ann. 639.

But a petition will not be dismissed on the ground that it is not accompanied by the required statement of points and authorities, if the petitioner states that he relies solely upon the points and authorities cited in his original printed

briefs which are on file, and upon printed briefs to be filed by an *amicus curia*, to whom an extension of time has been granted for that purpose. *Breaux v. Negrotto*, 43 La. Ann. 426.

In Wisconsin briefs filed with a petition for a rehearing must be printed; written briefs are insufficient. *Collart v. Fisk*, 38 Wis. 239.

2. **In Florida** it has been held that it is irregular and contrary to the rule of the court to accompany the petition with a written argument and citation of authorities. *Smith v. Croom*, 7 Fla. 180; *Florida First Nat. Bank v. Ashmead*, 23 Fla. 379.

But where some of the judges who sat on the hearing have gone out of office since the judgment was rendered, the rule above stated will be disregarded, and in such a case the petition may be accompanied by a printed brief. *Lines v. Darden*, 6 Fla. 37.

In the United States Circuit Court of Appeals no new matter can be introduced on a rehearing (especially in equity cases). Therefore, except in special cases, and then only after leave is granted by the court, no papers can be filed except the petition itself. *Gregory v. Pike*, 67 Fed. Rep. 837, citing *Russell v. Southard*, 12 How. (U. S.) 139; *Maxwell Land-Grant Case*, 122 U. S. 365.

3. *Boynton v. Champlin*, 40 Ill. 63; *Vanneter v. Crossman*, 39 Mich. 610; *Green v. Castello*, 35 Mo. App. 127; *Mason v. Pennington*, 53 Mo. App. 118; *Maverick v. Routh*, 7 Tex. Civ. App. 669; *Weld v. Johnson Mfg. Co.*, 84 Wis. 537; *Kalckhoff v. Zoehrlaut*, 43 Wis. 373.

4. *Winchester v. Winchester*, 121 Mass. 127; *Hinds v. Keith*, 57 Fed. Rep. 10.

c. NOTICE, AND SERVICE OF COPIES. — In some jurisdictions notice of the application must be given to the adverse party, and a copy of the petition served upon him or his attorney.¹

7. **Hearing and Determination of the Application** — a. IN GENERAL. — No argument on the merits of the original case can be allowed on an application for a rehearing,² and the petition is generally considered without any oral argument whatever unless it is desired by the court.³

b. MODIFICATION OF ORIGINAL JUDGMENT ON HEARING OF PETITION. — Material alterations in the original judgment must be reserved for the rehearing proper and cannot be allowed on the hearing of the petition;⁴ but verbal errors may be corrected at that time although a formal rehearing is denied;⁵ and in like manner the judgment may be corrected so as to conform to the pleadings;⁶ errors in calculation of the amount allowed by the judgment may be remedied;⁷ and further directions may be given as to the payment of costs taxed in the Supreme Court;⁸

1. In *Illinois* notice of intention to apply for a rehearing must be filed with the clerk within fifteen days from the rendition of the judgment, and unless it is so filed the petition may be stricken from the files. And a failure to file the required notice with the clerk is not remedied by service of notice of the application upon the attorney for the adverse party. *Louisville, etc., R. Co. v. Patchen*, 167 Ill. 613.

In *Iowa* it was intimated in an early case that the application was an *ex parte* proceeding, and that notice thereof was unnecessary. *Zeigler v. Vance*, 3 Iowa 528. But according to the present practice of the supreme court a copy of the petition must be served on the adverse party, and proof of service must be filed with the clerk. *Austin v. Wilson*, 52 Iowa 731.

In *Tennessee* the petition must be presented to the court within ten days after the decision is rendered, and a petition which is marked as filed nine days after the entry of the decree will be dismissed, where it appears that the court had no notice of said petition within the time limited by the rules, and that the counsel for the adverse party never had any notice whatever. *Adams v. Sharon*, 89 Tenn. 335.

2. *Kraft v. Rath*, 45 Mich. 20; *Pringle v. Dunn*, 39 Wis. 435; *Wells v. Clarkson*, 2 Mont. 379.

3. *Internal Imp. Fund v. Bailey*, 10 Fla. 238; *Gonzales v. State*, 35 Tex. Crim. Rep. 33; *Chadron Bank v. Anderson*, (Wyo. 1897) 49 Pac. Rep. 406.

An Answer to a Petition for a Rehearing will not be allowed. *Anonymous*, 40 Ill. 130.

In *Washington*, under Code Proc., § 1439, no oral argument is allowable. *Thompson v. Huron Lumber Co.*, 4 Wash. 600.

The Court May Prescribe the Terms on which the motion shall be argued. Thus argument may be allowed on the express terms that it shall not operate as a stay of proceedings. *Columbia Min. Co. v. Holter*, 1 Mont. 429.

Argument Limited by Order Indorsed on Petition. — Where an order by the judge, specifying the points which may be considered, is endorsed on the petition, no other points can be urged on the hearing of the application. *Weisel v. Cobb*, 122 N. Car. 67.

Costs of the Application. — When the application is made after the expiration of the statutory period it must be denied without costs. The court having lost jurisdiction of the case, has no power to impose costs in deciding the application. *Pierce v. Kelly*, 39 Wis. 568.

4. *Clark v. Boyreau*, 14 Cal. 634; *Argenti v. San Francisco*, 30 Cal. 458; *Rhea v. Surryhne*, 39 Cal. 581.

5. *Mechanics, etc., Ins. Co. v. Lozano*, 39 La. Ann. 321.

6. *Winter v. Fulstone*, 20 Nev. 260.

7. *Anger's Succession*, 38 La. Ann. 492; *Arnau v. Florida First Nat. Bank*, 36 Fla. 398; *Bolster v. Stocks*, 13 Wash. 460.

8. *Jones v. Roberts*, 96 Wis. 427.

and various other immaterial alterations may be made.¹

c. PETITION DISMISSED OR STRICKEN FROM FILES. — A Discourteous and Unprofessional Petition will be stricken from the files.²

Application Not in Time. — Where the application is not made within the statutory time it fails, and a motion to dismiss is unnecessary.³

8. Practice on the Rehearing — **a. METHODS OF ARGUMENT.** — The rehearing is generally had upon briefs filed by the respective parties,⁴ and all persons interested in supporting the original

1. Where the Adverse Party Consents to the allowance of the relief sought by the petition, the decree may be amended without granting a rehearing. *McKenzie v. Bacon*, 40 La. Ann. 157.

After All the Parties Have Waived Their Right to apply for a rehearing, and the case has been certified to the court below, a formal rehearing cannot be granted, but the court on being advised of a mistake in the judgment may correct the same without a rehearing, either on its own motion, or on the application of a party. *Parker v. State*, 133 Ind. 178.

Former Judgment Modified to Prevent Conflict of Decisions. — In *Breaux v. Negrotto*, 43 La. Ann. 426, where it appeared that the judgment was in conflict with a judgment in another case previously decided by the court, the latter judgment was modified, but a rehearing of the decision in the case at bar was refused.

Decision Modified to Grant New Trial Below. — Where the appellate court has reversed a judgment of the lower court and remanded the case with directions to enter judgment in favor of one of the parties, it will sometimes modify its original judgment so as to order a new trial below, without hearing a formal reargument of the case. *Pollard v. Putnam*, 54 Cal. 630; *Giles v. Austin*, 34 N. Y. Super. Ct. 540; *Weld v. Johnson Mfg. Co.*, 84 Wis. 537.

2. Horton v. Donohoe-Kelly Banking Co., 15 Wash. 403; *Foulkes v. Howes*, 11 La. Ann. 449.

3. Dierolff v. Winterfield, 26 Wis. 175.

Notice of Motion to Strike from Files. — A motion to strike the petition from the files must be made upon notice. *Chadron Bank v. Anderson*, (Wyo. 1897) 49 Pac. Rep. 406.

4. When a Rehearing is Granted for Newly Discovered Evidence the proofs will not be opened in the appellate court, but the case will be remanded to the court below with proper directions

for a rehearing. *Adams v. Field*, 25 Mich. 16.

Method of Argument Dependent on Circumstances of Case. — Where the court grants a reargument on the ground that there is a decision or principle of law which has been overlooked, or that there has been a misapprehension of fact, and counsel have not been heard in regard to these points on the original argument, then a formal reargument should be had in order to allow counsel to be heard; but when the rehearing is granted on other grounds it generally happens that the argument of the application involves a reargument of the matter, and in such cases it is an unnecessary waste of time after granting the application to hear counsel again on the reargument. *Boles v. Duff*, 56 Barb. (N. Y.) 574.

Procedure Prescribed by Order of Court. — In *Kirby v. Western Union Tel. Co.*, 4 S. Dak. 439, a reargument was granted, and it was ordered that the clerk of the court place the case upon the calendar with directions that counsel for the appellant prepare his briefs upon the questions raised in the petition, that they be served on the counsel for the respondent within twenty days after notice of the order, that the respondent have twenty days after such service to file his brief and serve it upon the appellant's counsel, that, if appellant deemed it necessary, he might have ten days in which to file and serve a reply brief, and that after the expiration of this time the cause stand for hearing at such time as the convenience of the court and the attorneys of the parties might permit; the same number of briefs, on each side, to be filed in the office of the clerk of the court as is required by the rules upon an original hearing of a cause.

In Iowa the petition stands as the argument of the petitioner, and the court in its discretion may allow the adverse party to file a reply thereto within a specified time, but no addi-

judgment are entitled to be heard in its favor, but the petitioner alone can be heard in opposition thereto.¹

b. HOW FAR CASE IS OPEN.—Where a rehearing is granted generally, the whole case is open, and will be examined and considered by the court as fully as on the original hearing;² but if the application was based on particular errors in the original judgment, or if the court in granting the rehearing has limited it to a certain portion of the case, other points cannot be considered, and should not be raised on the reargument.³

c. NEW QUESTIONS AND AMENDED RECORDS.—Questions which were not raised on the original hearing will not be considered on a rehearing;⁴ nor will additional or amended records receive any attention from the court.⁵

9. Relief Granted.—If the court on rehearing the appeal is satisfied that its former decision was erroneous it will correct the

tional papers or arguments can be filed by either party. *Webster County v. Hutchinson*, 60 Iowa 721; *Richards v. Burden*, 59 Iowa 723.

In Louisiana the Supreme Court may grant an application for a rehearing without hearing any argument thereon, and may pass upon the case immediately without refixing it, or it may assign a day for argument. No special decree granting a rehearing is necessary, but it is sufficient if the opinion delivered on reargument shows that it was made on rehearing, and the decree rendered sets aside the previous judgment and adjudicates the case anew. *Westerfield v. Levis*, 43 La. Ann. 63.

1. *Summerlin v. Reeves*, 29 Tex. 85.

2. *Rinehart v. Bowen*, 44 Ind. 353; *Booher v. Goldsborough*, 44 Ind. 490.

3. *Arizona Prince Copper Co. v. Copper Queen Copper Co.*, (Ariz. 1886) 11 Pac. Rep. 396; *Gatling v. Newell*, 12 Ind. 116; *Haas v. Evansville*, (Ind. 1898) 51 N. E. Rep. 105.

Where a party to an appeal applies for leave to remit a portion of the judgment, such judgment will be set aside, to enable the court to consider the application on a rehearing; and the rehearing will be limited to that particular proposition. *Fox v. Hale*, etc., *Silver Min. Co.*, (Cal. 1898) 53 Pac. Rep. 169.

In Indiana when one party is granted a rehearing as to particular questions, the adverse party, in order to obtain a rehearing as to other questions, must petition therefor; but the rule is otherwise in some jurisdictions. *Gatling v. Newell*, 12 Ind. 118.

4. *Republic L. Ins. Co. v. Swigert*, 135 Ill. 150; *Schafer v. Schafer*, 93 Ind. 586; *Manor v. Jay County*, 137 Ind. 367; *Tubbesing v. Burlington*, 68 Iowa 691; *Goodenow v. Litchfield*, 59 Iowa 226; *Minneapolis Trust Co. v. Eastman*, 47 Minn. 301; *Chamberlain v. Northeastern R. Co.*, 41 S. Car. 399.

5. *Cramer v. Burlington*, 45 Iowa 627; *Simplot v. Dubuque*, 49 Iowa 630; *Nixon v. Downey*, 49 Iowa 166; *Parsons v. Parsons*, 66 Iowa 754; *McDermott v. Iowa Falls*, etc., R. Co., 85 Iowa 180; *Iowa City v. Johnson County*, 99 Iowa 513; *Petitpain v. Palmer*, 1 Rob. (La.) 221; *Wright v. Terry*, 24 Hun (N. Y.) 228.

Contra.—In *Doty v. Berea College*, (Ky. 1891) 16 S. W. Rep. 268, a judgment was reversed because the record did not show service on one of the parties in interest, but a rehearing was afterwards granted on the ground that this record was defective, and on the rehearing the petitioner was allowed to show that the transcript of the record was erroneous and that the party had in fact been served.

Erroneous Record Presented Without Correction on Reargument.—Where the court of its own motion has refused to consider a bill of exceptions because the record showed that it was not filed in time, and a rehearing is subsequently granted on the ground that the record was erroneous, if the record is presented on rehearing without alteration or correction, the adverse party may urge the same objection thereto which proved fatal to the case on the original hearing. *Linahan v. Barley*, 124 Mo. 560.

same;¹ and while the petitioner is obliged to confine his arguments to points presented by his original brief, the court is not bound by a similar limitation in deciding the case, and it may base its decision on grounds which were not urged either on the hearing or on the reargument.²

If the Members of the Court Are Equally Divided in opinion the original decision should be adhered to;³ and the result is the same where the court comes to the conclusion that its previous judgment was substantially correct.⁴

Defect Remedied Pending Reargument. — The authorities differ as to whether the court has jurisdiction to proceed to a determination in a case where the defect for which the rehearing was granted is waived or remedied pending reargument;⁵ but it is clear that the

1. *Union Wharf Co. v. Katz*, 11 Wash. 407.

Where the appellate court has reversed the judgment because the record did not show service on certain parties to the suit, if it is shown on rehearing that the record was defective and a stipulation is filed showing that the service was in fact made, the previous judgment will be reversed and the judgment of the lower court will be affirmed. *St. Louis v. Gleason*, 15 Mo. App. 588.

Direct Modification of Judgment Appealed From. — In *Luthe v. Luthe*, 12 Colo. 429, it was held that the decree of the lower court which was appealed from could not be modified on a rehearing of the appeal. The judgment on the rehearing acts on the judgment rendered on appeal, and not directly on the decree of the lower court.

Certificate Allowing Appeal to United States Supreme Court. — A party to an action in a state court, who desires a certificate to enable him to appeal to the United States Supreme Court, cannot obtain it on a rehearing unless the facts necessary to the allowance of such certificate appeared on the face of the record which was before the court on the original hearing. *Martin v. Cole*, 38 Iowa 141.

Costs of Brief Filed on Reargument. — Where an additional brief has been printed for the reargument, the costs thereof, not exceeding ten pages, will be allowed to the successful party. *Emry v. Raleigh, etc., R. Co.*, 105 N. Car. 44, 45.

2. *Lewis v. Labauve*, 13 La. Ann. 382; *Iowa City v. Johnson County*, 99 Iowa 513.

3. *Richards v. Burden*, 59 Iowa 723.

And see in general article DIVISION OF OPINION, vol. 7, p. 44.

4. *Everson v. Mayhew*, 85 Cal. 1.

If the Court Has Inadvertently Made Up and Announced Its Decision without having heard the argument of counsel, it will re-examine the case, but if it comes to the conclusion that its first decision was correct that decision will be adhered to. *Maddox v. Bramlett*, 84 Ga. 89.

Excessive Judgment — Offer to Remit. — If a case has been reversed on appeal because the amount allowed by the judgment was excessive, and on rehearing the appellee offers to remit the excess, this correction will be made, but the original judgment will not be altered in other respects. *Hyde v. Minneapolis Lumber Co.*, 53 Iowa 243.

Withdrawal of Application. — Where the guardian *ad litem* of an infant applies for a rehearing and it is granted, and thereafter one of the infants in whose behalf the application was made becomes of age before the reargument is had, and asks that the former decision be allowed to stand, his request will be granted. *Dow v. Dow*, (Supm. Ct.) 21 N. Y. Supp. 487.

5. Curative Act Passed Pending Reargument. — Where an act curative of the defect for which the rehearing was granted is passed pending the reargument, the case will be regarded precisely as though no opinion had been filed, and the defect will be deemed cured. *Iowa R. Land Co. v. Sac County*, 39 Iowa 124.

Judgment Satisfied Pending Reargument. — Where the court of its own motion orders a rehearing, but the parties are ignorant of this order, and the

decision must be without prejudice to the rights of third parties, where such rights have intervened since the rehearing was granted.¹

10. Effect on Original Judgment — a. OF PETITION FILED. — The filing of a petition for a rehearing does not of itself operate as the stay of a *remittitur*,² nor does it have the effect of a *superseas*.³ The judgment on appeal is not suspended,⁴ and proceedings which may have been had under the judgment are not affected thereby.⁵

b. OF ORDER GRANTING REHEARING. — At common law an order granting a rehearing operates as a reversal of the original decision.⁶ In some jurisdictions, however, where the common-

remittitur is filed below by the appellee, and the appellant pays the judgment, and the appellee receives payment and enters satisfaction thereof, the court is without jurisdiction to make any further order in respect to the judgment. *Hasted v. Dodge*, (Iowa 1888) 39 N. W. Rep. 668.

Jurisdiction of Court Not Affected. — In *Rapid Safety Filter Co. v. Wyckoff*, (N. Y. City Ct. Gen. T.) 20 Misc. (N. Y.) 429, a rehearing of a motion to retax costs was ordered, but before the reargument was had, the judgment under which the costs were taxed was reversed on appeal; but it was held that the court would nevertheless proceed to determine the question of law involved in the rehearing.

1. *Montanye v. Wallahan*, 84 Ill. 355.

Where Innocent Third Parties Have Bought Land in reliance upon a decree affirming the title of the vendor, and a rehearing of this decree is subsequently granted, the judgment rendered upon this rehearing must be without prejudice to the rights of said purchasers. *Dunning v. Bathrick*, 41 Ill. 425.

2. *Ex p. Dunovant*, 16 S. Car. 299.

3. *Columbia Min. Co. v. Holter*, 1 Mont. 429.

Where an Appeal Has Been Dismissed by the court of appeals the jurisdiction of the circuit court to make orders in the case is not effected by the pendency, in the court of appeals, of a motion for a rehearing. *Chappell v. Chappell*, 86 Md. 532.

4. *Real Estate Bank v. Rawdon*, 5 Ark. 558; *Joyner v. Hall*, 36 Ark. 513; *Ex p. Craig*, 130 Mo. 590; *Chambers v. Hodges*, 23 Tex. 104.

Where a Petition for a Rehearing Is Postponed or Continued there should be a simultaneous order vacating or sus-

pending the judgment. *Doggett v. Jordan*, 4 Fla. 121.

In Iowa it is provided by the code that a petition for a rehearing, when filed, suspends the decision if the court on its presentation, or one or more of the judges in vacation, so orders. *McKinley v. Chicago, etc., R. Co.*, 44 Iowa 314.

In Kentucky it has been held that petitions filed in the court of appeals suspend the judgment until the application is disposed of, without any express order of suspension. *Turner v. Booker*, 2 Dana (Ky.) 334.

Petition Filed by Order of Court. — If the court on the day of its adjournment makes an order permitting parties to file petitions for rehearing in all cases decided at that term, within ten days after the date of the order, and a petition is filed in compliance therewith, the effect of filing the petition is to continue the cause to the next term, and the opinion filed does not become the opinion of the court until the petition is disposed of. *State v. Philips*, 96 Mo. 570.

5. *Montanye v. Wallahan*, 84 Ill. 355.

6. *Lipscomb v. Grubbs*, 3 Bibb (Ky.) 392; *Sterritt v. Lockhart*, 7 J. J. Marsh. (Ky.) 554; *Longworth v. Sturges*, 2 Ohio St. 104.

When a Rehearing Is Granted Generally the entire judgment as to all parties to the appeal is thereby set aside and vacated, and the cause goes back upon the docket for resubmission. *Gilbert v. Southern Indiana Coal, etc., Co.*, 62 Ind. 522.

And if, in such a case, the brief of the appellant is on file on the second submission of the cause, the case will not be dismissed because it was not filed within sixty days after the original submission. *Crown Point First*

law rule has been modified, it is held that when a rehearing is ordered the first opinion is simply suspended and ceases to have any effect except as incorporated in or approved by the opinion filed on rehearing.¹

c. OF RELIEF GRANTED ON REARGUMENT. — Where the relief originally granted conflicts with that granted on rehearing the latter prevails,² but it does not retroact to disturb any rights which have been innocently acquired under the first judgment.³

11. **Subsequent Rehearings.** — A second application for a rehearing is generally refused;⁴ and especially where it is made by the same party who presented the first petition.⁵

Nat. Bank v. Richmond First Nat. Bank, 76 Ind. 561.

Rehearing Limited to a Single Point. — If the rehearing is granted merely for error in awarding costs the case will not be replaced on the docket. Dewar v. Beirne, McGloin (La.) 75.

1. *Morrow v. Weed*, 4 Iowa 77; *Stewart v. Stewart*, 96 Iowa 620; *Matter of Peet*, 99 Iowa 314.

After a case has been appealed from the County Court it is in the circuit court which has entire control of all proceedings therein. Granting a rehearing in such a case operates as a suspension of a decree of affirmance, and if on the rehearing the decree of the county court is reversed the cause proceeds in the circuit court as if originally brought there. *Summers v. Darne*, 31 Gratt. (Va.) 791.

2. Where the opinion of the trial court determines the effect of a *lis pendens* filed by the plaintiff, but the judgment rendered on a rehearing of the same case expressly omits any determination as to the effect of such *lis pendens*, the original judgment does not constitute any adjudication on that point. *Welton v. Cook*, 61 Cal. 481.

Petition for Removal, Filed Pending Rehearing, Rendered Ineffectual. — In *Chicago, etc., R. Co. v. McKinley*, 99 U. S. 147, the supreme court of Iowa reversed a judgment of an inferior court and ordered a new trial, but a petition for a rehearing of the appeal having been duly presented, it was granted, and on the rehearing a judgment was entered modifying the judgment of the lower court and reversing the first judgment on appeal. After the first judgment on appeal, but before filing of the petition for a new hearing, the appellant had obtained and filed a writ of *procedendo* in the lower court and also a petition for the

removal of the cause into the United States Circuit Court. Under these circumstances it was held that the judgment of the supreme court of Iowa rendered on rehearing effected a reversal of its previous judgment granting a new trial, and thereby withdrew the case out from under the petition for removal filed below, and that said petition for removal was therefore ineffectual.

3. *Montanye v. Wallahan*, 84 Ill. 355.

4. *Durham v. Seymour*, 10 App. Cas. (D. C.) 274; *Trench v. Strong*, 4 Nev. 87; *Williams v. Conger*, 131 U. S. 390.

In *Bope v. Ferris*, 77 Mich. 299, the court granted a rehearing on the condition that the defendant make a deposit; no deposit was made but the defendant afterwards filed a second petition urging practically the same grounds as the first petition, and giving no excuse for his failure to comply with the terms of the former order. Under these circumstances it was held that the application must be refused.

Points Reserved on First Rehearing. — In *Louisiana* a second rehearing cannot be had unless new points have been considered on the first rehearing and reserved for a second reargument. *Westerfield v. Levis*, 43 La. Ann. 63; *State v. Willson*, 37 La. Ann. 727.

First Rehearing Dismissed by Mistake. — If the appellate court, after granting a petition for a rehearing, has erroneously dismissed the case on the reargument, it may subsequently set aside the order of dismissal on its own motion and proceed with the rehearing. *Flash v. Schwabacker*, 32 La. Ann. 356.

5. *Merchants' Nat. Bank v. Grunthal*, 39 Fla. 388; *Garrick v. Chamberlain*, 100 Ill. 476; *Smith v. Dennison*, 101 Ill. 657; *Newberry v. Blatchford*, 106 Ill. 584. *Contra*, *Homes v. Hen-*

Application by Adverse Party. — But where one rehearing has resulted in an alteration of the original decision, an application by the adverse party for a second will be granted, provided the petition is filed in accordance with the rules.¹

III. STATUTORY REHEARINGS AT LAW IN COURTS OF ORIGINAL JURISDICTION — 1. In General. — In the state of *Alabama* rehearings in actions at law in the circuit court are authorized by the code.²

2. Grounds. — The Remedy Is Purely Statutory, and in order to avail himself thereof, a party must show that one or more of the grounds enumerated in the statute exist. Thus the application will not be granted unless the petitioner has a valid defense³ of which he has been deprived by surprise, accident, mistake, or fraud;⁴ it must also appear that the judgment complained of is not due to any fault of the petitioner, negligence on his part

rietta, (Tex. Civ. App. 1898) 46 S. W. Rep. 871.

It is very doubtful whether a second rehearing can be granted at all on the application of the same party, but, if this is allowable in any case, the second rehearing can only reach questions which were considered upon the first. *Crawfordsville v. Johnson*, 51 Ind. 397.

A Motion for a Rehearing Which Has Been Granted is no bar to a second motion by the same party. The effect of granting the first motion is that the judgment is set aside and its entry vacated, and the case goes back on the calendar to be heard and considered as if it had never been decided, and where it is apparent that both of the former decisions are erroneous there can be no objection to the allowance of the second application. *Fallass v. Pierce*, 30 Wis. 443.

1. *Brant v. Gallup*, 117 Ill. 640.

2. Code Ala. (1896), § 3342, provides that "when a party has been prevented from making his defense by surprise, accident, mistake, or fraud, without fault on his part, he may * * * apply for a rehearing at any time within four months from the rendition of the judgment."

Purpose of the Enactment. — The cases in which a rehearing may be had under this enactment are substantially the same as those in which a party might formerly obtain relief in equity from a judgment at law. The purpose of the statute is to provide a remedy less expensive than a resort to equity, and in view of this fact the court should always keep in mind the principles of equity, in deciding applications of this

nature. *Waddill v. Weaver*, 53 Ala. 58; *Renfro v. Merryman*, 71 Ala. 195.

To What Judgments Statute Is Applicable. — Where a defendant is required by the court to confess a judgment for a part of the plaintiff's claim, as a condition precedent to the allowance of a continuance, he cannot afterwards have a rehearing of said judgment under the statute. *Davis v. McCampbell*, 37 Ala. 609. Nor is the statute applicable to cases of common-law certiorari. *Exp. Madison Turnpike Co.*, 62 Ala. 93.

3. A Defense Which Is Merely Formal and Technical, and does not go to the merits, is insufficient. Relief should only be granted in cases where its refusal would work substantial injustice, and would deprive the petitioner of relief to which he is entitled in equity. *Waddill v. Weaver*, 53 Ala. 58.

4. Grounds Held to Be Insufficient. — In *Stewart v. Williams*, 33 Ala. 492, a rehearing was refused although the petition alleged that one of the documents read in evidence by the adverse party on the trial was erroneous, and that petitioner was not aware of the mistake therein until after the trial; that petitioner was not personally present at the trial, which was held at a distant place; that the case had previously been submitted to arbitrators, which submission, however, was rescinded for noncompliance of the adverse party; and that after revocation of the submission the case was tried without further notice to the petitioner.

An Erroneous Opinion as to the Competency of a Witness is not such a mistake as to authorize a rehearing, especially where the testimony of said witness

being a bar to the allowance of a rehearing however meritorious the defense in question may be.¹

Mistake, Negligence, or Absence of Counsel. — A rehearing will not be granted on account of the negligence, mistaken advice, or oversight of counsel,² or his absence from the hearing.³

Absence of Party or Irregular Procedure on Hearing. — Nor can the absence of the party,⁴ or immaterial irregularities in procedure on the hearing, be urged as grounds for granting the application.⁵

would not have been admissible, even though he was competent. *Bruce v. Williamson*, 50 Ala. 313.

Inability to Procure the Testimony of an Important Witness on the trial is not sufficient ground for a rehearing where the application simply avers that the said witness "moved and traveled about a great deal, before said trial, and it was exceedingly difficult to ascertain his whereabouts, so as to obtain his testimony." *Allington v. Tucker*, 38 Ala. 655.

Mistaken Belief that Service of Summons Was Illegal. — A defendant against whom a judgment by default has been rendered, cannot obtain a rehearing under the statute on the ground that the summons was served upon him by a special officer, and that he thought that said service was invalid, and for that reason did not appear in court to make defense to the action. *Dothard v. Teague*, 40 Ala. 583.

1. Negligence on Part of Applicant. — *White v. Ryan*, 31 Ala. 400; *Ex p. North*, 49 Ala. 385; *Ex p. Carroll*, 50 Ala. 9; *Martin v. Hudson*, 52 Ala. 279; *Shields v. Burns*, 31 Ala. 535.

A Rehearing Will Not Be Granted on the ground that the petitioner was surprised, confused, and ignorant of the proper course to pursue, and that in consequence he did not make his testimony as clear as he might have done if he had had more time for reflection, where it appears that this surprise was largely the result of his own negligence. *Barron v. Robinson*, 98 Ala. 351.

Where an Action at Law Is Continued by Consent to await the termination of a suit in chancery the parties to the former action must be ready to proceed to trial as soon as they are informed of the result in the chancery suit, and a defendant who has been negligent in preparing his defense under such circumstances cannot have a rehearing on the statutory grounds. *Ex p. O'Neal*, 72 Ala. 560.

2. Wheeler v. Morgan, 51 Ala. 573; *Ex p. Walker*, 54 Ala. 577; *Blood v. Beadle*, 65 Ala. 103.

3. Absence of Counsel. — *Shields v. Burns*, 31 Ala. 535. Even though the attorney's absence was caused by urgent professional engagements in another court a rehearing cannot be had, as a matter of right, on that ground. *Brock v. South, etc., Alabama R. Co.*, 65 Ala. 79.

In *Renfro v. Merryman*, 71 Ala. 195, the plaintiff and his attorney attended court on two days of the first week of the term, but went away on finding that the cause had not been docketed. The cause was subsequently docketed and tried without notice to them, and in their absence, an attorney employed by the plaintiff in another suit appearing for said plaintiff on the trial without his knowledge or consent. Notwithstanding these facts the application of the plaintiff for a rehearing was refused.

4. Absence from the Hearing Is Not Excusable although the party's attorney informed him that the adverse party would not take advantage thereof. *Brock v. South, etc., Alabama R. Co.*, 65 Ala. 79.

Or because the party believed that his case would not be reached, basing his opinion on the appearance of the docket, and on the opinion of the presiding judge and others, expressed in conversation out of court. *White v. Ryan*, 31 Ala. 400.

5. A rehearing was refused where the petition of the defendant alleged that some of his witnesses were absent at the trial term, that, contrary to the usual custom of the court, he was ruled to a strict showing for a continuance, that he was unable to state fully the facts which his witnesses might have proved, and that the case was decided without due deliberation on the part of the jury, who were anxious to return to their homes. *Elliott v. Cook*, 33 Ala. 490.

3. Time of Making the Application. — The petition must be filed within the time limited by the statute.¹

4. How Application Is Made — *a.* IN GENERAL. — The manner of making the application, the notice to be given thereof, the general form of the petition, and the manner in which proceedings under the judgment are to be stayed pending the hearing, are all prescribed by the code, and strict compliance with its provisions is essential.²

b. ESSENTIAL AVERMENTS OF PETITION. — A petition will not be entertained unless it affirmatively alleges facts which bring the case within the terms of the statute.³

Affidavits of Third Persons Filed with the Petition cannot be considered as a part thereof, although they may be looked to for other purposes.⁴

5. Objections to Sufficiency of Petition. — Objections to the sufficiency of the petition must be taken by demurrer, and it cannot be dismissed on a mere general motion not disclosing specific defects.⁵

1. *State v. Gardner*, 45 Ala. 46; *White v. Ryan*, 31 Ala. 400; *Shields v. Burns*, 31 Ala. 535.

Aside from the statute the court cannot grant a rehearing unless the application is made before the end of the term, and the effect of the enactment is to extend the period within which the petition may be filed. *Pratt v. Keils*, 28 Ala. 390; *Ex p. Highland Ave., etc.*, R. Co., 105 Ala. 221.

2. Code Ala. (1896), §§ 3343-3351. And see also *Fuller v. Boggs*, 49 Ala. 127.

The Petition Must Be Presented to the Judge in Person, and filing it with the clerk of the court is not sufficient. *Ex p. Johnson*, 60 Ala. 429.

Security for Costs Must Be Given, and the necessity for such security is not dispensed with by the giving of a supersedeas bond. *Garrett v. Terry*, 33 Ala. 514.

But a petition filed by a nonresident will not be dismissed for want of security for costs, after the adverse party has appeared and resisted the granting of the interlocutory orders and supersedeas, without raising any objection to the want of security. *Heflin v. Rock Mills Mfg., etc., Co.*, 58 Ala. 613.

3. *Bingham v. Montgomery*, 59 Ala. 334; *Barron v. Robinson*, 98 Ala. 351; *Turner Coal Co. v. Glover*, 101 Ala. 289. See also cases cited *supra*, III. 2. *Grounds*.

Where a Meritorious Defense Is Alleged, the facts constituting such defense must be set out in full in order that the

court may see for itself that the defense is meritorious. *Chastain v. Armstrong*, 85 Ala. 215; and in addition thereto it must be shown that the defense is capable of being proven on a subsequent trial. *Ex p. Wallace*, 60 Ala. 267.

Excuse for Failure to Move for New Trial. — Where the facts alleged in the petition would have authorized an application for a new trial, a sufficient excuse for failure to make such application must also be alleged. *Blood v. Beadle*, 65 Ala. 103.

Absence of Important Witness. — Failure to make defense resulting from the absence of a witness on account of sickness may be urged as a ground for granting a rehearing, but in such case the petition must show that he was the only witness by whom the defense could be established. *Martin v. Hudson*, 52 Ala. 279.

Diligence in Ascertaining the Facts going to make up the defense must be shown by stating in full the effort made by the petitioner in that behalf. *Waddill v. Weaver*, 53 Ala. 58.

A Petition on the Ground of Newly Discovered Evidence must allege that the evidence was not discovered until after the adjournment of the term at which the judgment was rendered, and must show in what the evidence consists, and that it is not merely cumulative. *Freeman v. Gragg*, 73 Ala. 199.

4. *Callahan v. Lott*, 42 Ala. 167.

5. *State v. Gardner*, 45 Ala. 46; *Martin v. Hudson*, 52 Ala. 279.

Amendment. — A defective petition may be amended.¹

6. Decision of the Application. — When the trial of the petition results favorably to the petitioner, the judgment in the original action is vacated, the execution issued under it is quashed, a rehearing is granted in the original action, the petitioner is let in to make his defense in that action, and he may recover of the adverse party the costs of the application.²

Review of Decision Granting or Refusing Rehearing. — Since rehearings of this nature are authorized by statute, their allowance is not entirely a matter of discretion, and the decision of the court is reviewable. An order granting a rehearing under the statute is not a final order, and therefore is not appealable, but if improperly made it will be vacated by mandamus. An order refusing the application, however, is final, and the proper method of reviewing the same is by appeal.³

IV. REHEARINGS IN ADMIRALTY. — Rehearings in admiralty are governed in general by the same principles which control rehearings in equity. Thus a rehearing will be granted where there is a manifest mistake in the decree in a matter which goes to the merits of the controversy;⁴ but not on the ground of newly dis-

The Demurrer Must Be Interposed in the Court Below, and if the objection is not there taken it cannot be raised on appeal. *Pynes v. State*, 45 Ala. 52.

A Demurrer Is Sufficient Which Alleges that the petition does not show that the alleged accident, fraud, or mistake occurred without fault of the plaintiff or petitioner. *Brock v. South, etc., Alabama R. Co.*, 65 Ala. 79.

1. *Dothard v. Teague*, 40 Ala. 583; *Seymour v. Farquhar*, 95 Ala. 527.

A petition may be amended after a judgment of the circuit court improperly sustaining a demurrer thereto has been reversed by the supreme court, and the case remanded. *Ex p. North*, 49 Ala. 385.

2. *Pratt v. Keils*, 28 Ala. 390.

3. *Callahan v. Lott*, 42 Ala. 167; *Fuller v. Boggs*, 49 Ala. 127; *Ex p. North*, 49 Ala. 385; *Carroll v. Vaughan*, 48 Ala. 352; *Bruce v. Williamson*, 50 Ala. 313; *Ex p. Walker*, 54 Ala. 577; *Heflin v. Rock Mills Mfg., etc., Co.*, 58 Ala. 613; *O'Neal v. Kelly*, 72 Ala. 559; *Seymour v. Farquhar*, 95 Ala. 527.

Where a Judge, in Vacation, Refuses to Grant a Rehearing, the decision is not final and the proper remedy is mandamus; not appeal. *Chastain v. Armstrong*, 85 Ala. 215; *Seymour v. Farquhar*, 95 Ala. 527.

Where the Appeal Is from the Original Judgment, and error by the trial court

in refusing to grant a rehearing is assigned, the appellate court will not consider whether the application was made in time, or whether the petition was legally sufficient, unless the point is urged in argument by appellant's counsel. *Cook v. Patterson*, 35 Ala. 102.

Practice After Order Granting Rehearing Is Vacated. — An order granting a rehearing which is made during vacation, contrary to the code, which provides that the application shall be heard and determined in term time, will be vacated on mandamus. But the vacation of the order leaves the petition for a rehearing pending in the circuit court, to be heard and determined at the next term. *Seymour v. Farquhar*, 95 Ala. 527.

4. In the courts of admiralty of the United States a rehearing will be granted if there is a substantial mistake in the decree even though no fraud is shown, and there was some slight negligence on the part of the petitioner at the original hearing. But in England rehearings in admiralty are not granted on the ground of mere negligence or oversight; a direct case of fraud or something equivalent thereto must be shown. *The Steamboat New England*, 3 Sumn. (U. S.) 495, citing *The Fortitudo*, 2 Dods. 70.

covered evidence, where such evidence might have been obtained in time for the hearing,¹ or where it is disputed and of doubtful character;² nor where the application is made after the end of the term at which the decree was made.³

V. REHEARINGS OF HABEAS CORPUS, MANDAMUS, AND CERTIORARI. — Whether decisions granting or refusing applications for habeas corpus, mandamus, or certiorari may be reheard, depends on the practice of the court in which the petition is filed.⁴

1. *Hatch v. The Newport*, 44 Fed. Rep. 300.

An appeal in admiralty cannot be reheard on the ground that new evidence has been discovered concerning a fact which was known to the witnesses of the adverse party but not disclosed by them, and of which the petitioner was ignorant, where no sufficient reason is shown why it was not ascertained and proved on the original hearing. *The Iron Chief*, 63 Fed. Rep. 289.

2. *The Havilah*, 39 Fed. Rep. 333.

3. **Application After End of Term.** — *The Martha, Blatchf. & H. Adm.* 151; *The Steamboat New England*, 3 Sumn. (U. S.) 495; *The Comfort*, 32 Fed. Rep. 327; *Petty v. Merrill*, 12 Blatchf. (U. S.) 11.

In *The Martha, Blatchf. & H. Adm.* 173, it was held that an application for a rehearing made after the end of the term at which the decree was rendered could not be granted except with the free consent of all the parties affected thereby, which consent must be in writing, and entered in the minutes. The court said: "The Court of Chancery allows a rehearing, upon sufficient reasons, at any time before decree enrolled, and it has been permitted at the distance of twenty-four years from the time the decree was rendered. *Harr. Pr.* 341; *Mills v. Banks*, 3 P. Wms. 8, and note. But this practice has never been introduced into the courts of common law or of admiralty, though I am not aware of any defect of authority in this court to establish such a rule. The character of the suits usually prosecuted here would, however, deter the court from adopting that practice, unless the great ends of justice were put in hazard by withholding it. Usually,

it is of the last importance to suitors here to have an immediate despatch of their business. Seafaring men are not in circumstances to conduct protracted and reiterated litigations upon their claims, and it is usually better for their interests to have prompt decisions, even though adverse to their demands. Experience, I believe, fully justifies the remark that whether in the Instance or the Prize Court, every delay and appeal is of serious detriment to the mariner's interest. The sum in dispute is usually small, and of immediate necessity to the suitor. It is for his interest, therefore, that the most speedy decision possible should be obtained, and that, when it is adverse to him he should rather go immediately to his employment than linger over the contingencies of a reconsideration of his case. These views have probably led to the exclusion from courts of admiralty of the practice referred to; and I concur in the sentiment of the eminent men sitting in the English Admiralty and Consistory Courts upon this point, that it is a matter of great doubt whether a power of this description should be exercised in this court, without the free consent of all parties to be affected by it." *Citing The Vrouw*, 1 Rob. 163; *Lawrence v. Maud*, 1 Add. Ecc. 481.

4. In *California* it has been held that the determination of the court in habeas corpus cases cannot be reviewed by a rehearing. *Ex p. Robinson*, 71 Cal. 608.

In *Louisiana* it has been held that orders of the supreme court granting or refusing the writs of mandamus, prohibition or certiorari are final orders, and therefore open to application for rehearing. *State v. Richardson*, 37 La. Ann. 261.

REJOINDERS AND SUBSEQUENT PLEADINGS.

BY HENRY STEPHEN.

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CROSS-REFERENCES

See generally articles *PLEAS AT LAW*, vol. 16, p. 539; *REPLICATIONS AND REPLIES*; *SIMILITER*; and the General Index to this work.

I. NATURE AND VARIETIES OF — 1. In General. — Pleadings subsequent to the reply are, with the exception of the rejoinder, not very frequently met with in practice.¹ When any of them is used it must either traverse some statement of the previous pleading to which it is an answer, or must admit the facts alleged therein and set forth such new facts as neutralize or avoid their effect.²

Application of Ordinary Rules of Pleading. — When necessary to adopt their use, it is generally the case that the same rules are applicable to them as to prior pleadings presented by the same party.³

2. At Common Law — a. REJOINDER. — The first pleading of fact subsequent to the reply is the rejoinder, which is the answer of the defendant to the reply.⁴

b. SURREJOINDER. — The plaintiff's reply to the rejoinder is the surrejoinder.⁵

c. REBUTTER AND SURREBUTTER. — The next successive pleadings of fact are the rebutter and surrebutter respectively, which are the defendant's reply to the surrejoinder and that of the plaintiff to the rebutter.⁶

3. Under Codes. — As a general rule no pleading after the reply is recognized where the code system prevails, but allegations of new matter made in the reply are deemed controverted without any direct denial.⁷

1. 3 Steph. Com. 527.

In *Smith v. Lloyd*, 9 Exch. 562, all common-law pleadings, with the exception of the surrebutter, seem to have been used. Parke, B., said: "The only doubt with us has been whether the pleadings, somewhat complicated and inartificial, do admit all the facts sufficiently to raise the real question between the parties. It is to be regretted that the litigant parties have not raised the point, as easily might have been done without resorting to these long and complicated pleadings, which are very difficult to understand." And he added that the traverse of one allegation in the replication would have raised the whole question.

In *Nelson v. Woodbury*, 1 Me. 251, the pleadings went into a surrebutter.

2. *Probate Judge v. Ordway*, 23 N. H. 205, holding that a rejoinder doing neither was bad. See also *McGavock v. Whitfield*, 45 Miss. 452.

So also a surrejoinder should deny or confess and avoid the rejoinder. *Potter v. Titcomb*, 10 Me. 53.

3. 1 Chitty on Pleading (16th Am. ed.) 682, 683.

See in general, as to these rules, articles ANSWERS IN CODE PLEADING, vol. 1, p. 777; ANSWERS IN EQUITY PLEAD-

ING, vol. 1, p. 863; PLEAS AT LAW, vol. 16, p. 539; PLEAS IN EQUITY, vol. 16, p. 585; REPLICATIONS AND REPLIES.

4. Com. Dig., tit. Pleader, H.

Rejoinder Used Instead of Plea. — Where the plaintiff newly assigns and the defendant rejoins, a plea and not a rejoinder is proper. "A rejoinder is not a plea, nor can it be so regarded." *Jones v. McNeill*, 1 Hill L. (S. Car.) 84.

5. Com. Dig., tit. Pleader, I, where it is said that this pleading was sometimes termed *quadruplicatio*.

6. Com. Dig., tit. Pleader, K, L.

Any Pleadings Beyond These, which were very unusual, were not distinguished by any separate denomination. 3 Steph. Com. 527.

In *Massachusetts* no further pleading is required after the answer except by order of court. *Montague v. Boston, etc., Iron Works*, 97 Mass. 502.

7. *Hughes v. Durein*, 3 Kan. App. 63; Board of Education *v.* Shaw, 15 Kan. 34; Continental Ins. Co. *v.* Pearce, 39 Kan. 396. See also the codes of the different states.

Practice under Judicature Acts — England. — Leave may be granted on terms to rejoin, and when permitted the rejoinder must be delivered within four days. After a rejoinder the pleadings are at an end. 3 Steph. Com. 528.

II. WHEN NECESSARY AND ADVISABLE. — Where the replication contains new matter, material to a proper decision of the cause,¹ or where the replication concludes with an offer to verify, the defendant should rejoin instead of joining issue.²

Matter of Estoppel. — Where matter constituting an estoppel does not appear in the replication, the defendant, if he relies on the

Unauthorized Rejoinder. — The fact that a rejoinder has been filed when not provided for by the code will not be ground of error after a trial on the merits, provided substantial justice has been done. *Crapster v. Williams*, 21 Kan. 109.

In Kentucky all the old common-law pleadings appear to be recognized. *Bullitt's Civ. Code Ky.* (1895), §§ 99, 100.

1. *Miller v. Hoc*, 1 Fla. 221; *Rutherford v. Tevis*, 5 Ind. 530; *Pegram v. McCormack*, 14 Iowa 141; *Atty.-Gen. v. McQuade*, 94 Mich. 439; *Hinchy v. Foster*, 3 McCord L. (S. Car.) 428; *Wilkinson v. Bennett*, 3 Munf. (Va.) 314; *Stevens v. Taliaferro*, 1 Wash. (Va.) 155; *Totty v. Donald*, 4 Munf. (Va.) 430; *Moore v. Mauro*, 4 Rand. (Va.) 488; *Bobyshall v. Oppenheimer*, 4 Wash. (U. S.) 388.

Rejoinder in Equity. — Where a special replication is permissible there seems to be no reason why a rejoinder is not proper. There is an instance of one in *Vattier v. Hinde*, 7 Pet. (U. S.) 252.

Denial of Allegation in Rejoinder Not New Matter. — To a plea that A B had faithfully accounted for all moneys received by him as a collecting clerk the replication was that A B had received divers sums for which he did not account. The rejoinder was that the sums mentioned in the replication were three sums of different amounts, received by him from three persons, and that he had accounted for those sums. The surrejoinder was that the sums mentioned in the replication were other and different sums than those alleged in the rejoinder to have been received and accounted for by A B and it concluded to the country. This was held not an allegation of new matter, but merely a denial of the allegation in the rejoinder. The court, in holding that an averment was unnecessary as a conclusion to the surrejoinder, remarked that the regular mode of rejoicing to this replication would have been to allege that A B had well and

truly accounted and to have concluded to the country, but that as defendant departed from the usual mode and alleged in his rejoinder that the sums mentioned in the breaches assigned in the replication were certain specific sums received by A B from persons whose names were not mentioned, thereby the plaintiffs in their surrejoinder were driven to vary from the usual surrejoinder and were at liberty to take issue on any of the facts stated in the rejoinder. *Calvert v. Gordon*, 7 B. & C. 809, 14 E. C. L. 135.

It is said in 2 Chitty on Pleading (16th Am. ed.) 23, that "the rejoinder is necessary where the replication is a traverse of the defendant's plea and a tender of issue, not a joinder in issue, or contains new matter." So also in the case of the surrejoinder, rebutter, and surrebutter, if the previous pleading does not complete the issue.

2. *Cumberland, etc., R. Co. v. Slack*, 45 Md. 161; *Southside R. Co. v. Daniel*, 20 Gratt. (Va.) 344; *Henry v. Ohio River R. Co.*, 40 W. Va. 234; *Huffman v. Alderson*, 9 W. Va. 616.

Information in Nature of Quo Warranto. — In proceedings to test the title to office the relator's replications, which concluded with an averment or offer to verify, proceeded on the theory that except as to certain specified precincts and ballots the returns were correct and pointed out the illegal votes which the relator claimed changed the declared result in favor of the respondent and showed his nonelection. It was said by the court: "We think this course of pleading is proper and commendable. It seeks to narrow the issues. When the respondent rejoins to the replications, he can either admit or traverse any of the allegations therein set forth. If he claims a miscount elsewhere, or that there is a mistake or fraud elsewhere, he is entitled to set that up specifically in his rejoinder, and the relator will, by his surrejoinder, join issue thereon." *Atty.-Gen. v. May*, 97 Mich. 568.

estoppel, should rejoin the matter creating it, and should not demur, or it will be waived.¹

Replication of *Nul Tiel Record*. — Where the defendant pleads a record of another court, the replication *nul tiel record* may conclude with an averment of and prayer for the debt and damages. In such case there must be a rejoinder reasserting the existence of the record.²

Irrelevant Allegations. — Where the opposite party's last pleading contains irrelevant allegations not referring to the subject-matter of the controversy there need be no rejoinder or later pleading.³

Sufficient Denials in Previous Pleading. — No further answer is necessary when the denials contained in the previous pleading are sufficient to put in issue the allegations of a former pleading,⁴ and additional averments, in effect superfluous and argumentative denials of the fact to which a sufficient denial has already been made, may be safely disregarded, because they will not be taken as confessed.⁵

A Surrejoinder Is, Except by Joining Issue, improper, when a regular issue on a material fact is tendered by the rejoinder, for the plaintiff cannot avoid the issue and plead over other facts by way of answer;⁶ but by joining issue he does not admit the truth of facts stated by way of inducement to the material traverse.⁷

Traverse in Affirmative Form. — Where the pleading to which a rejoinder or later pleading may possibly be necessary sets out affirmatively matter in denial of the opposite party's previous pleading, there is no necessity for another pleading, because the issues are fully made.⁸

Affirmation on One Side, Denial on the Other. — Where the opposite party's pleading contains either a denial of matter affirmed in a previous pleading of the party whose turn it is to plead or an

1. *McFarland v. Rogers*, 1 Wis. 452, holding that where such matter appears in the replication a rejoinder is unnecessary and a demurrer is proper.

As to the practice in pleading estoppels in general, see article ESTOPPEL, vol. 8, p. 5.

2. *Bobyshall v. Oppenheimer*, 4 Wash. (U. S.) 388.

3. *Blackburn v. Blackburn*, (Ky. 1889) 11 S. W. Rep. 712.

4. *Combs v. Combs*, (Ky. 1897) 41 S. W. Rep. 7; *Haremeran v. Sanders*, 5 Ky. L. Rep. 860; *Jefferson v. Jefferson*, 4 Ky. L. Rep. 701.

5. *Combs v. Combs*, (Ky. 1897) 41 S. W. Rep. 7, holding, where the answer stated that the defendants had paid the plaintiffs respectively various sums in payment for their interest in their father's estate and the reply denied that the said sums were paid them for such interest, and further alleged that such sums were paid for their interests

in their home farm, that no rejoinder was necessary.

6. In *Dawes v. Winship*, 16 Mass. 291, it was held that if necessary to bring out new facts the plaintiff's proper course would be to amend his replication.

7. *Fowler v. Clark*, 3 Day (Conn.) 231, holding, where the replication alleged that arbitrators made and published an award, indorsed down a note and delivered certain deeds to grantees, which were accepted, and a rejoinder set out the revocation of the powers of the arbitrators and traversed the allegations of the replication, that it was correct to take issue on the facts traversed and not to notice the allegation as to a revocation in the surrejoinder.

8. *Grigsby v. Hart*, (Ky. 1892) 18 S. W. Rep. 537; *Conrad v. Jennett*, 13 Ky. L. Rep. 784, affirming the rule stated in the text in the case of surrejoinders.

affirmation of matter denied, no rejoinder or later pleading is necessary.¹

Pleading Concluding to the Country. — Where the opposite party's last pleading concludes to the country the party whose turn it is to plead can only add a *similiter*.²

Pleading Setting Up Evidence Only. — No further pleading is requisite where the previous pleading contains matter of evidence only.³

Motion to Make Pleading More Specific. — There need be no rejoinder, and presumably no later pleading, until disposition has been made of motions to make more specific the opposite party's last pleading.⁴

Withdrawal of Demurrer in Order to Plead. — Where, after filing a demurrer to any pleading, the party thinks it better to plead, he may move for leave to withdraw the demurrer filed.⁵

III. EFFECT OF FAILURE TO PUT IN — 1. **In General.** — Upon a failure to rejoin⁶ or to surrejoin⁷ under circumstances requiring such pleadings, the allegations of the replication or rejoinder will be taken as true, and evidence introduced to sustain the plea, answer, or replication may be excluded,⁸ because there is no issue to be submitted to a jury.⁹

Defects Not Cured by Verdict. — In such case the defect cannot be cured by verdict.¹⁰ Nor under the strict rule of the common law

1. In *Tinsley v. Ross*, (Ky. 1893) 22 S. W. Rep. 313, where the defendant pleaded a title in himself, which the replication traversed, it was held unnecessary to rejoin.

2. 1 Chitty on Pleading (16th Am. ed.) 682.

As to *Similiters*, see article *SIMILITERS*.

3. *Collins v. Partin*, (Ky. 1897) 42 S. W. Rep. 1111, holding that, where the defendant pleaded that he neither signed, executed, nor delivered a note, nor authorized any one else to sign or execute it for him, and the plaintiff in reply set up that while the defendant did not write his name he made his mark, which was attested, no rejoinder was necessary, because the issues were complete when the answer was filed.

4. It was so held where a case was submitted on the day following the overruling of a motion to make a reply more specific, for the rejoinder was not due until the motion was disposed of and the defendant should have been allowed to plead and take proof in support of his defense. *Moreland v. Citizens Sav. Bank*, 16 Ky. L. Rep. 860.

5. *Treasury Com'rs v. Brevard*, 1 Brev. (S. Car.) 11. In this case leave was given to rejoin issuably on payment of costs. The court cited *Sher-*

lock *v. Templer*, 1 Barnes N. Cas. 246, and Bac. Abr., tit. Pleas, N 2.

6. *Hinchy v. Foster*, 3 McCord L. (S. Car.) 428.

7. *Dixon v. Ford*, (Ky. 1886) 1 S. W. Rep. 817.

8. *Atty.-Gen. v. McQuade*, 94 Mich. 439; *Pegram v. McCormack*, 14 Iowa 141.

9. *Stevens v. Taliaferro*, 1 Wash. (Va.) 155; *Miller v. Hoc*, 1 Fla. 221; *Lewisburg, etc., R. Co. v. Stees*, 77 Pa. St. 332.

Trial Without Issue. — In *Rutherford v. Tevis*, 5 Ind. 530, facts material to a proper decision of the cause were alleged in a replication to which there was no rejoinder, and the parties went to trial, and the judgment was reversed.

Where There Was No Rejoinder to a special replication to a plea of the statute of limitations it was held there was no issue, and judgment for the plaintiff was reversed. *Totty v. Donald*, 4 Munf. (Va.) 430.

10. *Miller v. Hoc*, 1 Fla. 221.

Objections Waived — *Pennsylvania.* — In *Lewisburg, etc., R. Co. v. Stees*, 77 Pa. St. 332, it was said by Sharswood, J., in refusing to reverse a case on this ground: "There was no rejoinder to this replication. In strictness then

could an objection on the ground of its absence be obviated by a statement in the record that a jury was sworn to try the issues or rendered a verdict on the issues joined;¹ but later cases hold that where the record states that issue was thereupon joined it is but a misjoining of issue which is cured by the statute of jeofails.²

2. Order to Plead. — It seems that either party may, in case of absence of a rejoinder or other necessary subsequent pleading, obtain a rule to plead within a prescribed period.³

3. Disobedience of Order to Plead — Failure to Rejoin or Rebut When Ordered. — Where the defendant fails to rejoin or rebut when ordered to do so, it would seem that the previous pleadings should be stricken out and judgment entered as for want of a plea.⁴

Failure to Surrejoin or Surrebut When Ordered. — Where the plaintiff did not surrejoin or surrebut within the period prescribed by law, the common-law practice was for the defendant to sign judgment of *non pros*.⁵

there was no issue to be tried by the jury. But the parties chose to go to trial on the pleadings without a formal issue, and in this state it is settled that an omission to compel the opposite party to perfect the pleadings beforehand is a tacit agreement to waive matters of form and try the cause on the merits, just as going to trial on a short plea is, according to our practice, a waiver of the right to demand a plea in full form."

After Issue Has Been Joined upon all matters in controversy, if a rejoinder is filed, and there is no averment contained in it which is required to be traversed, or which can be taken as confessed by reason of the plaintiff's failure to surrejoin, there is no error in disregarding its uncontroverted affirmative allegations. *Dixon v. Ford*, (Ky. 1886) 1 S. W. Rep. 817.

1. *Wilkinson v. Bennett*, 3 Munf. (Va.) 314; *Stevens v. Taliaferro*, 1 Wash. (Va.) 155.

2. *Moore v. Mauro*, 4 Rand. (Va.) 488.

A Mere Technical Objection. — In *Southside R. Co. v. Daniel*, 20 Gratt. (Va.) 344, it was said that the doctrine that the error is cured is "in harmony with the spirit of the modern cases, and the disposition manifested by the courts to disregard mere technical objections, unless there be omitted something so essential to the action or defense that judgment according to law, and the very right of the cause, cannot be given."

Defect Disregarded on Appeal. — It

seems, therefore, in general, that according to modern practice, where the parties have gone to trial on the merits, submitting the cause to the jury as though the issues had been formally joined, the absence of a rejoinder will not be regarded in an appellate court. *Henry v. Ohio River R. Co.*, 40 W. Va. 234; *Southside R. Co. v. Daniel*, 20 Gratt. (Va.) 344; *Moore v. Mauro*, 4 Rand. (Va.) 488.

Mississippi. — In *Grubbs v. Collins*, 54 Miss. 485, it was held that the intentment of Code Miss. (1871), § 622, was that the parties should settle the pleadings before trial, and if the objection to their completeness and formality were not made in proper time neither party should be permitted after trial ending in verdict and judgment to complain of it. This would, *mutatis mutandis*, be presumably the law in the absence of a surrejoinder, rebutter, or surrebutter.

3. 1 Tidd's Pr. (4th Am. ed.) 693.

4. *Petrie v. Fitzroy*, 5 T. R. 152; *Wyatt v. Woodlief*, 1 Leigh (Va.) 473.

It was remarked by the court in *Petrie v. Fitzroy*, 5 T. R. 152, that "the master says that in such cases it is the practice to strike out all the pleadings. And * * * if the defendant do not rejoin it is considered as an abandonment of the plea."

5. 1 Tidd's Pr. (4th Am. ed.) 693.

Under the Rules of Trinity Term, 1 William IV., 1831, it was ordered that no judgment of *non pros*. should be signed for want of any surrejoinder or

Volume XVIII.

IV. FORM OF PLEADINGS — 1. In General — Reference to Next Previous Pleading. — The rejoinder and all subsequent pleadings should refer by apt and proper words to the replication or to those pleadings to which they are applicable.¹

They Are Entitled, as a rule, in the court and of the term in which they are pleaded, the names of the plaintiff and the defendant being stated in the margin as in the case of pleas and replications generally. Their other component parts are also similar to such pleadings.²

subsequent pleading on the part of the plaintiff until four days next after a demand thereof should have been made in writing upon the plaintiff, his attorney or agent, as the case might be.

1. *Macfarland v. Dean, Cheves L. (S. Car.) 64.*

2. 1 Chitty on Pleading (16th Am. ed.) 682, 683. See also *supra*, I. 1. *In General*; and articles PLEAS AT LAW, vol. 16, p. 553; REPLICATIONS AND REPLIES.

Under Hilary Rules, 4 William IV., 1833, it was ordered that every pleading should be entitled of the day of the month and year when it was pleaded and should bear no other time or date, and that no venue should be stated in the body of any rejoinder or subsequent pleading, provided that in cases where local description was at that time required such local description should be given. And it was further provided that it should not be necessary to use any allegation of *actionem non*, or to the like effect, or any prayer of judgment in any rejoinder or subsequent pleading intended to be pleaded in bar of the whole action generally; nor should it be necessary in any subsequent pleading intended to be pleaded in maintenance of the whole action to use any allegation of *precludi non*, or to the like effect, or any prayer of judgment; and all rejoinders or subsequent pleadings pleaded without such formal parts as aforesaid should be taken unless otherwise expressed as pleaded respectively in bar of the whole action, or in the maintenance of the whole action, provided that nothing therein contained should extend to cases where an estoppel is pleaded.

Under the Maryland Code much of the common-law strictness has been abolished, and it is provided that any rejoinder or subsequent pleading necessary to form a legal defense shall be sufficient without reference to mere form, nor is it necessary to state any

formal commencement or conclusion to them. Accordingly, to a replication which at common law ought to have concluded with a verification, a rejoinder "joining issue thereon" should be understood in the same manner as if the defendant had formally traversed it and tendered an issue by a conclusion to the country according to the old forms. *Cumberland, etc., R. Co. v. Slack, 45 Md. 161*, in which case it was remarked by the court: "We are not to be understood as sanctioning this loose method of pleading. Unquestionably the defendant ought to have traversed the averment in the replication, but the omission to do so in a more formal manner is no cause for reversal, as the parties proceeded to trial, and the issue was found against the plaintiff."

Forms of Subsequent Pleading. — The forms given in 2 Chitty on Pleading (16th Am. ed.) 23, are as follows:

Rejoinder.
 "In the ——. The — day of ——. A. D. ——. C. D. } The defendant joins issue
 ats. } upon the plaintiff's replication
 A. B. } to the defendant's plea [or 'first plea']". If the replication contains new matter requiring a special answer or a traverse of some particular allegation, the rejoinder is thus: "The defendant, as to the said replication to his said plea [or 'first plea'], says that," etc., stating the matter relied upon.

Surrejoinder. — If the rejoinder tenders issue: "And the plaintiff joins issue upon the rejoinder to his replication to the said plea [or 'first plea,' as the case may be] of the defendant." If the surrejoinder introduces new matter: "And the plaintiff, as to the rejoinder to the replication to the defendant's second plea, says that," etc.

Rebutter. — If the surrejoinder be not a joinder in issue, but traverses some allegation in the previous pleading or

2. Conclusion — *a.* TO COUNTRY. — Where the rejoinder negatives the affirmations of the replication, or where it asserts what the replication has denied, the conclusion should be to the country.¹ So, also, in the case of a surrejoinder containing similar negations and affirmations, and *mutatis mutandis* of either of the subsequent pleadings.²

No New Matter. — Where the pleading does not contain any new matter the conclusion should be to the country.³

b. OFFER TO VERIFY. — Where new matter is introduced the conclusion should be with an averment, or offer to verify.⁴

Nul Tiel Record. — Where there is a rejoinder of *nul tiel record* it is proper to conclude with an offer to verify.⁵

V. SUFFICIENCY AND REQUISITES — **1. Completeness.** — The rejoinder and each pleading subsequent to it must be fully responsive to the replication or other pleading to which it applies;⁶ other-

alleges new matter, the rebutter will be: "And the defendant joins [or 'takes'] issue upon the surrejoinder to the rejoinder to the replication to the defendant's said plea" or "first plea," as the case may be. If it be necessary to allege new matter in the rebutter, proceed as follows: "And the defendant, as to the said surrejoinder, says that," etc.

Surrebutter. — "And the plaintiff joins [or 'takes'] issue upon the defendant's said rebutter." If necessary to allege new matter, say: "And the plaintiff, as to the said rebutter, says that," etc.

A Rejoinder of a Tender should not conclude in bar of the action, but should pray judgment whether the plaintiff ought to recover damages by reason of the nonpayment of the sum alleged to have been tendered. *Karthaus v. Owings*, 6 Har. & J. (Md.) 134.

1. *Dawes v. Winship*, 16 Mass. 291; *Bowman v. Harper*, 17 N. H. 571; *Probate Judge v. Ordway*, 23 N. H. 205; *Roberts v. Marriot*, 1 Mod. 289; *Morgan v. Man*, T. Raym. 94.

The Effect of a Conclusion to the Country is that the cause is put at issue. *U. S. v. Hodson*, 10 Wall. (U. S.) 395.

Under Hilary Rules 4 William IV., 1833, it was provided that all special traverses or traverses with an inducement of affirmative matter should conclude to the country, provided that this regulation should not preclude the opposite party from pleading over to the inducement when the traverse was immaterial.

2. *Potter v. Titcomb*, 10 Me. 53, holding that this was the correct conclusion

where a surrejoinder denied a material fact alleged in the rejoinder.

3. *Williams v. Whitmore*, Kirby (Conn.) 249; *McGavock v. Whitfield*, 45 Miss. 452.

4. *Andrus v. Waring*, 20 Johns. (N. Y.) 153; *Calvert v. Gordon*, 7 B. & C. 809, 14 E. C. L. 135; *Probate Judge v. Ordway*, 23 N. H. 205; *Dawes v. Winship*, 16 Mass. 291.

A Rejoinder Confessing and Avoiding the replication must conclude with an offer to verify. *Probate Judge v. Lane*, 50 N. H. 556.

Instance of New Matter. — Where a plea alleged that a suit was not commenced within a year and the replication was that the defendants had notice of the suit, a rejoinder denying the notice and adding that the plaintiff neglected to avail himself of the defense of a statute of limitations clearly introduces new matter. *McClure v. Erwin*, 3 Cow. (N. Y.) 331.

5. *Davis v. Crow*, 7 Blackf. (Ind.) 129

Under the Maryland Code no formal commencement or conclusion to a rejoinder or subsequent pleading is necessary. *Cumberland, etc., R. Co. v. Slack*, 45 Md. 161.

6. *U. S. v. Cumpton*, 3 McLean (U. S.) 163; *McCue v. Washington*, 3 Cranch (C. C.) 639; *Dutton v. Holden*, 4 Wend. (N. Y.) 643; *Kimball v. Penney*, 117 Ala. 245.

Contents of Rejoinder — Kentucky. — According to Civ. Code Ky., § 99, a rejoinder may contain: "(1) a traverse; (2) a statement of facts which constitute an estoppel against or avoidance of (a) facts stated in the reply in sup-

wise they will be insufficient.¹

May Traverse or Confess and Avoid.—The pleader may either deny the allegations of the pleading which he has under consideration,

port of the plaintiff's original cause of action; (b) a defense stated in the reply to a set-off or counterclaim; (c) a counterclaim stated in the reply." See *Dixon v. Ford*, (Ky. 1886) 1 S. W. Rep. 817.

Demurrer and Rejoinder to Replication.

—It being a rule of pleading that if a replication be bad in part it is bad for the whole, a tender cannot be rejoined to part of a replication and a demurrer filed to the residue. *Karthauss v. Owings*, 6 Har. & J. (Md.) 134.

Replication Avoiding Statute of Limitations.—Where the replication set up that the defendant was a nonresident, in avoidance of his plea of the statute of limitations, a rejoinder alleging generally, a return to the state was held sufficient. *Shapley v. Felt*, 3 N. H. 121.

Unresponsive Rejoinders.—Where the replication was that an estate of an intestate came into the hands of one of two administrators, but that neither of them rendered any inventory to the probate court, a rejoinder that neither the estate of the intestate mentioned in the replication nor any estate whatever ever came into the knowledge or possession of the administrators or either of them was held not responsive. *Edwards v. White*, 12 Conn. 34.

Where the replication was that "at the time of the commencement of this suit there was due to the state of Illinois, which the said assignees were required to pay, the sum of \$295,000 of state liabilities; also the sum of \$20,000 of state liabilities forfeited to the state, by reason of the nonpayment of said \$295,000; that there was also outstanding and unredeemed the bills and certificates of said bank, to the amount of \$34,000, which the said assignees were bound to redeem, and that the assets of said bank had been exhausted in paying the liabilities of said bank, by said assignees, except the amount of \$100,000, so that the interest of the creditors of said bank required the collection of said stock notes," a rejoinder admitting the allegations of the replication and alleging that "at the time of the commencement of this suit there was due to the plaintiff and Albert C. Caldwell, as such assignees, upon stock notes given upon original subscription

to the capital stock of said bank, the sum of \$500,000, so that the interest of the creditors of said bank did not require the collection of the whole amount of said notes sued on herein," was held defective as not being responsive to any allegation of the replication. *Ryan v. Vanlandingham*, 25 Ill. 128.

1. *Ryan v. Vanlandingham*, 25 Ill. 128; *Conard v. Dowling*, 7 Blackf. (Ind.) 481.

Insufficient Rejoinder.—A rejoinder that the sureties on a bond for prison bounds surrendered the principal, who was received and discharged by the sheriff, where the replication avers that no schedule was rendered by the principal according to the condition of the bond, is insufficient. *Miller v. Bagwell*, 3 McCord L. (S. Car.) 429.

Statute of Limitations.—In the *District of Columbia* the rejoinder may set up the statute of limitations. The rule requiring it to be set up by plea intends only to enforce its interposition at the earliest stage of the pleading which discloses its applicability. *Wiard v. Semken*, 19 D. C. 475.

Rejoinder of Nil Debet.—The plea of *nil debet* can never be rejoined when a specialty is the foundation of the action, though it is proper where the deed is mere inducement. *U. S. v. Cump-ton*, 3 McLean (U. S.) 163.

Rejoining Tender.—The rejoinder should plead the tender with a *profert in curia*. *Karthauss v. Owings*, 6 Har. & J. (Md.) 134.

Demurrer to Rejoinder Improper.—Under the old common-law practice, if the rejoinder purports to answer a portion only of the replication, leaving the other unanswered, it is bad; a demurrer thereto, however, is not proper, but a judgment, of *nil dicit* as for want of the rejoinder should be signed, inasmuch as by demurring there is a discontinuance by the plaintiff. *Com. Dig.*, tit. Pleader, E, 1; *Edwards v. White*, 12 Conn. 34.

In Connecticut it seems that the above practice does not prevail. If the rejoinder is insufficient the plaintiff may demur, and it makes no difference whether the rejoinder professes to answer the whole or part only of the plaintiff's cause of action, or whether it is

or confess and avoid it, as the facts permit;¹ and if he fails to adopt either of these courses, all traversable matter in such pleading will be taken as true.²

Repetition of Previous Pleading. — The pleader should not repeat his own previous pleading, or the later pleading may be stricken out on motion.³

2. Necessity to Allege Facts. — The pleader must set out his facts⁴ in a plain and direct averment, and not in an argumentative manner.⁵

3. Pleading Law and Evidence. — Matters of law should be carefully omitted from the pleading,⁶ and so also should matters of evidence.⁷

pleaded separately or in connection with other pleas. *Edwards v. White*, 12 Conn. 34.

Duplicity in Adversary's Pleading. — Even if a rejoinder be double, the plaintiff should, if he pleads, instead of demurring, surrejoin to the whole of the rejoinder; it will not be sufficient to make a partial answer to it. *Neff v. Powell*, 6 Blackf. (Ind.) 420.

1. *McGavock v. Whitfield*, 45 Miss. 452.

2. *Atty.-Gen. v. McQuade*, 94 Mich. 439, so holding in the case of a rejoinder. See also articles ANSWERS IN CODE PLEADING, vol. 1, p. 777; PLEAS AT LAW, vol. 16, p. 539; REPLICATIONS AND REPLIES.

3. *Hightower v. Ogletree*, 114 Ala. 94, so holding in the case of a rejoinder.

Nor Should the Surrejoinder be a Mere Repetition of what is averred in the replication. *Western Assur. Co. v. Hall*, (Ala. 1896) 24 So. Rep. 936.

Where There Was a Plea Son Assault Demesne in an action in trespass, which was confessed and avoided by the replication, a rejoinder which was a mere reiteration of the plea was held not to be an answer to that which confessed and avoided it. *Macfarland v. Dean, Cheves L.* (S. Car.) 64.

Rejoinder a Repetition of Plea in Effect a Joinder of Issue. — A rejoinder to a replication was in part a repetition of the pleas, and for the rest denied the facts alleged in the replication, but because it was in effect a taking of the issue upon the replication it was held good upon demurrer. The plaintiff, taking issue on it, filed two special surrejoinders, which after the manner of the rejoinder harked back upon matters already presented. To the surrejoinders there was a demurrer which was

overruled. "Thereupon the defendant, apparently having exhausted the nomenclature of pleadings, offered to file a paper which came in the time and sequence of a rebutter, but which it called 'A.'" This "A" proposed to escape the charges of the complaint by setting up matter which was provable under the general issue, but the court was of the opinion "that it was time to put a stop to this bandying back and forth of averments which were either already in the case or had nothing to do with it, and very properly declined to allow this 'A' to be filed." *Louisville, etc., R. Co. v. Orr*, (Ala. 1899) 26 So. Rep. 35.

Remedy — Alabama. — It seems that the remedy for such a defect is a motion to strike out the pleading, not a demurrer. *Hightower v. Ogletree*, 114 Ala. 94.

4. *Barnes v. Matteson*, 5 Barb. (N. Y.) 375, holding that a rejoinder seeking to raise an issue as to the validity of an assignment made by an assignee in bankruptcy should set out the facts on which its invalidity depends.

5. *Tracy v. Rathbun*, 3 Barb. (N. Y.) 543; *Smith v. Lloyd*, 9 Exch. 563.

6. *Tracy v. Rathbun*, 3 Barb. (N. Y.) 543; *McCue v. Washington*, 3 Cranch (C. C.) 639.

7. *Hoard v. Garner*, 1 Sandf. (N. Y.) 614, holding that a rejoinder setting forth as the causes of delay in foreclosure proceedings the institution of two distinct suits by other parties, in the Court of Chancery, against the plaintiff and defendant in this action, the mortgagors and other persons, affecting the validity and operation of the mortgage, was bad, as such matter, though appropriate testimony on behalf of the defendant on the issues already taken by the replication, was improperly pleaded.

4. Materiality. — All material allegations set out in the opposite party's last pleading must be answered directly and succinctly,¹ and it is insufficient to evade them and set out immaterial matters, thus tendering an issue which on verdict would not determine the merits of the controversy and would leave the court at a loss for which of the parties to give judgment.² Immaterial averments in a pleading need not be noticed in the subsequent pleading.³

Allegations of Time and Place. — When material, an omission of any statement as to the time and place when and where the several acts set up in the pleading took place will render it defective in form and open to a demurrer.⁴

5. Consistency — *a.* **IN GENERAL** — **Rejoinder Must Not Depart from Plea.** — The defendant must conform his rejoinder to a maintenance of the defense made by his plea, and is not allowed to shift his ground so as to bring forward a new and independent defense departing from it.⁵ This is in pursuance of a cardinal rule of pleading that the allegations of the pleader must be consistent

1. *Andrus v. Waring*, 20 Johns. (N. Y.) 153; *Monroe County v. Beach*, 9 Wend. (N. Y.) 144; *Union Bank v. Clossey*, 11 Johns. (N. Y.) 182; *Conard v. Dowling*, 7 Blackf. (Ind.) 481.

Issue on Inducement. — In *Satterlee v. Sterling*, 8 Cow. (N. Y.) 233, to a plea of the statute of limitations the plaintiff replied that the writ issued on a particular day within six years after the cause of action accrued, and that the defendant promised within six years before that day; the rejoinder did not answer the allegation that the writ was issued on such a day, but took issue on an immaterial point that the writ was not sued out within six years after the cause of action accrued. It was held that the rejoinder was bad as being inconsistent.

2. *Langkopff v. West*, 3 Har. & M. (Md.) 197; *McMechan v. Hoyt*, 16 Ark. 303.

Instance of Irrelevant Issue. — Where the replication was that an account was not rendered within one year in compliance with the condition of a probate bond, a rejoinder alleging that the account had been rendered after the expiration of the year and had been allowed was held insufficient. *Probate Judge v. Tillotson*, 6 N. H. 38; *Probate Judge v. Lane*, 50 N. H. 556.

3. *Potter v. Titcomb*, 10 Me. 53.

4. *Barnes v. Matteson*, 5 Barb. (N. Y.) 375.

5. *Florida*. — *Lanier v. Chappell*, 2 Fla. 621.

Massachusetts. — *Keay v. Goodwin*,

16 Mass. 1; *Hapgood v. Houghton*, 8 Pick. (Mass.) 451.

Mississippi. — *Vanzant v. Shelton*, 40 Miss. 332; *McGavock v. Whitfield*, 45 Miss. 452.

New Hampshire. — *Tarleton v. Wells*, 2 N. H. 306.

New York. — *Allen v. Watson*, 16 Johns. (N. Y.) 205; *Barlow v. Todd*, 3 Johns. (N. Y.) 367; *Andrus v. Waring*, 20 Johns. (N. Y.) 153.

Pennsylvania. — *M'Sherry v. Askew*, 1 Yeates (Pa.) 79.

England. — *Ellis v. Rowles*, Willes 638; *Roberts v. Marriot*, 1 Mod. 289; *Fisher v. Pimbley*, 11 East 188; *Dudlow v. Watchorn*, 16 East 39; *Elliot v. Lane*, 1 Wils. 334; *Palmer v. Stone*, 2 Wils. 96; *Richards v. Hodges*, 2 Saund. 84; *Cutler v. Southern*, 1 Saund. 117; *Vere v. Smith*, 2 Lev. 5; *Sams v. Dangerfield*, 2 Mod. 31; *Long v. Jackson*, 2 Wils. 8; *Praed v. Cumberland*, 4 T. R. 588.

Practice Under the English Judicature Acts. — The rejoinder must not allege any fact inconsistent with the defense. 3 Steph. Com. 527.

Illustrations of Departure. — In Co. Litt. 304a it is said: "Whensoever the rejoinder * * * containeth matter subsequent to the matter of the bar, and not fortifying the same, this is regularly a departure, because it leaveth the former and goeth to another matter." Thus "if a man plead performance of covenants and the plaintiff reply that he did not such an act according to his covenant, the de-

with each other. The declaration must be supported by the replication; the plea by the rejoinder.¹

defendant saith that he offered to do it and the plaintiff refused it, this is a departure, because the matter is not pursuant; for it is one thing to do a thing and another to offer to do it, and the other refused to do it; therefore that should have been pleaded in the former plea."

Where the Defendant Pleads Non Damificatus generally and the plaintiff replies and shows how damified, a rejoinder that the plaintiff was damified *de injuria sua* is a departure. *Richards v. Hodges*, 2 Saund. 83.

Where the Statute of Limitations Was Pleaded, and the reply justified neglect in suing by reason of insanity, it was held a departure to rejoin that prior to the commencement of the suit the plaintiff had been judicially declared a lunatic and that the causes of action mentioned in the replication accrued to the plaintiff's committee and not to the plaintiff. *Smith v. Fetter*, 61 N. J. L. 102.

Departure from Plea of Omnia Performavit.—In *Probate Judge v. Lane*, 50 N. H. 556, the plaintiff's third replication to a plea of *omnia performavit* alleged that the executor did not, within one year, render a just and true account, although goods came into his hands. A rejoinder alleged that the executor "made and returned to said judge, upon oath, a just and true account of his said administration within thirteen months of the date of said writing obligatory, to wit, on the 23d day of March, 1869; and the said judge, after examining said account, and after hearing such objections as the parties interested in said estate chose to make, if any, allowed said account, by which settlement all damages occasioned to the party or parties interested in this suit for not returning said account within one year were settled and allowed." This was held to be a departure.

Consideration for Note.—Where the plea set up no consideration for a note, and the rejoinder was the failure of a small part of its consideration, it was held a departure. *Kilgore v. Powers*, 5 Blackf. (Ind.) 22.

Matter of Estoppel.—If the defendants knew of the matter constituting the estoppel at the time when they pleaded, it is a departure to set out

such matter in the rejoinder. *Ellis v. Rowles*, Willes 638. *Aliter*, if they were not aware of it at that time. *Dixon v. James*, 2 Lutw. 1238.

An Excuse for Nonperformance cannot be rejoined after a plea of performance. This would be "saying 'yes' and 'no' to the same point of controversy." *Warren v. Powers*, 5 Conn. 373. To the same effect see *White v. Clever*, 2 Ld. Raym. 1449; *Arron v. Crispe*, 1 Salk. 221; *Racine v. Barnes*, 6 Wis. 472; *Ordinary v. Bracey*, 1 Brev. (S. Car.) 191; *McGowan v. Caldwell*, 1 Cranch (C. C.) 481.

Where the Statute of Limitations of One State is pleaded and the plaintiff replies a saving clause of the statute, a rejoinder of the statute of limitations of another state is an abandonment of the plea. *Harper v. Hampton*, 1 Har. & J. (Md.) 453.

Confessing and Avoiding in the rejoinder a matter denied in the plea is a departure. *Munro v. Alaire*, 2 Cai. (N. Y.) 320; *Andrus v. Waring*, 20 Johns. (N. Y.) 153.

Where Liberum Tenementum Is Pleaded.—In *Dutton v. Holden*, 4 Wend. (N. Y.) 643, it was said that where *liberum tenementum* is pleaded it is no departure to rejoin to a demise alleged in the replication that it contained a reservation to do what was complained of as a trespass. Citing *Fisher v. Pimbley*, 11 East 188.

After Pleading No Award it was considered inconsistent to rejoin a performance of the award or that there was not a breach, or to confess the award in fact, but allege that it was legally void. *House v. Lander*, 1 Lev. 85.

Where the Award Was Not Set Out Correctly in the replication a rejoinder setting out the award verbatim was considered to support the plea of no award, because it showed no legal and valid award under the submission. *Fisher v. Pimbley*, 11 East 188.

Connecticut Statute.—In *Edwards v. White*, 12 Conn. 28, the correctness of the decision in *Warren v. Powers*, 5 Conn. 373, above cited, was questioned, the court having regard to the construction of a Connecticut statute authorizing the rejoining of "several matters by distinct rejoinders."

1. *Per James, J.*, in *Wiard v. Semken*, 19 D. C. 475.

Departures in Pleadings Subsequent to Rejoinder. — The surrejoinder must not vary from the case made by the replication,¹ and presumably the rebutter and surrebutter should not shift from the position taken up by the preceding pleadings of the defendant and plaintiff respectively.²

Consistent Matters May Be Set Up. — The rejoinder or any later pleading, however, may set up matters as an answer to the facts stated in the opposite party's pleading which are not inconsistent with the pleader's previous pleading.³

b. IMMATERIAL DEPARTURE. — A variance from the party's previous pleadings in time, place, or other matter, when immaterial, is not a demurrable defect.⁴

6. Double Pleading — *a.* **AT COMMON LAW.** — Rejoinders and all subsequent pleadings are bad if they tender several distinct answers to the pleadings to which respectively they are applicable.⁵

1. Dawes v. Winship, 16 Mass. 291; Andrus v. Waring, 20 Johns. (N. Y.) 153.

2. See *supra*, I. 1. *In General*.

Aider by Statute. — When the subject of the adversary's pleading is such that the pleader cannot answer specially without departing from his previous pleadings, but must take issue upon the opposite party's pleading, a non-joinder of issue is cured by the statute of jeofails. *Southside R. Co. v. Daniel*, 20 Gratt. (Va.) 344; *Griffie v. McCoy*, 8 W. Va. 201.

3. *Racine v. Barnes*, 6 Wis. 472, holding that where performance had been pleaded a rejoinder of any defense to the breaches assigned in the replication was allowable. See also *Ellis v. Rowles*, Willes 638; *Dixon v. James*, 2 Lutw. 1238, and generally cases cited *supra*, in the first note to this subsection.

4. *Thompson v. Fellows*, 21 N. H. 430, holding that a surveyor's warrant being as valid and effectual without a seal as with one, it is immaterial to omit such an allegation from the rejoinder when the warrant is set out in the plea as being under seal. See also *McMechan v. Hoyt*, 16 Ark. 303.

5. *Gray v. White*, 5 Ala. 490; *Stiles v. Lacy*, 7 Ala. 17; *Ryan v. Vanlandingham*, 25 Ill. 128; *Neff v. Powell*, 6 Blackf. (Ind.) 420; *Slocumb v. Holmes*, 1 How. (Miss.) 139; *Probate Judge v. Lane*, 50 N. H. 556; *Satterlee v. Sterling*, 8 Cow. (N. Y.) 233; *Monroe County v. Beach*, 9 Wend. (N. Y.) 144; *McClure v. Erwin*, 3 Cow. (N. Y.) 313; *Barnes v. Matteson*, 5 Barb. (N. Y.) 375; *U. S. v. Cumption*, 3 McLean (U.

S.) 163; *McCue v. Washington*, 3 Cranch (C. C.) 639.

Rejoinder to New Assignment. — Where the defendant may file as many pleas as he desires, a novel assignment has been held to place him in the position of a defendant pleading to a declaration, and he may then file as many rejoinders as necessary. *Crockett v. Lashbrook*, 5 T. B. Mon. (Ky.) 534.

Issues Not Appearing on Record. — When a consignor of goods sued the consignees for the proceeds of the sale of goods consigned to them, and they set up a claim against him on account of their expenditures incurred in fitting the goods for market, it was held that the consignor could not rejoin their negligence in failing to bring an action against the carriers and owners of the ship for damage done to the goods as a reply to their claim for reimbursement, but was driven to an action against them for damages. The court said: "If it could be done, then the case would be an anomaly—it would present an instance of four issues tried in one cause and one only of them upon the record." Thus there would be the original claim in assumpsit on the record, one on account of the defendants not on the record, and a third on the plaintiffs' claim for damages also not on the record. "Nor do the issues stop here, for to his rejoinder of negligence, the plaintiffs in error would be entitled to surrejoinder that this was not a case where the carrier and the ship owners were liable, and therefore, no negligence could be imputed to them in not suing for the damage done to the cotton.

Election. — The defendant may elect which of several rejoinders he will adopt.¹

Matters Tending to One Issue. — But where the several matters contained in the rejoinder or later pleading all tend to the same conclusion it will not be double.² And the pleader will accordingly not be precluded from the introduction of several facts into his surrejoinder if they form one connected proposition.³

Duplicity in Adversary's Pleading. — Where there is double pleading in the replication, if there is no demurrer therefor there must be rejoinders to each replication severally;⁴ so also where the rejoinder is double the surrejoinder should answer both parts.⁵

b. UNDER STATUTES. — Where statutes of the different states of the Union have so provided, more than one rejoinder or subsequent pleading is permitted; in some cases, however, it is necessary to move the court for leave to plead double.⁶

Nor would that issue appear upon the record." *Brown v. Clayton*, 12 Ga. 564.

If on a Demurrer the Court Considers Them they will be deemed to have been filed by leave. *Ryan v. Vanlandingham*, 25 Ill. 128.

1. *Slocumb v. Holmes*, 1 How. (Miss.) 139.

2. *McClure v. Erwin*, 3 Cow. (N. Y.) 313. In this case the point or main proposition which a rejoinder sought to establish was that a judgment recovered against the plaintiff was recovered against him through his own neglect or default, in not availing himself in his defense of the fact that a suit was not commenced within a year after the escape, and in order to maintain that proposition, the defendants averred that they had no notice of the suit, and that the plaintiff defended it without their privity or knowledge. It was held that this, of itself, was no ground of defense; for if the plaintiff had set up every matter of defense within the power of the defendants, they were not injured by the omission. It became important, therefore, only when connected with the subsequent averment that the plaintiff omitted to avail himself of a legal defense. Nor would the latter averment alone have been sufficient. The plaintiff, in his replication, had distinctly charged the defendants with notice of the suit. If that averment was material, and the defendants had omitted all answer, the notice would have stood confessed upon the record, and would have been a complete answer to the allegation that the plaintiff had not availed himself of

every legal matter of defense. The court said: "The two averments, therefore, form one connected proposition, and are constituent parts of the same entire defense." *Citing Robinson v. Raley*, 1 Burr. 316; *Currie v. Henry*, 2 Johns. (N. Y.) 433; *Patcher v. Sprague*, 2 Johns. (N. Y.) 462.

Comparison of Replication and Rejoinder in This Respect. — Where the plaintiff could not avoid a statute of limitations without showing in his replication a suit brought and a new promise, these facts would combine to make but one point therein; but a denial of either fact in the rejoinder would be sufficient to bar the plaintiff, and a denial of both would therefore be double. *Tuttle v. Smith*, 10 Wend. (N. Y.) 386.

3. *Potter v. Titcomb*, 10 Me. 53, holding that where it was necessary to bring the neglect of an administrator to cause certain notes belonging to his intestate's estate within the terms of the condition of the administration bond, a surrejoinder alleging that the notes were due and a part of the estate and that the defendant was well aware of those facts was neither multifarious nor double.

The Issue Tendered Must Be on a Single Point, though it may include several facts. *U. S. v. Cumpton*, 3 McLean (U. S.) 163.

4. *Com. Dig.*, tit. *Pleader*, H.

5. *Neff v. Powell*, 6 Blackf. (Ind.) 420.

6. *Alabama.* — Under a statute providing that "the defendant in any cause may plead as many several matters as he may judge necessary to his defense," there cannot be two rejoinders.

7. Traverses.—When the traverse in the opposite party's pleading is good and is taken to a material point, and when it goes to the gist and substance of the action, there can be no traverse taken on it;¹ but where such traverse is too narrow, idle, not well taken, or not pertinent to the matter, but is of that

ders to the replication. *Gray v. White*, 5 Ala. 490.

Arkansas.—A statute permitting a defendant to file as many pleas as necessary was held not to extend to rejoinders. By another statute, however, the courts were empowered to allow more than one rejoinder whenever such course, in their opinion, became necessary to attain the ends of justice. *State Bank v. Minikin*, 12 Ark. 715.

Connecticut.—As early as 1822 it was provided that in actions on contracts with conditions not set out in the plaintiff's declaration, the defendant might, with leave of the court, rejoin to a replication setting forth breaches of such conditions as many several matters by distinct rejoinders as he might have pleaded had the conditions and breaches thereof been set forth in the declaration. *Warren v. Powers*, 5 Conn. 373.

Illinois.—It seems that leave of the court is required to file more than one rejoinder. Where several are filed without such leave, all of them but the first are as if never filed, and are not properly before the court. *Ryan v. Vanlandingham*, 25 Ill. 128.

Massachusetts.—Under Gen. Stat. Mass. (1860), c. 129, § 23 (Pub. Stat. 1882, c. 167, § 24), no further pleading except by order of court is required after the answer. *Montague v. Boston*, etc., Iron Works, 97 Mass. 502; *Cook v. Shearman*, 103 Mass. 21; *School Dist. v. Boston*, etc., R. Co., 102 Mass. 552.

Mississippi.—A statute in force in 1834, allowing to the defendant the right of pleading as many pleas as might be necessary, was held not to apply to rejoinders. *Slocumb v. Holmes*, 1 How. (Miss.) 139.

New Hampshire.—Gen. Stat. N. H., c. 208, § 4 (Pub. Stat. 1891, c. 223, § 4), does not permit more than one rejoinder to a single replication. *Probate Judge v. Lane*, 50 N. H. 556.

New Jersey.—Elm. Dig. 422 did not authorize a defendant to rejoin several matters, and as a result the defendant in an action on a bond for any penal sums for nonperformance of covenants

or agreements contained in any indenture, deed, or writing, or upon any bonds with conditions other than for the payment of money, could not rejoin several matters to any one breach assigned in a replication. To obviate this hardship on the defendant, who was practically deprived of the benefit of the act authorizing him to plead several matters in his defense because on such a bond the plaintiff was permitted to declare generally without assigning breaches, the Supreme Court adopted a rule that if the plaintiff should declare generally, without assigning breaches, the defendant, upon demanding oyer of the bond or deed, might also in writing require the plaintiff to deliver to the defendant, together with a copy of such bond or deed, a specification, in the nature of a particular, of the breach or breaches; and that the defendant should have as much time to plead to the action, after the delivery to him of such oyer and specification, as he had at the time of demanding the same. And further it was ordered that the plaintiff should not be at liberty, without leave of court, to assign in his replication or other pleading any other or further breaches. *Van Voorst v. Morris Canal, etc., Co.*, 20 N. J. L. 167.

New York.—Under the law extant in New York in 1831, a double surrejoinder was not allowed, although a double rejoinder was. *Oakley v. Romeyn*, 6 Wend. (N. Y.) 521.

Surrejoinders Should Specifically Refer to Rejoinders.—Where several pleadings are allowed no effect should be accorded to a vague attempt to assign generally surrejoinders to rejoinders. *Western Assur. Co. v. Hall*, (Ala. 1898) 24 So. Rep. 936.

1. *Breck v. Blanchard*, 20 N. H. 333; *Bennet v. Filkins*, 1 Saund. 22, note 2.

No Admission of Facts in Inducement.—Where the rejoinder traverses a material part of the replication the plaintiff can surrejoin only by taking issue, but by so doing there is no admission of the truth of facts stated by way of inducement to the material traverse. *Fowler v. Clark*, 3 Day (Conn.) 231.

which is sufficiently confessed and avoided before, it may be passed by and another traverse may be tendered.¹

Quality of Traverse. — The traverse should be as broad as the material averments of the pleading it denies, and one in the nature of a negative pregnant is objectionable.²

Special Traverse. — This form of traverse is admissible, although little used. When adopted in the rejoinder or any later pleading there must be an inducement alleging matter inconsistent with the replication or pleading to which it is applicable, but without a direct denial of it, so as to lay the foundation of the formal traverse.³

VI. SEVERANCE OF PARTIES. — It seems that where all the defendants have joined in pleas in bar and in rejoinders, thereby uniting their defense, one of them cannot afterwards interpose a separate rejoinder going to his personal discharge.⁴

VII. WAIVER OF DEFECTS IN PRIOR PLEADINGS. — All Formal Defects in the last pleading of the opposite party are waived by pleading to it. Thus, by rejoicing such defects in the replication will be

1. *Breck v. Blanchard*, 20 N. H. 323. In this case the defendant justified in trespass by virtue of an execution issued upon a judgment obtained against the plaintiff and others, and the plaintiff replied that the judgment had been paid, without this, that at the time of the arrest it was in full force and in no part paid or satisfied. It was held that a rejoinder that the judgment was not paid as averred, taking no notice of the formal traverse offered in the replication, was good, because the traverse was of matter not alleged in the plea, that the judgment was in full force at the time of the arrest; and it was too narrow, that the judgment was in full force and in no part satisfied; for if a part remained unpaid, the arrest would have been justified.

In *Richardson v. Orford*, 2 H. Bl. 182, *overruling* the judgment of the King's Bench in the same case, *cited* 4 T. R. 439, it was observed by Eyre, C. J., that "the first traverse was of the right of all the king's subjects to fish in the arm of the sea, stated by the defendants; now this was clearly a bad and immaterial traverse, for it was not only a traverse of an inference of law, but it was so taken that if at the trial it had been proved that it was the separate right of others and not of the plaintiffs, the issue must have been found for the plaintiffs, not only without their being obliged to prove either possession or right, but where in fact they had neither possession nor right."

That an immaterial traverse might be passed over and the matter of the inducement traversed, which had been properly done in this case by the defendants.

2. *Probate Judge v. Ordway*, 23 N. H. 205, holding where the replication said that a balance of the expenses of administration of an estate was unpaid, that a rejoinder that no balance was unpaid of the expenses of administration of said estate, so far as the same had been incurred at a particular time, was not a denial of the statement of the replication, but was in fact a negative pregnant tacitly admitting the facts it seemed to controvert. See also *McCue v. Washington*, 3 Cranch (C. C.) 639.

3. *Bowman v. Harper*, 17 N. H. 571.

4. *Andrus v. Waring*, 20 Johns. (N. Y.) 153.

Denial of New Promise by Several Defendants. — Where the replication averred a new promise by several defendants, a rejoinder by one defendant that he did not promise is insufficient, as it admits that the others did. *Tracy v. Rathbun*, 3 Barb. (N. Y.) 543.

In Trespass, where all the defendants pleaded not guilty, and one of them filed a further plea in justification, the replication was that he used more force than necessary. A rejoinder that all the defendants did not use more force than necessary did not pursue the plea. *Morrow v. Belcher*, 4 B. & C. 704, 10 E. C. L. 442.

waived,¹ even if a demurrer has been filed thereto.²

Substantial Defects Not Cured. — Substantial defects in a replication will not be made good by any implication in the rejoinder; but if the matter be good though defectively pleaded, a rejoinder admitting the matter and tendering an issue on other matters will make the replication good.³

VIII. DEMURRER — 1. In General. — As a general rule advantage of any insufficiency in a rejoinder or subsequent pleading may be taken by demurrer,⁴ but the demurrer will bring into view the whole record and will be applied to the first material defect in the pleadings.⁵

2. Inconsistency. — Whether or not inconsistency is a defect of form or of substance is not clearly settled. In order to take

1. *Tarleton v. Wells*, 2 N. H. 306, holding that duplicity and a wrong conclusion of the replication were waived. See also *Tuckey v. Hawkins*, 4 C. B. 655, 56 E. C. L. 655.

A Surrejoinder will cure a departure in the rejoinder. *Keay v. Goodwin*, 16 Mass. 1.

A Motion for Judgment Non Obstante, on the ground that the caption of a reply did not state that it was a counterclaim, will not be granted where the defect has been waived by a rejoinder. *Nutter v. Johnson*, 80 Ky. 426.

2. *Aurora City v. West*, 7 Wall. (U. S.) 82.

3. *Cutler v. Southern*, 1 Saund. 117.

In *Spear v. Bicknell*, 5 Mass. 125, the plaintiff in his declaration alleged that a trespass had been committed by the defendant upon his close. The defendant pleaded that the place in question was part of a public highway, and that at the time when the alleged trespass was committed a gate obstructed his passage across the highway which he opened, as he was entitled to do. The replication admitted that the said place was a portion of the highway, but alleged that the inhabitants of a certain place and their lessees, of whom he was one, were entitled to keep up a gate for the preservation of the grass at such seasons of the year as was necessary, and that at the time of year in which the alleged trespass was committed he had found it necessary to erect the gate in question. The rejoinder did not traverse the allegation of the necessity for the gate at such time, but did traverse several other distinct matters, and it was held bad for duplicity. It was considered by the court that the rejoinder avoided a trial on the merits. If the defendant "did

not admit the necessity of the gate he ought to have traversed it. If he intended to avail himself of the defective averment of the necessity he ought to have demurred. He has taken neither of these methods, but has pleaded a bad rejoinder in which he has not traversed the necessity of the gate and has thereby admitted it."

4. *Edwards v. White*, 12 Conn. 34; *Herring v. Poritz*, 6 Ill. App. 208; *Satterlee v. Sterling*, 8 Cow. (N. Y.) 233; *Tracy v. Rathbun*, 3 Barb. (N. Y.) 543; *Union Bank v. Clossey*, 11 Johns. (N. Y.) 182; *Barnes v. Matteson*, 5 Barb. (N. Y.) 375; *Ripplinghall v. Lloyd*, 5 B. & Ad. 742, 27 E. C. L. 169.

5. **Demurrer Carried Back.** — In *McGavock v. Whitfield*, 45 Miss. 452, the plaintiff counted upon a note given by a husband and wife, the pleas set up the coverture of the wife, and the replication was that the consideration of the note brought the contract within the terms of a statute in reference to married women, and that she was bound by it. No new matter in avoidance was rejoined, and the surrejoinder did not introduce any facts in support of the declaration and replication. A demurrer to the surrejoinder was carried back to the plea, which was bad on the ground that the coverture of the wife was no defense to the husband and would not bar a recovery against him.

On Demurrer to a Surrejoinder, the rejoinder being defective, judgment will be for the plaintiff, if in that pleading the first fault was committed. *Ordinary v. Bracey*, 1 Brev. (S. Car.) 191.

Where No Cause of Action appeared in a surrejoinder it was held that there should be judgment for the defendant, although the rejoinder was bad. *Keay v. Goodwin*, 16 Mass. 1.

advantage of this defect demurrers both special and general have been used at different times. The preponderance of opinion, however, seems to be that a general demurrer will suffice to raise the point.¹

3. Double Pleading. — The opposite party may demur specially for double pleading on the part of his adversary.²

4. Wrong Conclusion. — Advantage of an erroneous conclusion must be taken by a special demurrer, as the error is one of form only.³

Where a Frivolous Rejoinder was put in for delay and the defendant refused to waive it and take issue the plaintiff was permitted to sign judgment. *Bury v. Bishop*, 1 Saund. 318*a*.

Leave to Both Parties to Amend. — Where on demurrer to a replication it seemed that both the rejoinder and the plea were not sufficiently full and conclusive both parties had leave to amend. *Reynolds v. Torrance*, 3 Brev. (S. Car.) 49.

1. Special Demurrers were used in *Paine v. Fox*, 16 Mass. 131; *White v. Clever*, 2 Ld. Raym. 1449; *Cossens v. Cossens*, Willes 26; *Nevill v. Boyle*, 11 M. & W. 26; *Scarpellini v. Atcheson*, 7 Q. B. 864, 53 E. C. L. 864; *Elliot v. Von Glehn*, 13 Q. B. 632, 66 E. C. L. 632; *Kinder v. Paris*, 2 H. Bl. 562.

General Demurrers were used in *McAden v. Gibson*, 5 Ala. 345; *Warren v. Powers*, 5 Conn. 373; *Lamer v. Chap-pell*, 2 Fla. 621; *Kilgore v. Powers*, 5 Blackf. (Ind.) 22; *Keay v. Goodwin*, 16 Mass. 1; *Harper v. Hampton*, 1 Har. & J. (Md.) 461; *Sterns v. Patter-*

son, 14 Johns. (N. Y.) 133; *Andrus v. Waring*, 20 Johns. (N. Y.) 160; *Munro v. Alaire*, 2 Cal. (N. Y.) 320; *Smith v. Felter*, 61 N. J. L. 102; *Ellis v. Rowles*, Willes 640; *Pascoe v. Pascoe*, 3 Bing. N. Cas. 898, 32 E. C. L. 374; *Wright v. Burroughes*, 3 C. B. 690, 54 E. C. L. 690; *Richards v. Hodges*, 2 Saund. 84.

2. Neff v. Powell, 6 Blackf. (Ind.) 420; *Barnes v. Matteson*, 5 Barb. (N. Y.) 375; *Stiles v. Lacy*, 7 Ala. 17; *State v. Green*, 4 Har. & J. (Md.) 542; *Nichols v. Arnold*, 8 Pick. (Mass.) 172; *McCue v. Washington*, 3 Cranch (C. C.) 639.

General Demurrer. — It was said by *Erskine, J.*, that "duplicity is not a ground of objection on general demurrer." *Wilkins v. Boucher*, 3 M. & G. 807, 42 E. C. L. 420.

Practice under English Judicature Acts. — An inconsistency or departure of a substantial character is ground for striking the pleading out as embarrassing. 3 Steph. Com. 527.

3. Bowman v. Harper, 17 N. H. 571; *State v. Green*, 4 Har. & J. (Md.) 542.

RELATORS.

See articles *INFORMATIONS IN EQUITY*, vol. 10, p. 856; *MANDAMUS*, vol. 13, p. 479; *OFFICIAL BONDS*, vol. 15, p. 83; *PARTIES TO ACTIONS*, vol. 15, p. 456; *QUO WARRANTO*, vol. 17, p. 383; and consult the General Index.

RELEASE.

By S. B. FISHER.

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I. PLEA — 1. *Necessity of Special Plea* — a. AT COMMON LAW.
— In assumpsit and trespass on the case a release may be shown

under the common-law rules of pleading under the general issue, and no special plea is necessary.¹ But it has been held that in an action of covenant a release must be specially pleaded.²

b. UNDER THE CODE. — Under the codes and practice acts a

1. Chicago, etc., Coal Co. v. Peterson, 45 Ill. App. 507; Brown v. Baltimore, etc., R. Co., 6 App. Cas. (D. C.) 237; Lyon v. Marclay, 1 Watts (Pa.) 271; Shafer v. Stonebraker, 4 Gill & J. (Md.) 345. In this latter case it was held that the plea of not guilty, in an action upon the case, puts in issue not only every material fact contained in the declaration, but every defense admissible in evidence under such plea, of which the defendant should offer testimony. Under such a plea the defendant may give in evidence a release, satisfaction, an award, a license to do the act complained of — any justification or excuse, or whatever in equity and conscience, according to the existing circumstances, precludes the plaintiff from recovering. See also 2 Greenleaf on Evidence, § 231; article PAYMENT, vol. 16, p. 170.

Action for Money Had and Received — Plea PUIS DARREIN CONTINUANCE. — In Lyon v. Marclay, 1 Watts (Pa.) 271, which was an action on the case for money had and received, the court, in holding that a release might be given in evidence under the general issue, though executed after suit brought, said: "It is contended that it was not evidence, because it appeared on its face to have been given after the suit was instituted. The suit was commenced in April, 1826, and the release was given in September, 1826. It was also argued that it should have been pleaded *puis darrein continuance* to have justified the court in the admission of it in evidence. It is true that such is the general rule; but the court may at any time, to prevent injustice, or for special reasons, permit a plea to be put in *nunc pro tunc*, although a continuance has intervened. Wilson v. Hamilton, 4 S. & R. (Pa.) 238. And see Morgan v. Dyer, 10 Johns. (N. Y.) 161. I apprehend that whenever the pleas already entered are sufficient to entitle the party to the admission of the evidence, in case it existed before the bringing of the suit, it may be given in evidence without any additional plea, or a repetition of the same plea *puis darrein continuance*. * * * No one will doubt that money had and received

in payment after action brought, but before trial, may be given in evidence under the general issue of nonassumpsit in an action on the case, or that the record of a recovery from another person equally liable with the defendant to the payment of the same sum for which the action is brought may not also be given in evidence under the general issue. * * * In the case of Bird v. Randall, 3 Burr. 1353, which was an action on the case for inducing a journeyman to leave the service of the plaintiff, Lord Mansfield says: 'An action upon the case is founded upon justice and conscience of the plaintiff's case, and is in the nature of a bill in equity, and in effect is so; and, therefore, such a former recovery, release, or satisfaction need not be pleaded, but may be given in evidence. For whatever will in equity and conscience, according to the circumstances of the case, bar the plaintiff's recovery, may in this action be given in evidence by the defendant; because the plaintiff must recover upon the justice and conscience of his case, and upon that only.' From an attentive consideration of the principles contained in this case of Bird v. Randall, it seems that satisfaction or release given after suit brought, but before trial, may be given in evidence in this action, under the general issue. And with this opinion accords the case of Baylies v. Fettyplace, 7 Mass. 325." See also article PUIS DARREIN CONTINUANCE, vol. 17, p. 262.

Action for Damages for Personal Injuries. — In Brown v. Baltimore, etc., R. Co., 6 App. Cas. (D. C.) 237, it was held that in an action for damages for personal injuries releases by the plaintiff are admissible in evidence under a plea of not guilty.

2. Johnson v. Kerr, 1 S. & R. (Pa.) 25, in which case the release was dated on the day of trial. See also Harvey v. Sweasy, 4 Humph. (Tenn.) 449, in which case it was held that in an action of debt on a note a release should be specially pleaded. See further Smithwick v. Ward, 7 Jones L. (N. Car.) 64, 75 Am. Dec. 453, which was an action for assault and battery.

release or discharge must be specially pleaded in order to be available,¹ since it is an affirmative defense of new matter.²

2. Manner of Pleading Release After Action Commenced — *a. PLEA PUIS DARREIN CONTINUANCE* — **Generally.** — As in the case of other matters of defense arising after issue joined, the defense of a release by the plaintiff may be raised by a plea *puis darrein continuance*.³

1. *San Pedro Lumber Co. v. Reynolds*, 121 Cal. 74; *Horton v. Horton*, 83 Hun (N. Y.) 213; *Nelson v. Thompson* 7 Cush. (Mass.) 502; *Bender v. Sampson*, 11 Mass. 42.

2. *San Pedro Lumber Co. v. Reynolds*, 121 Cal. 74; *Grunwald v. Freese*, (Cal. 1893) 34 Pac. Rep. 73; *Piercy v. Sabin*, 10 Cal. 30; *Glazer v. Clift*, 10 Cal. 303; *Coles v. Soulsby*, 21 Cal. 50; *Turner v. Caruthers*, 17 Cal. 431; *Gyle v. Shoenbar*, 23 Cal. 538; *Horton v. Horton*, 83 Hun (N. Y.) 213; *McKyring v. Bull*, 16 N. Y. 297; *Kirchner v. New Home Sewing Mach. Co.*, 135 N. Y. 182; *Trotter v. Mutual Reserve Fund L. Assoc.*, 9 S. Dak. 596; *Marley v. McAnelly*, 17 Tex. 658.

In *Massachusetts* a writing signed by the plaintiff in an action of assumpsit declaring that it was commenced without his authority or consent, and that he thereby discharges the same, is no defense to the action when specified in defense under the general issue. *Nelson v. Thompson*, 7 Cush. (Mass.) 502.

Release Considered New Matter. — In *Coles v. Soulsby*, 21 Cal. 47, the court, in holding that a release must be specially pleaded, said: "In our practice a denial, whether general or special, only puts in issue the allegations of the complaint. The difference between a general and special denial in this respect is only in the extent to which the allegations are traversed. New matter must be specially pleaded; and whatever admits that a cause of action, as stated in the complaint, once existed, but at the same time avoids it — that is, shows that it has ceased to exist — is new matter. It is that matter which the defendant must affirmatively establish. Such are release and accord and satisfaction. Defenses of this character must be distinctly set up in the answer, or evidence to establish them will be inadmissible. This view disposes of the appeal and necessitates a reversal of the judgment; but as by an amendment to the answer the defense of an accord and satisfaction may be set up on a second trial, it becomes

important to pass upon the other questions raised."

Release as a Consideration to Be Alleged and Proved. — A brought an action against B and averred in his complaint that C was indebted to A; that B promised A to pay C's debt if A would release C, and that in consideration of the promise A did release C. It was held that the release of C, being the alleged consideration of the promise of B, was an essential fact to be proved, and that unless proved A could not recover. *Gyle v. Shoenbar*, 23 Cal. 538.

Unnecessary Allegations as to Release in Complaint. — In *Trotter v. Mutual Reserve Fund L. Assoc.*, 9 S. Dak. 596, it was held that an allegation as to the fraudulent execution of a release is unnecessary in a complaint, since the release is a matter of defense, but that such allegation will not render the complaint demurrable. The court said: "The release is a matter of defense, which should not have been mentioned in the complaint. The allegations relating thereto must be construed together, and if stated in an answer would certainly constitute no bar to plaintiffs' recovery. They do not defeat plaintiffs' right of action. They are inoperative and useless, and should be disregarded as surplusage. Phil. Code Pl., § 133. Without them we have a debt due the estate of five thousand dollars, upon which the administrator refuses to bring suit. We think the complaint states a cause of action, and that the order overruling the demurrer should be affirmed. It is so ordered."

No Necessity for Special Plea. — In an action by a partner to enforce a partnership demand, advantage of a release of the demand, given by another partner, although not pleaded in the answer, may be taken by the defendant, when the complaint contains averments in reference to the release, and the plaintiff himself proves the partnership and introduces the release in evidence. *Hawn v. Seventy-six Land, etc., Co.*, 74 Cal. 418.

3. 1 Chitty's Pleading (16th ed.) 689;

When Unnecessary. — It has been held, however, that a general release after the commencement of the action need not be pleaded *puis darrein continuance* where no prior plea has been filed, nor need it be pleaded in bar of the further maintenance of the action merely, but a plea of such release in bar generally is good.¹

Kimball v. Wilson, 3 N. H. 96; *Wisheart v. Legro*, 33 N. H. 177; *Wade v. Emerson*, 17 Mo. 267. See, however, as to ejectment, *Doe v. Brewer*, 4 M. & S. 300; *Doe v. Franklin*, 7 Taunt. 9, 2 E. C. L. 9, in which cases it was held that the lessor of a plaintiff in ejectment cannot release the action. And see article PUIS DARREIN CONTINUANCE, vol. 17, p. 262.

Illustration of Release Pleadable Puis Darrein Continuance. — An instrument under seal, in which the obligor "agrees and binds himself" to dismiss a suit he has pending, and to "pay the costs," though it also contains a deed for the land in controversy between them, and a covenant to surrender a bond for title to the same land, is nevertheless a release of the cause of action pending, and may be pleaded to that suit *puis darrein continuance*. *Stinson v. Moody*, 3 Jones L. (N. Car.) 53.

1. *Wisheart v. Legro*, 33 N. H. 177; *Kimball v. Wilson*, 3 N. H. 96, in which case the court said: "It is also objected that the plea in this case wants form, because the release is not pleaded strictly as matter arising *puis darrein continuance*, but only as arising after the commencement of the action. If, after a plea has been filed, new matter of defense arise, it must without doubt be pleaded strictly as arising *puis darrein continuance*. In such a case, it seems by the books that courts have always held the defendant with much strictness to state the term from which and the term to which the action was continued, and that the matters arose after the last continuance. The reason why, in England, so much strictness has prevailed in relation to pleas *puis darrein continuance* is probably that it was intended to prevent the filing of them at *nisi prius*, to obtain delay. And we here adopt the same rules with regard to such pleas, with the same object. But when the matter of such a plea is in the first instance pleaded in bar, before any other plea has been filed, we imagine that the plea may be in the form which has been adopted in this case. In such a case, we apprehend that the reasons upon which the

rules relating to pleas *puis darrein continuance* are founded do not exist, and that it is sufficient if the matter be alleged to have happened after the commencement of the action. It is further urged that the matter of the plea in this case ought to have been pleaded in bar of the further maintenance of the action, and not generally in bar. It is a general rule that when matter of defense arises after the commencement of the action, it shall be pleaded only in bar of the further maintenance of the suit, and the reason of the rule seems to be that as the action must be presumed to have been rightfully commenced, such matter can, in its nature, be an answer only to the further prosecution of it. And it seems that in England, when matter arising after the commencement of the action is used as a defense, the plaintiff is entitled to costs up to the time when the matter of the bar arose. At least, the remarks of the court and of the counsel in *Le Bret v. Papillon*, 4 East 507, and in *Harris v. James*, 9 East 89, seem strongly to indicate this. But when a general release is given after the commencement of the action, the presumption is, unless the contrary appear, that the costs have been adjusted between the parties, and we are of opinion that such a release forms an exception to the general rule, and may be pleaded in bar generally."

Setting Out Release in Brief Statement.

— In *Wisheart v. Legro*, 33 N. H. 177, it was held that, under the act to abolish special pleading, the defendant could plead the general issue, and file therewith a brief statement, setting forth a general release and settlement of the action since the last continuance, it appearing that no plea had been previously filed; and that no special plea was necessary. The court said: "A general release, given after the commencement of an action, need not be pleaded *puis darrein continuance*, unless a plea has been before filed in the action; nor need it be pleaded in bar of the further maintenance of the suit, but may be pleaded in bar generally. *Kimball v. Wilson*, 3 N. H. 96; *Austin*

b. SUPPLEMENTAL ANSWER. — A release after the commencement of an action may be set up by supplemental answer.¹

c. AMENDED ANSWER. — A release given by a party after a judgment has been rendered and a review has been had in an appellate court may be set up in an amended answer, and advantage of it may be taken on a subsequent hearing in the court below.²

3. Allegations of Plea — *a.* AVERMENT OF CONSIDERATION. — In pleading a release the defendant should set out the consideration therefor,³ since a release must be founded upon some consideration.⁴

b. AVERMENT OF SEAL. — Where the action is on a sealed obligation, a plea of release should allege that the release is under

v. Hall, 13 Johns. (N. Y.) 286; 5 Bac. Abr. 479; 1 Com. Dig., I, 24, p. 98. And such a release may be pleaded in bar, after the last continuance, with the general issue. 1 Chitty's Pl. 542; 1 Tidd's Pr. 610; Everenden *v.* Beaumont, 7 Mass. 76; Austin *v.* Hall, 13 Johns. (N. Y.) 286. In the present case the matter embraced in the second brief statement, being a general release and settlement of the action since the last continuance, could have been pleaded with the general issue at the time it was; and as it could then have been pleaded in bar with the general issue, and no pleadings had been previously filed by the defendants, we think it comes within the provision of the statute, and could properly be set forth in a brief statement."

1. *Matthews v. Chicopee Mfg. Co.*, 3 Robt. (N. Y.) 711. See also *Mitchell v. Allen*, 25 Hun (N. Y.) 543; *Smithwick v. Ward*, 7 Jones L. (N. Car.) 64, 75 Am. Dec. 453.

Release of Claim for Damages. — In *Seehorn v. Big Meadows, etc.*, Wagon Road Co., 60 Cal. 240, it was held that a release of a claim for damages pending suit should be allowed to be pleaded by supplemental answer.

Waiver of Objection to Manner of Introduction. — In *Kelsey v. Hobby*, 16 Pet. (U. S.) 269, in which case a release executed after commencement of the suit was introduced, the court said: "Some objections have been made as to the manner in which the release was introduced into the proceedings. It was filed in the cause, and a motion thereupon made to dismiss the bill; and it is said that, being executed while the suit was pending, and after the answers were in, and the accounts before the master, it should have been

brought before the court by a cross-bill or supplemental answer, and could not in that stage of the proceedings be noticed by the court in any other way. It is a sufficient answer to this objection to say that it was admitted in evidence without exception, and both parties treated it as properly in the cause; and the complainant proceeded to take testimony to show that it was obtained from him by duress, and the defendants to show that it was freely and voluntarily given. It had the same effect that it would have had upon a cross-bill or supplemental answer, and the complainant had the same opportunity of impeaching it. And there is no propriety in requiring technical and formal proceedings, when they tend to embarrass and delay the administration of justice; unless they are required by some fixed principles of equity law or practice, which the court would not be at liberty to disregard."

2. *Hennings v. Conner*, 4 Bibb (Ky.) 299.

3. *Swan v. Benson*, 31 Ark. 728; *Yanney v. Hine*, 5 Ohio Cir. Dec. 301; *Hale v. Grogan*, 99 Ky. 170; *Maness v. Henry*, 96 Ala. 454; *Roche v. Morgell*, 2 Sch. & Lef. 727; *Brooks v. Sutton*, L. R. 5 Eq. 361.

4. *Roche v. Morgell*, 2 Sch. & Lef. 727; *Brooks v. Sutton*, L. R. 5 Eq. 361; 1 Dan. Ch. Pr. 669.

Answer Demurrable for Want of Averment. — An answer setting up a release of a lien for an annuity upon land devised is demurrable where it fails to aver or show any consideration, especially where the said release was given to a person having no interest in the lands. *Yanney v. Hine*, 5 Ohio Cir. Dec. 301.

seal;¹ but in other actions such averment is not necessary,² because a release *ex vi termini* imports a seal, and whether or not it has a seal, if a seal is necessary, is a matter of evidence.³

c. AVERMENT OF ACCOUNT RENDERED AND PAYMENT MADE. — It is held that a plea of release to a bill for an account should contain an averment that an account has been rendered and payment made where those facts are denied in the bill, though the release recites an account and payment.⁴

d. AVERMENT OF PERFORMANCE OF CONDITIONS OF EXECUTORY CONTRACT. — In order that an executory contract for a release upon conditions may be a defense, performance of or readi-

1. *Griggs v. Voorhies*, 7 Blackf. (Ind.) 561, in which case the court said: "The demurrer to the third plea was properly sustained. The plea did not show that the release pleaded was under seal. The debt pretended to be released was due by an instrument under seal, and it required a writing of equal dignity to release it. The weight of authority is to that effect. Co. Litt. 264; *Sellers v. Bickford*, 8 Taunt. 31, 4 E. C. L. 8; *Cordwent v. Hunt*, 8 Taunt. 596, 4 E. C. L. 216." See also *Gibson v. Weir*, 1 J. J. Marsh. (Ky.) 446; *Bender v. Sampson*, 11 Mass. 42.

2. *Bailey v. Cowles*, 86 Ill. 333; *Illinois Cent. R. Co. v. Read*, 37 Ill. 485.

3. *Illinois Cent. R. Co. v. Read*, 37 Ill. 484, which was an action on the case for personal injuries. The court said: "We have looked into the books, and can find no case wherein it has been held in pleading a release that it should be averred it was under seal. A release *ex vi termini* imports a seal, and it is matter of evidence whether it have a seal or not, if a seal be necessary. The plea should have been traversed. The demurrer admits the release for a valuable consideration. But this court said, in *Benjamin v. McConnell*, 9 Ill. 536, and we repeat here, when a valuable consideration is expressed in a release, or otherwise proved to have passed between the parties, it is totally immaterial whether the instrument is sealed or otherwise. In *Ryan v. Dunlap*, 17 Ill. 40, this court held that a release of a debt secured by mortgage need not be under seal, *a fortiori*, it need not be, where prospective damages are released."

Release and Quitclaim of Equity of Redemption. — Where a defendant pleads a release and quitclaim of his equity of

redemption in real estate to the plaintiff, and the acceptance thereof by the plaintiff as an accord and satisfaction, it is not necessary that the plea should allege that such release and quitclaim were under seal. *Bailey v. Cowles*, 86 Ill. 333.

4. *Fish v. Miller*, 5 Paige (N. Y.) 26. In this case the court said: "The plea appears to be defective in not averring that the defendant had accounted with the complainant and paid him the balance of such account. This is expressly denied in the bill, and is, therefore, an impeachment of the whole consideration of the release. It is true the release recites, as facts, that such account had been rendered and such payment made; and if the facts were properly put in issue, and it should turn out upon the proofs that the release was absolutely delivered, the release itself would be *prima facie* evidence of such facts. But the defendant should have distinctly averred these facts in his plea, so that upon a replication to the plea the complainant might have had an opportunity of showing that the allegations in his bill were true, notwithstanding these recitals in the release. Upon a replication to a plea, nothing is in issue except what is distinctly averred in the plea; and if that is established at the hearing, the plea is an absolute bar to so much of the bill as it professes to cover. It is very evident that upon a replication to this plea the truth of these recitals would not be put in issue; but only the fact that the release contained such recitals. And under such an issue, the complainant would not be permitted to introduce evidence to show that the recitals were false." *Citing Allen v. Randolph*, 4 Johns. Ch. (N. Y.) 693; *Parker v. Alcock*, 1 Y. & J. 432; *Mittf. Pl.* (Edwards's ed.) 262, 323.

ness to perform the prescribed conditions must be averred.¹

4. Release to One Joint Trespasser. — Since co-trespassers are jointly as well as severally liable for the damages occasioned by their wrongful acts, a release of one or satisfaction received from one joint trespasser may be pleaded in an action to recover damages for the trespass, and will be a conclusive answer to the suit.²

5. Release by One of Several Interested Parties. — A plea of a release made by one only of several beneficially interested parties, to one only of two defendants equally liable, is bad.³

6. Demurrer to Plea. — If the matter specially pleaded by the defendant does not come within the legal description of a release, the plaintiff should demur, as by replying and joining issue he admits the sufficiency in law of the matter.⁴

7. Striking Out Plea on Ground of Collusion. — Where a release which was obtained by collusion or fraud is pleaded *puis darrein continuance*, the court may, on application, strike such plea from the record, and may order the release to be given up for cancellation.⁵

1. *Gibbons v. Scott*, 15 Cal. 285.

2. *Stone v. Dickinson*, 5 Allen (Mass.) 29, 7 Allen (Mass.) 26; *Brown v. Cambridge*, 3 Allen (Mass.) 474.

Pleading and Proof. — In an action brought to recover damages for wrongfully causing the plaintiff to be arrested upon a writ and imprisoned thereon in jail for a long space of time, an answer which avers that during the whole time mentioned in the declaration the plaintiff was held in custody by the same officers who arrested and detained him by order of divers other persons, and that such other persons have compensated and paid the plaintiff for said imprisonment, sets forth a full defense; and it is supported by proof that several different creditors, of whom the defendant was one, caused the plaintiff to be arrested on their several writs, at the same time, by the same officer, and to be committed to jail, where he was confined upon all of the writs at the same time, and that he executed to one of such creditors a discharge under seal from all claims and demand for false imprisonment by reason of the arrest. *Stone v. Dickinson*, 5 Allen (Mass.) 29, 7 Allen (Mass.) 26.

3. *Buckmaster v. Beames*, 9 Ill. 443. In this case the court said: "The first plea interposed by defendants avers that Osborn, one of the defendants in the replevin case, had, since the last continuance of the present suit, released defendant Beames (to the extent of said Osborn's interest) from all

liability on said replevin bond. This plea, being one of *puis darrein continuance*, was defective in form, and being pleaded as a plea in bar, defective in substance. It averred a release made by one alone of three persons beneficially interested, by one who was no party to the record in any respect, and executed to one only of two defendants, equally liable."

4. *Blackburn v. Beall*, 21 Md. 208.

5. *Innell v. Newman*, 4 B. & Ald. 419, 6 E. C. L. 542. In this case a plea was struck from the record, and a release set up was canceled, when it appeared that a husband had released a deed in an action in which he was joint plaintiff with his wife, who sued as administratrix. The husband and wife were living separate under a deed by which the husband stipulated that his wife should enjoy as her separate property all effects which she might acquire, and that he would ratify all lawful proceedings to be brought in his or their names for recovering real and personal property.

So where a landlord, with the permission of the broker who had distrained on the goods of the lessee, commenced in the broker's name an action against the sheriff for taking insufficient sureties on a bond given by the lessee, who had replevied, and the broker afterwards, without the privity of the landlord, released the bond, the plea was set aside. *Hickey v. Burt*, 7 Taunt. 48, 2 E. C. L. 48. See also

II. ANSWER IN SUPPORT OF PLEA. — Where fraud or other circumstance is charged in the bill, to avoid a release the defendant pleading the release must, by proper negative averments in his plea, deny the allegations of fraud, etc., and must support his plea by a full answer and discovery as to every equitable circumstance charged in the bill in avoidance of such release.¹

III. REPLICATION — 1. Necessity Of. — As a General Rule, where the defendant pleads a release by way of defense the plaintiff should controvert it in his reply.²

Under the Provision of the Code that a reply is unnecessary unless the answer sets up a counterclaim, no reply need be filed to an answer setting up a release.³

2. What Matters May Be Replied — *a. IN GENERAL.* — Where the defendant sets up a release, it is proper to allege in the reply any matters which, if true, will avoid it, whether legal or equitable.⁴

b. NON EST FACTUM. — When a release is set up as a defense and it is intended to deny its execution, a reply of *non est factum* is proper, and a replication denying that the legal operation and effect of the release are such as to discharge the defendant is demurrable.⁵

Where a Deed of Release Is Not Set Out on Oyer, but is pleaded according to its alleged legal effect, the replication of *non est factum* puts in issue the alleged effect of the deed, as well as its execution.⁶

c. PROCUREMENT OF RELEASE BY FRAUD — **Propriety of Reply.** — Where a party has released his cause of action, being influenced

Jones *v.* Herbert, 7 Taunt. 421, 2 E. C. L. 420.

Strong Case of Fraud Must Be Made Out. — Unless, however, a very strong case of fraud is made out, the court will not control the legal power of a coplaintiff to execute a release. Jones *v.* Herbert, 7 Taunt. 421, 2 E. C. L. 420.

1. Bolton *v.* Gardner, 3 Paige (N. Y.) 273. See also generally article PLEAS IN EQUITY, vol. 16, pp. 609 *et seq.*

2. See Emerson *v.* Knower, 8 Pick. (Mass.) 63; Denniston *v.* Mudge, 4 Barb. (N. Y.) 243.

3. Dambman *v.* Schulting, 6 Thomp. & C. (N. Y.) 251. See also O'Meara *v.* Brooklyn City R. Co., 16 N. Y. App. Div. 204, in which case the court cited Arthur *v.* Homestead F. Ins. Co., 78 N. Y. 462. And see generally article REPLICATIONS AND REPLIES.

In Massachusetts, under the Practice Act, it has been held that in an action upon a promissory note, if the answer sets up a release under seal, and the release is put in evidence, the plaintiff may show that the release was obtained

by fraud, although no replication is filed by him. Lyon *v.* Manning, 133 Mass. 439.

4. Bean *v.* Western North Carolina R. Co., 107 N. Car. 731.

5. Denniston *v.* Mudge, 4 Barb. (N. Y.) 243. See also Walbourn *v.* Hingston, 86 Hun (N. Y.) 63.

6. North *v.* Wakefield, 13 Q. B. 536, 66 E. C. L. 536. In this case the court said: "We are of opinion that this rule for a nonsuit must be refused. The plea stated a release executed by the plaintiffs to one Goddard, who joined in the note on which the action was brought, whereby the defendant was released. The plaintiffs replied *non est factum*, without setting out the deed on oyer. It is clear that this replication put in issue, not only the execution of the deed, but the construction of it as alleged in the plea; it amounts to a denial that the plaintiff executed a deed having such effect as there stated. Had the deed been set out on oyer it would have been otherwise, for then the plea would be inconsistent in itself if the deed set out in it did not bear the

thereto by fraud, he may sue on such cause of action at law without resorting to equity to cancel such release;¹ and if, in such action, the release is pleaded as a defense, the plaintiff may, in his reply, allege by way of avoidance the fact that it was obtained by fraud.²

Averment that Defendant Was Party to Fraud. — A reply attempting to avoid a release on the ground that it was obtained by fraud,

construction put on it by the other part of the plea, and so the objection would be raised on demurrer." See also *Wilkinson v. Lindo*, 7 M. & W. 81.

1. *Girard v. St. Louis Car-Wheel Co.*, 46 Mo. App. 79.

2. *Girard v. St. Louis Car-Wheel Co.*, 46 Mo. App. 79, 123 Mo. 358. See also *Courtney v. Blackwell*, (Mo. 1899) 51 S. W. Rep. 668; *Bussian v. Milwaukee, etc., R. Co.*, 56 Wis. 325. *Contra*, *Hancock v. Blackwell*, 139 Mo. 440; *Och v. Missouri, etc., R. Co.*, 130 Mo. 27.

Resort to Equity to Cancel Release Unnecessary. — In *Girard v. St. Louis Car-Wheel Co.*, 46 Mo. App. 91, the court said: "The proposition that a party who has been induced by fraud or undue influence to release a right of action cannot sue directly at law upon the right of action thus released, but must first proceed in equity to avoid and cancel the release, is not, and never has been, the law. It is true that in *Blair v. Chicago, etc., R. Co.*, 89 Mo. 383, there is this observation in the opinion of the court: 'The release being valid, it was necessary that its bar be removed by appropriate procedure in order to the successful prosecution of the action at law.' As the plaintiff in that case took the course indicated by the remark of the court, it was not necessary for the court to decide that it was necessary for her to do so. The remark is, therefore, a mere dictum. That it does not correctly express the law is shown by the statement of Mr. Chitty in his work on pleadings, where he says that 'to a plea of release, he (the plaintiff) may reply *non est factum*, or that it was obtained by duress or fraud, and it is unnecessary and injudicious to state the particulars of the fraud.' 1 Chitty on Pleading [16th Am. ed.] 608. While the last clause of this authoritative writer, that it is not necessary or judicious for the plaintiff in his reply to state the particulars of the fraud, was the rule of pleading at common law, yet it does not remain the rule of

pleading under our code of procedure. In another place the same author gives the form of a reply of fraud, where the defendant had pleaded a release. 2 Chitty 455. This rule of pleading was recognized in the opinions of the judges in *Wild v. Williams*, 6 M. & W. 490, where they refuse to strike out a plea *puis darrein continuance*, setting up a release, on affidavits showing that the release was obtained by fraud, holding that the plaintiff could contest the plea on that ground under a replication setting up the fraud. That the plaintiff may, in an action at law, reply fraud to a plea or answer setting up a release of the cause of action, was held by the Supreme Court of New Hampshire in *Webb v. Steele*, 13 N. H. 230, and in *Hoitt v. Holcomb*, 23 N. H. 535, and by the Supreme Court of Illinois in *Chicago, etc., R. Co. v. Lewis*, 109 Ill. 120, in both of which states the common-law system of pleading is understood to prevail. The same rule has been declared in Wisconsin (*Bussian v. Milwaukee, etc., R. Co.*, 56 Wis. 335), and inferentially in New York (*Dixon v. Brooklyn City, etc., R. Co.*, 100 N. Y. 170), in both of which states there is a system of code procedure similar to that which obtains with us. This court evidently took the same view of the question in *Vautrain v. St. Louis, etc., R. Co.*, 8 Mo. App. 538, though the opinion is not very distinct on the point; and it is to be added that that case was affirmed by the Supreme Court on appeal (78 Mo. 44), although without noticing the particular point. We, therefore, overrule this assignment of error." See also *O'Donnell v. Clinton*, 145 Mass. 461; *Peterson v. Chicago, etc., R. Co.*, 38 Minn. 511; *Lusted v. Chicago, etc., R. Co.*, 71 Wis. 391; *Ryan v. Gross*, 68 Md. 377.

General Replication Insufficient to Admit Evidence of Fraud. — Where the answer sets up a release as a defense to the matter stated in the bill, and the plaintiff replies generally, he cannot at the hearing read testimony impeaching

where the fraud is alleged to have been perpetrated by a third person, must show either that it was done by the defendant's authority or that he was a party to it.¹

d. CIRCUMSTANCES INVALIDATING RELEASE. — Although an averment against the express words of a written discharge is not admissible,² a replication to a plea of release is good where it sets out the releasing instrument *in hæc verba*, by which it appears that the release was to be void in certain circumstances, and avers those circumstances.³

e. MISTAKE OF PARTIES. — According to some decisions, it would seem that when a general release is pleaded as an affirmative defense to a cause of action, the plaintiff may show that by a mutual mistake of the parties, or a mistake on his part and fraud on the part of the defendant, the cause of action was included in the release, contrary to the agreement and intent of the parties, or, in case of fraud, contrary to his intent.⁴

f. BY JOINT PLAINTIFFS LIMITING RELEASE TO SEPARATE DEMAND OF ONE. — Where, in an action by partners for their joint demand, a release to a debtor of the firm signed by one

the release as fraudulent. *Wilson v. Wilson*, 2 Dev. Eq. (N. Car.) 182, *citing* *James v. M'Kernon*, 6 Johns. (N. Y.) 545; *Lyon v. Tallmadge*, 14 Johns. (N. Y.) 501.

Replication of Fraud — Pleading and Proof. — Where in an action on a bond a release from the obligee was pleaded, and the plaintiff replied setting up fraud in obtaining the release, it was held that only fraud in the execution of the release could be given in evidence, and not that it was given in fraud of certain rights of the attorney of the plaintiff. *Anderson v. Johnson*, 3 Sandf. (N. Y.) 1.

1. *Meka v. Brown*, 84 Iowa 711. In this case a written contract of settlement was set up as a defense, and the reply alleged that the plaintiff's signature thereto was fraudulently obtained by a third person. It was held that such reply constituted no defense, in the absence of any allegation that such third person acted by the defendant's authority, and that evidence as to the alleged fraudulent acts of the third party were properly excluded.

Designation of Agents Making Fraudulent Representation. — A reply that the release was obtained through false and fraudulent statements by the defendant's agents is insufficient because of its failure to designate the agents by whom such fraudulent statement was made. *The Oriental v. Barclay*, 16 Tex. Civ. App. 193.

2. *Palmer v. Corbin*, 1 Root (Conn.) 271. In this case, which was an action of trespass committed on land, the defendant pleaded in bar a discharge which was: "Sept. 13, 1790, received of Selah Corbin forty shillings in full of all book accounts, and of all other demands, from the beginning of the world to this day." The plaintiff replied that he gave said discharge upon a settlement of their book accounts, and on a dispute they had respecting a steer; that the trespass complained of was not thought of nor included in said settlement or discharge, and was wholly the interest of one Mr. Talbot. The reply was held insufficient. The words made use of in the discharge included this trespass, and an averment contrary to the words of the discharge was not admissible.

3. *Nevill v. Boyle*, 11 M. & W. 26; *Hyde v. Watts*, 12 M. & W. 254.

4. *Kirchner v. New Home Sewing Mach. Co.*, 135 N. Y. 182. In this case the court said: "Generally speaking, whatever proofs would be regarded as sufficient to enable the plaintiff to maintain an action for the reformation of the release, so as to except from its provisions the demand in suit, would be available to him in this action by way of avoidance of its terms. There are numerous cases in this court determining when such an action will lie and what evidence is required to support it." *Citing Bryce v. Lorillard F.*

partner is pleaded by way of defense, and the partners desire to show that such release was intended to apply only to the separate demand of the partner signing it, they should reply alleging this fact.¹

IV. QUESTIONS FOR JURY — Fraud or Collusion. — Where a release has been pleaded, the question as to whether or not such release was voluntary, or was fraudulently or collusively obtained, is for the jury.²

Capacity of Plaintiff to Execute. — Where a release of the plaintiff's claims has been pleaded in defense to the action, the question as to the plaintiff's mental capacity to execute the release is for the jury.³

Ins. Co., 55 N. Y. 240; Maher *v.* Hibernia Ins. Co., 67 N. Y. 283; Paine *v.* Jones, 75 N. Y. 593; Kilmer *v.* Smith, 77 N. Y. 226; Smith *v.* Truslow, 84 N. Y. 661; Albany City Sav. Inst. *v.* Burdick, 87 N. Y. 40. See also Walbourn *v.* Kingston, 86 Hun (N. Y.) 63.

1. Emerson *v.* Knower, 8 Pick. (Mass.) 63.

2. Eastman *v.* Wright, 6 Pick. (Mass.) 316; Loring *v.* Brackett, 3 Pick. (Mass.) 403; Girard *v.* St. Louis Car-wheel Co., 46 Mo. App. 79; Julius *v.* Pittsburg, etc., Traction Co., 184 Pa. St. 19.

3. Gibson *v.* Western New York, etc., R. Co., 164 Pa. St. 142.

RELIEF.

See articles *DECREES*, vol. 5, p. 946; *JUDGMENTS*, vol. 11, p. 796; *PRAYERS FOR RELIEF*, vol. 16, p. 774.

RELIGIOUS SOCIETIES.

By S. B. FISHER.

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See generally article *CORPORATIONS*, vol. 5, p. 52; and as to matters of Substantive Law and Evidence, consult *AMERICAN AND ENGLISH ENCYCLOPEDIA OF LAW* (2d ed.), titles *DE FACTO CORPORATIONS*, vol. 8, p. 747, and *RELIGIOUS SOCIETIES*.

I. ACTIONS BY RELIGIOUS SOCIETIES — 1. Incorporated Societies —

a. CAPACITY TO SUE — Suits by Corporations De Facto. — In order to sue as a corporation it is not necessary that a religious society be a corporation *de jure*. It is sufficient, it seems, if it is a corporation *de facto*.¹

b. BY WHOM BROUGHT — (1) In General. — An action by an incorporated religious society should be brought by or through the board of trustees of such society, or by an agent appointed by the church or its board of trustees.² And it may be brought by trustees *de facto*.³

1. *First Baptist Church v. Branham*, 90 Cal. 22; *Baltimore, etc., R. Co. v. Fifth Baptist Church*, 137 U. S. 568; *West Koshkonong Congregation v. Ottesen*, 80 Wis. 62.

In *Baltimore, etc., R. Co. v. Fifth Baptist Church*, 137 U. S. 568, which was an action of tort, it was held, upon a plea of *nul tiel corporation*, that evidence that the plaintiff, after filing a defective certificate of incorporation under a general corporation law, acted for years as a corporation, and recovered a judgment as such in a similar action against the defendant without any objection made to its capacity to sue, was competent and sufficient to prove it a corporation *de facto* and therefore entitled to maintain the action.

2. *Drumheller v. First Universalist Church*, 45 Ind. 275; *Leftwick v. Thornton*, 18 Iowa 56; *Humphrey v. Burnside*, 4 Bush (Ky.) 223; *Stokes v. Phelps Mission*, 47 Hun (N. Y.) 570; *Phipps v. Jones*, 20 Pa. St 260, 59 Am. Dec. 708; *German Evangelical Congregation v. Hoessli*, 13 Wis. 348. See also *Skinner v. Richardson*, 76 Wis. 464; *Methodist Episcopal Church v. Sherman*, 36 Wis. 404.

Suits by Trustees to Enforce Contracts Made Prior to Organization. — The trustees of an incorporated church, as the representatives of all the members of a church, may, in the corporate name, enforce agreements made for the use and benefit of the society before its legal organization. On a bill to en-

force such an agreement specifically, it is immaterial with whom the agreement was made, and in that regard the fact need not be proved as alleged; and it is not necessary to state the names of such persons, as the agreement is enforceable in the corporate name. *Whitsitt v. Preëmption Presb. Church*, 110 Ill. 125. In this case the court said: "The point is much pressed that the proof does not support the allegations of the bill; that the bill alleges the agreement was made with William Hammond and others, and that there should be strict proof of an agreement made with William Hammond and others, in which there is not only entire failure, but that the name of Hammond does not appear at all in any of the affairs in question until his election as one of the trustees, on June 2, 1880, at the legal organization of the religious society. * * * Any agreement which was made here was made for the use and benefit of this Presbyterian church, and these trustees who bring this suit represent the interests of all the church members as to church property, and may enforce agreements made for the use and benefit of the society before its legal organization."

3. *First Baptist Church v. Branham*, 90 Cal. 22; *Green v. Cady*, 9 Wend. (N. Y.) 414. In this case the court said: "Without inquiring whether this religious society was duly incorporated or not, I am of opinion that the plaintiffs had sufficient possession of the meeting house to entitle them to main-

(2) *One of Several Trustees.*—One of several trustees may sue in behalf of the society, where the society itself cannot bring the action because the act complained of is the act of other trustees.¹

c. **USE OF CORPORATE NAME**—(1) *In General.*—As a general rule actions by incorporated religious societies should be brought in the corporate name of such societies, and not in the name of the trustees.² This is in accordance with the usual practice in actions by and against corporations.³

(2) *Statutory Exceptions.*—By statute, however, in some states, a suit on behalf of a religious corporation is properly brought in the name of its trustees as such.⁴ In order that the trustees

tain trespass against the defendant. Admitting that they were not legally trustees in pursuance of the provisions of the act regulating the incorporation of religious societies, 2 R. L. 212, they were trustees *de facto*, and as such had possession of the house according to the fourth section of that act; and that possession, being under color of right, was sufficient to entitle them to bring a suit against a trespasser." *Citing People v. Runkle*, 9 Johns. (N. Y.) 147.

Suit by Officers Not Elected as Provided by Law.—In *West Koshkonong Congregation v. Ottesen*, 80 Wis. 62, it was held that for the purposes of an action by the corporation to recover possession of its property, it is immaterial that its first meeting for the election of officers was not called in the manner provided by law. It is sufficient that it has officers *de facto*.

1. *Stokes v. Phelps Mission*, 47 Hun (N. Y.) 570, wherein the court said: "That actions may under certain conditions be brought upon behalf of a corporation by one of its trustees to redress wrongs done to the corporation seems to be too well settled to require citation of authority, and that this right exists as well in respect to religious corporations as to civil corporations is equally well settled." See also *Berryman v. Reese*, 11 B. Mon. (Ky.) 287; *Associate Reformed Church v. Theological Seminary*, 4 N. J. Eq. 77.

2. *Leftwick v. Thornton*, 18 Iowa 56; *First Baptist Church v. Branham*, 90 Cal. 22. See also *Baltimore*, etc., R. Co. v. *Fifth Baptist Church*, 137 U. S. 568.

Action Against Trustees.—An action to recover money due a church on a verbal contract with its trustees should be brought in the corporate name and not in the name of the trustees. *Leftwick v. Thornton*, 18 Iowa 56.

Use of Corporate Name by Corporation De Facto.—The trustees of a religious corporation *de facto* may sue in its corporate name until its existence is called in question by a direct proceeding upon information of the attorney-general. *First Baptist Church v. Branham*, 90 Cal. 22.

Action by Trustees—Judgment for Corporation.—In an action brought by trustees in their own names for the use of the corporation of which they are officers, the court may render judgment for the corporation. *Leftwick v. Thornton*, 18 Iowa 56.

3. See article CORPORATIONS, vol. 5, p. 62.

4. **Indiana.**—By statute a church organization can sue only in the name of "wardens and vestrymen of — church, —," or in the name of the "trustees of — church, —." *Drumheller v. First Universalist Church*, 45 Ind. 275. See also *Hamrick v. Bence*, 29 Ind. 500; *Wiles v. Philippi Church*, 63 Ind. 206.

Wisconsin.—Where an action is brought by the trustees of a religious society, there being statutes under which such trustees could have been incorporated, it will be presumed that they were incorporated and that they have legal capacity to sue. *Skinner v. Richardson*, 76 Wis. 464.

Amendment by Substituting Proper Names.—In *Methodist Episcopal Church v. Williamson*, 7 Del. Co. Rep. (Pa.) 129, it was held that the complainant in a bill filed in the name of the Methodist Episcopal Church of the United States of America, which is a body incapable of suing, would be permitted to amend by substituting as plaintiffs the names of the trustees of the particular church which was the real plaintiff, where the defendants had answered without objection.

may maintain an action under such statute, it is not necessary that the right to the office of trustee shall first have been settled by *quo warranto*.¹

(3) *Misnomer* — *How Pleaded*. — In an action by a religious corporation, the misnomer of the plaintiff is pleadable in abatement only, and is waived by pleading to the merits.²

d. AVERMENT OF INCORPORATION. — As to the necessity of the averment of incorporation, in an action by or against a religious society, the decisions are at variance as in the case of actions by or against other corporations.³ Thus in some jurisdictions it is held that an averment of the corporate existence of religious societies is unnecessary.⁴ In those states, however, where corporate existence must be alleged, such averment is necessary in an action by or against an incorporated religious society.⁵

e. DENIAL OF PLAINTIFF'S CORPORATE EXISTENCE — (1) *Manner*. — As in the case of actions by other corporations, the authorities differ as to the manner of denying the corporate existence of the plaintiff in actions by religious societies.⁶

1. Gaff *v.* Greer, 88 Ind. 122.

2. Baltimore, etc., R. Co. *v.* Fifth Baptist Church, 137 U. S. 568. See also Methodist Episcopal Church *v.* Tryon, 1 Den. (N. Y.) 451; Society, etc., *v.* Pawlet, 4 Pet. (U. S.) 501; Christian Soc. *v.* Macomber, 3 Met. (Mass.) 237; Gould's Pl., c. 5, § 79.

3. See article CORPORATIONS, vol. 5, p. 70 *et seq.*

4. Board of Domestic Missions *v.* Von Puechelstein, 27 N. J. Eq. 30; Zion Church *v.* St. Peter's Church, 5 W. & S. (Pa.) 215, where the court said: "No precedent of an averment of incorporation or of a profert of the charter has been produced in any declaration by a corporation; nor is there a reason why there should be one. Unlike a bond or a grant of administration, it is no part of the title to sue, any more than an act of baptism is part of such a title. Nothing but a deed or grant of administration is pleaded with a profert, and oyer cannot be demanded of a private statute even when a profert has been made of it. The name, in this instance, imports that the plaintiff is a body politic; and had the fact been otherwise, the defendant might have pleaded the want of an act of incorporation in abatement, or perhaps more properly in bar. But the parties went to issue on another fact, and it was afterwards too late to inquire into anything else."

5. Stoddard *v.* Onondaga Annual

Conference, 12 Barb. (N. Y.) 573; American Baptist Home Mission Soc. *v.* Foote, 52 Hun (N. Y.) 308.

6. See generally article CORPORATIONS, vol. 5, p. 77 *et seq.*

By Plea in Abatement or in Bar. — In Methodist Episcopal Church *v.* Wood, 5 Ohio 283, the court said: "If the defendant intended to object the want of capacity in the plaintiffs to sue, he should have pleaded that matter specially, in abatement or bar. He has pleaded the general issue. This admits the capacity of the plaintiffs to sue in the corporate character they have described for themselves." *Citing* Conard *v.* Atlantic Ins. Co., 1 Pet. (U. S.) 386; Society, etc., *v.* Pawlet, 4 Pet. (U. S.) 501; Com. *v.* Foster, 1 Mass. 488; Stafford *v.* Bolton, 1 B. & P. 40; 1 Saund. 340, note 2.

In Zion Church *v.* St. Peter's Church, 5 W. & S. (Pa.) 215, it was held that in a suit by a religious corporation the want of a charter may be pleaded in abatement, or perhaps in bar. See also, to the effect that *nul tiel corporation* may be pleaded in abatement as well as in bar, Christian Soc. *v.* Macomber, 3 Met. (Mass.) 235.

Under General Issue with Notice. — In Christian Soc. *v.* Macomber, 3 Met. (Mass.) 235, it was held that before the statutes of 1836, c. 273, prohibited pleas in bar, *nul tiel corporation* might have been pleaded in bar as well as in abatement, and since the passing of that

(2) *Admission by Pleading Over to the Merits.*—In an action by a religious corporation, if the defendant pleads over to the merits, he thereby admits the corporate existence of the plaintiff.¹

(3) *Effect of Denial.*—In an action brought by a religious society, the plaintiffs must prove their corporate existence if it is put in issue.²

2. Unincorporated Societies. (See also article UNINCORPORATED ASSOCIATIONS.)—*a.* WHO MAY MAINTAIN—(1) *In General.*—A suit in behalf of an unincorporated religious society may be maintained by the trustees thereof³ or by a committee appointed by the society.⁴

(2) *Parties by Representation.*—In accordance with the rule in equity and under the code that where the parties are numerous, one or more of several interested persons may sue for all,⁵ though the several members of a religious society may unite as plaintiffs,⁶ one or more may prosecute an action for all the members as well as for themselves.⁷

statute, if the plaintiff sues as a corporation, and the defendant on pleading the general issue gives notice, conformably to the rule of court, that he will deny that the plaintiffs are a corporation, they are bound to prove their corporate existence.

General Denial Insufficient.—In *Wiles v. Philippi Church*, 63 Ind. 206, it was held that the general denial does not put in issue the corporate existence of the plaintiff. *Citing* *Wert v. Crawfordsville, etc.*; *Turnpike Co.*, 19 Ind. 242; *Adams Express Co. v. Hill*, 43 Ind. 157; *Indianapolis Furnace, etc., Co. v. Herkimer*, 46 Ind. 142; *Presbyterian Church v. Horton*, 50 Ind. 223; and *Christian Church v. Johnson*, 53 Ind. 273. See also *Methodist Episcopal Church v. Wood*, 5 Ohio 283.

General Issue Without Notice.—If, in an action by a religious corporation, the defendant pleads the general issue without notice of his intention to deny the corporate existence of the plaintiff, he thereby admits the existence of the corporation. *Christian Soc. v. Macomber*, 3 Met. (Mass.) 235.

1. *Worrell v. First Presb. Church*, 23 N. J. Eq. 96; *Zion Church v. St. Peter's Church*, 5 W. & S. (Pa.) 215.

Objection Waived.—In *Young Men's Christian Assoc. v. Dubach*, 82 Mo. 475, it was held that the question of legal capacity of the plaintiff to sue as a corporation must be raised by demurrer or answer, or it is waived.

2. *Methodist Episcopal Union Church v. Picket*, 23 Barb. (N. Y.) 436, 19 N. Y.

482. See also *Methodist Episcopal Church v. Tryon*, 1 Den. (N. Y.) 451.

Evidence Sufficient to Prove De Facto Corporation.—See Am. and Eng. Encyc. of Law, titles *De Facto Corporations*, vol. 8, p. 747; *Religious Societies*.

3. *White v. Rice*, 112 Mich. 403; *Lilly v. Tobbein*, (Mo. 1890) 13 S. W. Rep. 1060; *Beatty v. Kurtz*, 2 Pet. (U. S.) 566; *Callsen v. Hope*, 75 Fed. Rep. 758. *Compare* *Curd v. Wallace*, 7 Dana (Ky.) 190, 32 Am. Dec. 85, in which case it was declared that at common law an unincorporated religious society could not sue in its aggregate name, or in the names of its agents or trustees not vested with a right of property, but that by Act Ky. 1814 the trustees of an unincorporated religious society in whom title is vested might sue in their own names for the safe keeping and preservation thereof.

4. *Hadden v. Chorn*, 8 B. Mon. (Ky.) 70; *Humphrey v. Burnside*, 4 Bush (Ky.) 215.

5. See article PARTIES TO ACTIONS, vol. 15, p. 627.

6. *Methodist Episcopal Protestant Church v. Adams*, 4 Oregon 77.

7. *Baker v. Ducker*, 79 Cal. 365; *McConnell v. Gardner*, 1 Morr. (Iowa) 272; *Fink v. Umscheid*, 40 Kan. 271; *Methodist Episcopal Protestant Church v. Adams*, 4 Oregon 77.

Where there Is a Board of Trustees.—In *Wheelock v. First Presb. Church*, 119 Cal. 477, it was held that several of the members of an unincorporated religious society may prosecute an action

b. THE COMPLAINT — Allegations as to Parties. — Where part of the members of a religious society are suing for all, the petition should set forth facts justifying such course.¹

II. ACTIONS AGAINST RELIGIOUS SOCIETIES — 1. Incorporated Societies — *a.* USE OF CORPORATE NAME — (1) *General Rule.* — As in the case of other corporations,² an incorporated religious society must be sued in its corporate name,³ and it has been held that a suit against the trustees of such a corporation individually, designating them as trustees of the corporation, omitting part of the corporate name, is not a suit against the corporate body, the designation superadded being merely *descriptio personæ*.⁴

or all the members of the church as well as for themselves, even though such society has a board of trustees. See also to the same effect *Baker v. Ducker*, 79 Cal. 365.

Where Property Has Been Given in Trust for a church not incorporated, it is competent for any person belonging to that church, on behalf of himself and of all others belonging to that church and entitled to the use of the funds, to come into a court of equity to enforce the execution of the trust. And if such church consists of various congregations, any one or more of such congregations, being incorporated, may in like manner enforce the execution of the trust. *Associate Reformed Church v. Theological Seminary*, 4 N. J. Eq. 77.

1. *McConnell v. Gardner*, 1 Morr. (Iowa) 272. In this case the court, in refusing to entertain a bill filed by an elder of a church in his name and right as an elder, to secure the title to a church lot granted to the church of which he was a member and elder, said: "As a general rule, all the members of a voluntary association should be joined in the petition, but to prevent the inconvenience and delay which such a requirement would occasion, where the members are numerous, courts of equity have of late countenanced the mode of a part commencing proceedings in behalf of all. But the petition in such a case should set forth facts to justify that course. In the present case it does not appear that the number of associated members is so great as to create inconvenience in having all their names joined. Nor is the proceeding instituted by McConnell in behalf of the association, but for himself alone, although it would be reasonable to infer that his success would redound to the exclusive benefit of the whole association. That is a matter,

however, which should not be left to inference."

Sufficient Averment of Common or General Interest. — In *Baker v. Ducker*, 79 Cal. 365, it was held that a complaint averring that the plaintiffs, together with a large number of other persons, were associated together for religious purposes, and were members of the First Reformed Church of the city of Stockton, and that the plaintiffs prosecuted the action for all the members of the church as well as themselves, showed the question to be one of common or general interest of many persons, and that the action was authorized by Code Civ. Pro. Cal., § 382.

2. See article CORPORATIONS, vol. 5, p. 62.

3. *Tartar v. Gibbs*, 24 Md. 323; *African Methodist Bethel Church v. Carmack*, 2 Md. Ch. 143; *Ladd v. Methodist Episcopal Church*, 1 Mich. N. P. 143.

4. *Tartar v. Gibbs*, 24 Md. 323. In this case the court said: "The defendants, the appellants, are sued individually, the designation 'trustees of the African Methodist Episcopal Church' superadded being a *descriptio personæ*. This is not a mere misnomer, but suing them in a different capacity."

Repetition of Full Name of Corporation.

— In *Antipoeda Baptist Church v. Mulford*, 8 N. J. L. 182, it is held that where the name of the corporation is correctly stated at the commencement of the declaration, thus: "The Trustees of the A B C of," etc., and in the subsequent part of the declaration it is alleged that "being so indebted they the said trustees * * * undertook and promised," this is a sufficient allegation that the promise was made by the corporation, and not by the trustees individually. It is not necessary to repeat the full name of the corporation

(2) *Statutory Provisions.* — By statute in some states incorporated religious societies can sue only by their trustees and can be reached by suit only through their trustees; as a church they cannot sue or be sued, but actions by or against them must be brought by or against the trustees.¹

b. SERVICE OF PROCESS — (1) *Upon Whom Made.* — Service of process in a suit against an incorporated religious society should be made upon the officers of such society who are *de facto* in possession of their offices, and a default based upon service made otherwise will be vacated.²

(2) *Waiver.* — In an action against an incorporated religious society, a general appearance by the defendant constitutes a waiver of the issuance and service of the writ.³

c. AVERMENT OF CORPORATE EXISTENCE — (1) *In General.* — As in the case of actions against other corporations, the authorities differ as to the necessity of averring the corporate existence of a religious society against which an action is brought.⁴

(2) *Objection for Want of Averment.* — An objection that the corporate character of a defendant religious society does not sufficiently appear by the bill cannot avail at the final hearing.⁵

at every recurrence in the declaration; reference in a clear manner to the name already given is sufficient.

1. *Ada Street M. E. Church v. Garnsey*, 66 Ill. 132, which case was decided under Act Ill. 1885, § 2. See also *First Cong. Church v. Stewart*, 43 Ill. 81; *Willard v. Methodist Episcopal Church*, 66 Ill. 55.

Effect of Error in Suing Church Instead of Trustees. — Advantage of an error made in suing a church as such, when, by statute, the suit should have been brought against its trustees, cannot be taken on appeal when it has been overlooked in the court below. *Ada Street M. E. Church v. Garnsey*, 66 Ill. 132.

2. *Berrian v. Methodist Soc.*, (N. Y. Super. Ct. Spec. T.) 4 Abb. Pr. (N. Y.) 424, in which case it was held that where a suit is commenced by service upon parties claiming to be officers, but not in possession of the offices, upon motion of the officers *de facto* after judgment by default, all the proceedings must be vacated as irregular, that the title of the acting trustees cannot be investigated upon such motion, and that if they are intruders, the court has no jurisdiction to determine the question. The court said: "The persons who for over five years have met in the church edifice for worship, have elected the officers of the society, and appointed and supported its

preachers, must be deemed for all the purposes of this motion as competent to appoint the trustees. And the trustees and officers appointed by them, in conformity with the provisions of the statute, and who have, in fact, acted and are continuing to act as such, are at least trustees and officers *de facto*; and on them alone, while such a state of things exists, can a valid service of process be made. How much a want of conformity in their proceedings to the discipline of the society may affect the title of the acting trustees or their agents to their officers cannot be investigated on this motion."

3. *Zion Church v. St. Peter's Church*, 5 W. & S. (Pa.) 215.

4. See article CORPORATIONS, vol. 5, p. 70.

Name Importing Corporation. — It has been held that a religious corporation may be declared against by the name by which it is known, without alleging that it is chartered or incorporated, if the description impliedly amounts to an allegation that the defendant is a corporate body. *Ladd v. Methodist Episcopal Church*, 1 Mich. N. P. 47.

5. *Worrell v. First Presb. Church*, 23 N. J. Eq. 96. In this case the court said: "Whatever force these objections might have had at an earlier stage of the cause, they cannot avail now. The defective allegations of corporate char-

d. DENIAL OF CORPORATE EXISTENCE. — The general rule as to the manner and effect of a denial of corporate existence in actions against corporations, applies in the case of actions against incorporated religious societies.¹

2. Unincorporated Societies — *a.* AGAINST WHOM BROUGHT. — A religious society which is not incorporated according to law cannot be sued as an organization.² It is not a person, and has no power either to sue or be sued.³ But the members of such society are liable as joint promissors or partners on contracts made by them in its behalf,⁴ and they may be sued collectively.⁵ See also article UNINCORPORATED ASSOCIATIONS.

b. PARTIES BY REPRESENTATION — **General Rule.** — Where the individual members of an unincorporated religious society are too numerous to admit of all being effectively brought before the court, one or more of them may be sued, and may defend for the whole.⁶

III. INJUNCTION AGAINST MISUSE OF PROPERTY — **Parties Plaintiff.** — A part, and in fact, even a minority of the trustees of a religious society may move for an injunction against a diversion of the society's property to the use of any other society. And in a case where all of the trustees are engaged in such diversion

acter and ecclesiastical rules have been waived or substantially supplied by the answer and proofs."

1. See article CORPORATIONS, vol. 5, p. 79.

Corporate Existence Not Put in Issue by General Denial. — As holding that a general denial does not put in issue the corporate existence of the defendant in actions against a religious society, see *Wiles v. Philippi Church*, 63 Ind. 206.

Notice of Intention to Deny Corporate Existence. — In *Massachusetts*, in an action against a religious society described in the writ as 'a body corporate for certain purposes,' if the defendants would deny their existence or organization as a corporation they must give notice of their intention to do so in a specification of defense. *Townsend v. First Freewill Baptist Church*, 6 Cush. (Mass.) 279, the court saying: "If the defendants intended to deny their existence or their organization as a corporation, they must have pleaded in abatement or in bar, under the old system of pleading; and since the statute abolishing special pleading, they must give notice of their intention to do so in a specification of defense."

2. *Keller v. Tracy*, 11 Iowa 530; *Burton v. Grand Rapids School Furniture Co.*, 10 Tex. Civ. App. 270; *Wilkins*

v. St. Mark's Protestant Episcopal Church, 52 Ga. 351.

3. *Burton v. Grand Rapids School Furniture Co.*, 10 Tex. Civ. App. 270.

4. *Wilkins v. St. Mark's Protestant Episcopal Church*, 52 Ga. 351.

5. *Keller v. Tracy*, 11 Iowa 530; *Burton v. Grand Rapids School Furniture Co.*, 10 Tex. Civ. App. 270.

6. *Wheelock v. First Presb. Church*, 119 Cal. 477; *Keller v. Tracy*, 11 Iowa 530, in which case it was said: "The church, if incorporated, should have been sued by its corporate name. If not, the individual members of the church might have been sued collectively, or, under section 1680 of the Code of 1851, if they were too numerous and it was impracticable to bring them all before the court, then one or more could have been sued, who could have defended for the whole, provided Tracy acted as their agent. In either event, whether against the corporation as such, or against the individual members of the church, the Catholic bishop holding the legal title should also have been made a party."

As to the general practice in the case of numerous parties plaintiff or defendant, see article PARTIES TO ACTIONS, vol. 15, p. 727.

Averment of Facts Justifying Omission of Parties. — Where a part of the mem-

or interference, any member of the church may institute the action, if not in the name of the corporation, at least in his own name for the benefit of all the members.¹

Action in Corporate Name. — An action for an injunction to restrain interference with the management or control of the property of a religious society by persons wrongfully claiming to be trustees is properly brought by the trustees in their corporate name, and the state need not be a party.²

bers of an unincorporated religious society are sued for all, the plaintiff should allege that all the members of such society have a common and personal interest in the cause, and also that by reason of their numbers it is impracticable or inconvenient to bring

them all before the court. *Wheelock v. First Presb. Church*, 119 Cal. 477.

1. *First Reformed Presb. Church v. Bowden*, (Supm. Ct. Spec. T.) 10 Abb. N. Cas. (N. Y.) 1.

2. *German Evangelical Congregation v. Hoessli*, 13 Wis. 348.

REMAND.

See article *MANDATE AND PROCEEDINGS THEREON*, vol. 13, p. 835.

REMEDY AT LAW.

By S. B. FISHER.

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CROSS-REFERENCES.

See generally articles in which subjects of equity jurisdiction are treated, such as *CREDITORS' BILLS*, vol. 5, p. 388; *INJUNCTIONS*, vol. 10, p. 951; *QUIETING TITLE*, vol. 17, p. 274; *RESCISSION, REFORMATION, AND CANCELLATION OF INSTRUMENTS*; *SPECIFIC PERFORMANCE*; and the General Index of this work. And see the title *EQUITY*, 11 AM. AND ENG. ENCYC. OF LAW (2d ed.) 199 *et seq.*

I. AS OUSTING JURISDICTION OF EQUITY. — There are certain heads of equity jurisdiction which are dependent upon the want or inadequacy of legal remedies, and these heads are so numerous and of such importance that it is often broadly stated as a general rule that equity is without jurisdiction where there is an adequate remedy at law.¹

Jurisdiction Dependent upon Statute. — In some states the jurisdiction of the courts as courts of equity is dependent upon statutes which limit the jurisdiction to those cases where there is not a plain, adequate, and complete remedy at law.²

II. AVERMENTS IN BILL AS TO INADEQUACY OF LEGAL REMEDY — **1. Necessity of Averment.** — In order to give jurisdiction to a court of equity the plaintiff's bill must, in various classes of actions, show that there is no legal remedy, or that it is inadequate under the circumstances;³ and in those states where the jurisdiction of the courts as courts of equity is limited by statutes to

1. *Colton v. Price*, 50 Ala. 424; *Curry v. Peebles*, 83 Ala. 225; *Wingfield v. McLure*, 48 Ark. 510; *Derry v. Ross*, 5 Colo. 295; *Fort v. Groves*, 29 Md. 188. See also for additional cases on this point the title *Equity*, 11 Am. and Eng. Encyc. of Law 199-202; and in this work the articles *INJUNCTIONS*, vol. 10, p. 953; *INTERPLEADER*, vol. 11, p. 447; *JUDGMENTS*, vol. 11, pp. 1176, 1190; and the General Index to this work.

Absence of Remedy Sole Test of Equity Jurisdiction. — In *Watson v. Sutherland*, 5 Wall. (U. S.) 74, which was a suit for an injunction, it was said that "the absence of a plain and adequate remedy at law affords the only test of equity jurisdiction, and the application of this principle to a particular case must depend altogether upon the character of the case as disclosed in the pleadings."

2. *Gordon v. Clapp*, 111 Mass. 22. See also generally article *REDEMPTION*, vol. 17, p. 942.

3. *Colton v. Price*, 50 Ala. 424; *State v. Mobile*, 5 Port. (Ala.) 279; *Wingfield v. McLure*, 48 Ark. 510; *Fort v. Groves*, 29 Md. 188; *Eastman v. Amoskeag Mfg. Co.*, 47 N. H. 71; *Parker v. Winnipiseogee Lake Cotton, etc., Co.*, 2 Black (U. S.) 545. See also articles *CREDITORS' BILLS*, vol. 5, p. 562; *INJUNCTIONS*, vol. 10, p. 953; *QUIETING TITLE*, vol. 17, p. 274; *SPECIFIC PERFORMANCE*; and other articles treating of subjects of equity jurisdiction.

In *Wingfield v. McLure*, 48 Ark. 514, which was a proceeding for injunction, the court said: "The appellant fails to

show in his complaint that he has not a full and adequate remedy at law. Unless he can show that he has not such a remedy, either by appeal, certiorari, application to the court itself which rendered the judgment, or in any other legal and adequate manner, he is not entitled to relief by injunction."

Necessity to Allege Insolvency. — This rule was applied and relief denied in *Cummings v. Bradford*, (Ky. 1895) 29 S. W. Rep. 747, where there was a remedy by action against an administrator and his sureties on their bond, and they were not alleged to be insolvent, or, if so, that a new bond could not be obtained at law.

Dismissal of Bill. — In *Parker v. Winnipiseogee Lake Cotton, etc., Co.*, 2 Black (U. S.) 545, the court affirmed a decree dismissing a bill for a private nuisance in which the nature of the injury was not set out in such a manner as to show that the plaintiff was without a legal remedy.

Omission Ground for Demurrer. — In *Wingfield v. McLure*, 48 Ark. 510, it was held that a demurrer to a complaint on the ground that it failed to show that the plaintiff had no adequate legal remedy was properly sustained.

Injunctions Against Nuisances. — In the case of injunctions against nuisances the decisions seem to differ as to the necessity of showing the want of an adequate remedy at law. Thus some of these decisions hold that this is essential, and that a bill may be dismissed for its omission. *Parker v. Winnipiseogee Lake Cotton, etc., Co.*,

cases where there is not a plain, adequate, and complete remedy at law, the allegations of the bill must disclose that from the nature of the property, the peculiar relation of the parties, or the difficulty of ascertaining the amount to be paid or tendered, it is apparent that there is no plain, adequate remedy at law.¹

2. Requisite Allegations — *a.* IN GENERAL. — The rule requiring that it should be shown that no adequate legal remedy exists would seem to be sufficiently complied with where the bill states facts from which it appears that such is the case.²

b. AVERMENT IN TERMS. — Where the fact that the remedy at law is inadequate sufficiently appears from the bill, it is unnecessary for it further to allege in terms the nonexistence of a legal remedy or its inadequacy.³

III. CERTIFICATE OF COUNSEL AS TO INADEQUACY OF LEGAL REMEDY. — The statutes of some states expressly provide that in certain cases no bill in chancery shall be entertained unless the counsel filing it shall certify that in his opinion the case is of such a nature that no adequate remedy can be obtained at law, or that the remedy at law will be attended with great additional trouble, inconvenience, or delay.⁴

IV. GENERAL RULE AS TO OBJECTION TO JURISDICTION OF EQUITY — *Statement of Rule.* — In accordance with the doctrine that the aid of equity may be invoked only where there is no adequate remedy at law,⁵ a court of equity will not entertain or exercise jurisdiction where the party has a complete and adequate remedy at law when the objection to such jurisdiction is seasonably taken.⁶

When Objection Available. — By an adequate remedy at law is meant "a remedy vested in the complainant to which he may at all times resort at his own option, fully and freely, without let or hindrance,"⁷ and the objection to the jurisdiction of the court for the reason that the plaintiff has an adequate remedy at law is

2 Black (U. S.) 545. Other decisions hold that when an injunction is sought to restrain the continuance of a nuisance, the petitioner need not, as a predicate to the relief he seeks, show that he has no adequate remedy at law, and that the rule sought to be invoked has no application in such cases, an injunction being the recognized method of abating nuisances. *International, etc., R. Co. v. Davis*, (Tex. Civ. App. 1895) 29 S. W. Rep. 483. See generally article NUISANCES, vol. 14, p. 1122 *et seq.*

1. *Gordon v. Clapp*, 111 Mass. 22, which was a bill for redemption.

2. *People v. Hilliard*, 29 Ill. 413; *Hon v. State*, 89 Ind. 253.

3. *People v. Hilliard*, 29 Ill. 413.

4. See Act Pa. Oct. 13, 1840, Bright. *Purd. Dig. Laws Pa.* (1894), p. 57;

Thomas v. Hall, 2 Pearson (Pa.) 64; *Everhart v. Everhart*, 3 Kulp (Pa.) 59.

No Application to Settlement of Partnership Accounts. — This rule is held in *Bachman v. Einhorn*, 5 W. N. C. (Pa.) 250, not to apply in the case of bills for the settlement of partnership accounts.

5. See title *Equity*, 11 Am. and Eng. Encyc. of Law 199.

6. *Kelley v. Kelley*, 80 Wis. 486; *Shepherd v. Genung*, 5 Wis. 397; *Stroebe v. Fehl*, 22 Wis. 337; *Deery v. McClintock*, 31 Wis. 195; *Gunderson v. Cook*, 33 Wis. 551; *Gray v. Tyler*, 40 Wis. 579; *McMillen v. Mason*, 71 Wis. 405.

7. *Wheeler v. Bedford*, 54 Conn. 244. For other definitions of adequate remedy at law see the title *Equity*, 11 Am. and Eng. Encyc. of Law 200.

available only where such remedy is as plain, adequate, and effectual as the remedy in equity.¹

V. NATURE OF OBJECTION.—Although the objection that the plaintiff has an adequate remedy at law is usually regarded as affecting the jurisdiction,² there are decisions to the effect that this ground of refusal to take cognizance of a case and proceed with it is in no proper sense jurisdictional,³ and that the rule is one of convenience.⁴

VI. NECESSITY OF RAISING OBJECTION — 1. **General Rule.**—It would seem to be the general rule that in an equitable action the objection that there is an adequate remedy at law must be raised by the defendant in his pleading in order to be available to him as a defense.⁵

1. *Boyce v. Grundy*, 3 Pet. (U. S.) 215; *Sullivan v. Portland, etc., R. Co.*, 94 U. S. 806, citing *Parker v. Winnipiseogee Lake Cotton, etc., Co.*, 2 Black (U. S.) 545.

"If the Remedy at Law Is Doubtful or Obscure, or if it falls short of correcting the whole mischief, or of securing to the party asking relief his whole right, in a perfect manner, this court must retain jurisdiction in order that full and complete justice may be done. 1 Story's Eq. Jur., § 33." *Chosen Freeholders v. Newark City Nat. Bank*, 48 N. J. Eq. 51.

Concurrent Legal Remedy Not Sufficient.—In *Harper v. Rosenberger*, 56 Mo. App. 388, it was held *arguendo* that the test of right to equitable relief is not whether there is a concurrent legal remedy, but whether the remedy at law is adequate and complete.

2. *Cummins v. White*, 4 Blackf. (Ind.) 356; *Keokuk, etc., R. Co. v. Donnell*, 77 Iowa 221; *Woodman v. Freeman*, 25 Me. 531; *Gough v. Crane*, 3 Md. Ch. 119; *Drury v. Conner*, 1 Har. & G. (Md.) 220; *Atty.-Gen. v. Moliter*, 26 Mich. 444; *Humphreys v. Atlantic Milling Co.*, 98 Mo. 542; *Pittsburgh, etc., Drove Yard Co.'s Appeal*, 123 Pa. St. 250; *Oelrichs v. Spain*, 15 Wall. (U. S.) 211; *Parker v. Winnipiseogee Lake Cotton, etc., Co.*, 2 Black (U. S.) 545; *Dumont v. Fry*, 12 Fed. Rep. 21; *Lewis v. Cocks*, 23 Wall. (U. S.) 466; *Mills v. Knapp*, 39 Fed. Rep. 592; *Sullivan v. Portland, etc., R. Co.*, 94 U. S. 806.

3. **Objection No More than a Rule of Practice.**—"The objection that the plaintiff has an adequate remedy at law is no more than a rule of practice in the court of chancery upon which the action will be dismissed if the attention of the court is called to it at the

proper time and in the proper manner; and although it is most frequently spoken of by courts and writers as a question of jurisdiction, it is strictly inaccurate to call it so. There is no want of jurisdiction, and should the court erroneously proceed, after objection properly taken, according to its own rule, it is very clear that the judgment would not be void. It might be erroneous and subject to reversal in a direct proceeding, but it could not be collaterally impeached or disregarded." *Per Dixon, C. J.*, in *Peck v. School Dist. No. 4*, 21 Wis. 523.

4. *May v. Goodwin*, 27 Ga. 352.

5. *Russell v. Loring*, 3 Allen (Mass.) 121; *Blair v. Chicago, etc., R. Co.*, 89 Mo. 388; *Harper v. Rosenberger*, 56 Mo. App. 388; *Tulleys v. Keller*, 45 Neb. 220; *Thomas v. Grand View Beach R. Co.*, 76 Hun (N. Y.) 601; *Tucker v. Manhattan R. Co.*, 78 Hun (N. Y.) 439; *Lough v. Outerbridge*, 143 N. Y. 271; *Amis v. Myers*, 16 How. (U. S.) 492; *Gage v. Lippman*, (C. Pl. Gen. T.) 12 Misc. (N. Y.) 93; *Heyer v. Burger*, *Hoffm.* (N. Y.) 1; *Reilly v. Freeman*, 1 N. Y. App. Div. 560; *Mentz v. Cook*, 108 N. Y. 504; *Baron v. Korn*, 127 N. Y. 224; *Ketchum v. Depew*, 81 Hun (N. Y.) 278; *Ostrander v. Weber*, 114 N. Y. 95; *O'Brien v. McCarthy*, 71 Hun (N. Y.) 427; *Wilkeson Coal, etc., Co. v. Driver*, 9 Wash. 177; *Sweetser v. Silber*, 87 Wis. 102; *State v. Circuit Ct.*, 98 Wis. 143; *Pierstoff v. Jorges*, 86 Wis. 128; *Pollock v. Farmers' L. & T. Co.*, 157 U. S. 429; *Post v. Corbin*, 19 Fed. Cas. No. 11,299.

It Is No Barrier to a Court of Equity proceeding to grant relief in a cause, even if there be an adequate remedy at law, if the defendant does not plead a remedy at law, for in such case the

2. Dismissal by Court Sua Sponte. — Although the usual rule seems to be, as has just been stated, that the defendant must himself raise the objection that there is an adequate remedy at law if he wishes to take advantage of it as a defense, and a failure to do this will be considered a waiver of the objection where the case is one in which a court of equity can afford relief,¹ yet according to numerous decisions it is held that the objection, being one which affects the jurisdiction, may be raised by the court *sua sponte* though not raised by the pleadings or suggested by the defendant's counsel. There are numerous decisions to this effect in the *United States* courts² as well as in the courts of the various states.³

court will go forward and afford relief in any cause of action, legal or equitable. *Blair v. Chicago, etc.*, R. Co., 89 Mo. 388.

Submission to Jurisdiction Without Objection. — "The Court of Chancery will not refuse to take jurisdiction of a case, and to make a proper decree therein, merely upon the ground that the complainant had a perfect remedy by an action at law, when the parties have submitted themselves to the jurisdiction of the chancellor without objection." *Utica Bank v. Mersereau*, 3 Barb. Ch. (N. Y.) 574.

Parties May Assent to Assumption of Jurisdiction. — "It appears to be settled by a very general concurrence of authority that a defendant cannot, when sued in equity, avail himself of the defense that an adequate remedy at law exists unless he pleads that defense in his answer. *Grandin v. Le Roy*, 2 Paige (N. Y.) 509; *Le Roy v. Platt*, 4 Paige (N. Y.) 77; *Truscott v. King*, 6 N. Y. 147; *Cox v. James*, 45 N. Y. 557; *Green v. Milbank*, (Supm. Ct. Spec. T.) 3 Abb. N. Cas. (N. Y.) 138; *Pam v. Vilmar*, (Supm. Ct. Spec. T.) 54 How. Pr. (N. Y.) 235. The rule proceeds upon the basis that parties may by their mutual assent litigate their differences in a court of equity, where the assent of the defendant, if withheld, might induce the court to refrain from the exercise of its jurisdiction. That jurisdiction existing over the general subject, the question of its exercise in the given case cannot be raised unless the answer raises it." *Mentz v. Cook*, 108 N. Y. 504.

1. See *infra*, IX. *Waiver of Objection*.

2. *Oelrichs v. Spain*, 15 Wall. (U. S.) 211; *Dumont v. Fry*, 12 Fed. Rep. 21; *Sullivan v. Portland, etc.*, R. Co., 94 U. S. 806; *Mills v. Knapp*, 39 Fed.

Rep. 592; *Spring v. Domestic Sewing Mach. Co.*, 13 Fed. Rep. 446; *Hipp v. Babin*, 19 How. (U. S.) 271.

Deprivation of Constitutional Right to Jury Trial. — Whenever a court of law is competent to take cognizance of a right and has power to proceed to a judgment which affords a plain, adequate, and complete remedy, without the aid of a court of equity, the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by a jury. *Hipp v. Babin*, 19 How. (U. S.) 271. See also *Parker v. Winnipiseogee Lake Cotton, etc., Co.*, 2 Black (U. S.) 545; *Grand Chute v. Winegar*, 15 Wall. (U. S.) 373; *Lewis v. Cocks*, 23 Wall. (U. S.) 466. And this objection to the jurisdiction may be enforced by the court *sua sponte*, though not raised by the pleadings or suggested by counsel. *Parker v. Winnipiseogee Lake Cotton, etc., Co.*, 2 Black (U. S.) 545; *Lewis v. Cocks*, 23 Wall. (U. S.) 466; *Killian v. Ebbinghaus*, 110 U. S. 568.

3. *Hine v. New Haven*, 40 Conn. 478; *Hartford v. Chipman*, 21 Conn. 488; *Cummins v. White*, 4 Blackf. (Ind.) 356; *Dinwiddie v. Roberts*, 1 Greene (Iowa) 363; *Woodman v. Freeman*, 25 Me. 531; *Gough v. Crane*, 3 Md. Ch. 119; *Crump v. Ingersoll*, 47 Minn. 179; *Humphreys v. Atlantic Milling Co.*, 98 Mo. 542; *Hart v. Mallet*, 2 Hayw. (N. Car.) 136. See also *Kriechbaum v. Bridges*, 1 Iowa 14.

Dismissal of Bill on Appeal. — In *Internal Imp. Fund, etc.*, v. *Gleason*, 39 Fla. 771, it was held that the appellate court will dismiss a bill in equity where there is an adequate remedy at law though the objection has not been raised. See also *Keokuk, etc.*, R. Co. v. *Donnell*, 77 Iowa 221; *Pittsburgh, etc.*, *Drove Yard Co.'s Appeal*, 123 Pa. St. 250, 23 W. N. C. (Pa.) 89.

Where the Subject-matter of the Bill Is Wholly Foreign to the jurisdiction of a court of chancery, as, for example, a claim for damages or for an assault and battery, the court may properly dismiss the cause at any stage of the proceedings.¹

Discretion of Court. — Where, however, the subject-matter belongs to the class over which a court of equity has jurisdiction, though the court may of its own motion make the objection after the defendant is barred by delay, whether it shall do so is discretionary.²

VII. TIME OF RAISING OBJECTION — Earliest Opportunity. — With regard to the time when the objection that the plaintiff has an adequate remedy at law should be raised, it may be laid down as a general rule that such objection should be taken at the earliest opportunity³ in the trial court.⁴

Reason for Rule. — In its very nature the objection is of that class which ought to be taken in the earliest stages of the suit, before costs have accumulated, or by the lapse of time irreparable injury may result, by remitting the complainant to a legal remedy which has in fact become unavailing.⁵

Objection Too Late at Hearing. — Where the defendant has, by his answer, put himself on the merits, and has failed to object on the ground of an adequate remedy at law, he cannot, according to

Case Remanded by Supreme Court. — In *Freeman v. Timanus*, 12 Fla. 393, the court said: "The appeal in this case bringing before this court the record prior to the default, the bill is open for our inspection, and if upon the face of the bill there is no equity or there is a plain and adequate remedy at law, the case must be remanded with directions conformable to that view. It may be urged that, no such objection being made in the pleadings or presented in the decree of the chancellor, this court cannot consider them. Such, however, is the practice of appellate tribunals in England, and such is the practice in the Supreme Court of the United States."

1. *Stout v. Cook*, 41 Ill. 447; *Kimball v. Walker*, 30 Ill. 503; *Deery v. McClintock*, 31 Wis. 195; *Tenney v. State Bank*, 20 Wis. 161; *Remington v. Foster*, 42 Wis. 608; *Western Electric Co. v. Reedy*, 66 Fed. Rep. 163; *Lewis v. Cocks*, 23 Wall. (U. S.) 466. See also *Fulton Irrigation Ditch Co. v. Twombly*, 6 Colo. App. 554; *Heyer v. Burger*, Hoffm. (N. Y.) 1.

2. **Discretionary with Court.** — In *Western Electric Co. v. Reedy*, 66 Fed. Rep. 163, it was held that though the defendant is barred by delay, the court may, of its own motion, upon proper

occasion, make and sustain the objection; but that whether the court shall do this is discretionary, and not imperative.

3. *May v. Goodwin*, 27 Ga. 352; *Bell v. McGrady*, 32 Ga. 257; *Johnson v. Miller*, 50 Ill. App. 60; *Western Electric Co. v. Reedy*, 66 Fed. Rep. 163; *Brown v. Lake Superior Iron Co.*, 134 U. S. 530; *Thompson v. Central Ohio R. Co.*, 6 Wall. (U. S.) 134; *Kilbourn v. Sunderland*, 130 U. S. 505.

Before Making Defense. — In *Kilbourn v. Sunderland*, 130 U. S. 505, it was held that where it is competent for a court of equity to grant the relief asked for, and it has jurisdiction of the subject-matter, the objection that the plaintiff has an adequate remedy at law should be taken at the earliest opportunity, and before the defendants enter upon a full defense.

4. *Mowry v. Hawkins*, 57 Conn. 453; *Sexton v. Pike*, 13 Ark. 193; *Dodge v. Wright*, 48 Ill. 384; *Stout v. Cook*, 41 Ill. 447; *Magee v. Magee*, 51 Ill. 500; *Savery v. Browning*, 18 Iowa 246; *Bomar v. Means*, 47 S. Car. 190; *Stonebunger v. Roller*, (Va. 1896) 25 S. E. Rep. 1012; *Preteca v. Maxwell Land Grant Co.*, 50 Fed. Rep. 674.

5. *Per Brickell, C. J.*, in *Tubb v. Fort*, 58 Ala. 277.

the weight of authority, insist on it at the hearing,¹ unless the

1. *Arkansas*. — Cockrell v. Warner, 14 Ark. 345.

Connecticut. — Niles v. Williams, 24 Conn. 279.

Georgia. — May v. Goodwin, 27 Ga. 352; Bell v. McGrady, 32 Ga. 257.

Illinois. — Stout v. Cook, 41 Ill. 447; Magee v. Magee, 51 Ill. 500; Turpin v. Dennis, 139 Ill. 274; Harding v. Olson, 76 Ill. App. 475; Ryan v. Duncan, 88 Ill. 144.

Massachusetts. — Clark v. Flint, 22 Pick. (Mass.) 231; First Cong. Soc. v. Trustees, 23 Pick. (Mass.) 148; Crocker v. Dillon, 133 Mass. 91; Page v. Young, 106 Mass. 313; Massachusetts Hospital v. State Mut. L. Assur. Co., 4 Gray (Mass.) 227; Jones v. Keen, 115 Mass. 170; Dearth v. Hide, etc., Nat. Bank, 100 Mass. 540.

Michigan. — Stockton v. Williams, Walk. (Mich.) 120.

Mississippi. — Cable v. Martin, 1 How. (Miss.) 558.

New York. — Livingston v. Livingston, 4 Johns. Ch. (N. Y.) 290; Underhill v. Van Cortlandt, 2 Johns. Ch. (N. Y.) 339; Atty.-Gen. v. Purmort, 5 Paige (N. Y.) 620; Bradley v. Root, 5 Paige (N. Y.) 632; Wolcott v. Sullivan, 6 Paige (N. Y.) 117; Gable v. Miller, 10 Paige (N. Y.) 627.

Pennsylvania. — Harrington v. Florence Oil Co., 178 Pa. St. 444; Evans v. Goodwin, 132 Pa. St. 136; Searight v. Carlisle Deposit Bank, 162 Pa. St. 504.

United States. — Consolidated Roller-Mill Co. v. Coombs, 39 Fed. Rep. 25; Kilbourn v. Sunderland, 130 U. S. 505; Waite v. O'Neil, 72 Fed. Rep. 348; Post v. Corbin, 19 Fed. Cas. No. 11,299.

In Doubtful Cases. — In *Evans v. Goodwin*, 132 Pa. St. 143, it was said: "It is too late now for the defendant to urge that an adequate remedy at law existed. *Sunbury, etc., R. Co. v. Cooper*, 33 Pa. St. 278. The doctrine laid down in *Adams's Appeal*, 113 Pa. St. 449, may be adopted here. While it is true that manifest want of jurisdiction may be taken advantage of at any stage of the cause, the court will not permit an objection to its jurisdiction to prevail in doubtful cases after the parties have voluntarily proceeded to a hearing on the merits, but will administer suitable relief."

Objection Not Expressly Reserved. — An agreement by the parties to a suit in equity to submit the case on facts

agreed is a waiver of objections to the form of proceeding, unless such objections are expressly reserved; and the objection that the plaintiff has a plain, adequate, and complete remedy at law cannot be raised for the first time on the final hearing, on facts agreed, when not stated in any of the pleadings. *Russell v. Loring*, 3 Allen (Mass.) 121. See also *Meux v. Anthony*, 11 Ark. 423, in which case it was held that a defendant in chancery, by a reservation of his objection to the jurisdiction in his answer, might have the same benefit thereof as if he had adopted the more concise mode of defense by pleading or demurring.

Contra — Objection Available at Any Stage. — In *Baker v. Biddle*, 1 Baldw. (U. S.) 394, 2 Fed. Cas. No. 764, it was held that an objection of there being an adequate remedy at law need not be made by demurrer, plea, or answer, but may be made at the hearing or on appeal. In this case the court said: "We must * * * take the law of equity to be settled that a defendant may, at any stage of the cause, rely on the want of equity in the bill on the ground that the plaintiff has a complete remedy at law." See also, to the same effect, *Pierpont v. Fowle*, 2 Woodb. & M. (U. S.) 23, 19 Fed. Cas. No. 11,152.

Motion at Hearing. — In *Daniels v. Street*, 15 Ark. 307, it was held, apparently, that the defendant may object at the hearing if the want of jurisdiction appears from the proofs. See also *Price v. State Bank*, 14 Ark. 55; *Cockrell v. Warner*, 14 Ark. 354.

Objection Raised at Hearing — Construction of Bill. — In *Zimmerman v. Carpenter*, 84 Fed. Rep. 747, it was held that if at the hearing the defendant raises the objection that a speedy and adequate remedy exists at law, the court will not make a decree if there is a plain defect of jurisdiction; but that in such case the court will construe the bill more liberally than if the point had been raised by demurrer.

Findings of Fact — Adequate Remedy at Law. — In *Brewster v. Colegrove*, 46 Conn. 105, it was held that where the allegations of a bill in equity are sufficient to give jurisdiction to a court of equity, and the case goes to a hearing upon its merits, and the facts are found, the jurisdiction is not defeated

court is wholly incompetent to grant the relief sought by the bill.¹

Court Having Law and Equity Jurisdiction. — This is the rule in chancery, and it applies *a fortiori* where the same court combines both law and equity jurisdiction;² and where the defendant goes to trial on the merits in such courts it is too late afterwards to object that the plaintiff has an adequate remedy at law.³

Objection Not Available by Motion to Dismiss. — The question cannot be raised at the trial by a motion to dismiss.⁴

Objection Too Late After Testimony Taken. — Where the defendant neglects until after the testimony in the cause is in, to object to the jurisdiction of the court on the ground that the complainant has an adequate remedy at law, the objection comes too late.⁵

Objection Too Late on Appeal. — Except in those cases where the subject-matter is wholly foreign to the jurisdiction of the court, and incapable of being brought before it, even by consent, the objection that there is an adequate remedy at law must be insisted upon in the court below and cannot be made for the first time on appeal.⁶ Whenever this objection is raised for the first time on

by the fact that the finding shows that the petitioner had an adequate remedy at law.

1. *Cockrell v. Warner*, 14 Ark. 345; *Clark v. Flint*, 22 Pick. (Mass.) 231; *Harrington v. Florence Oil Co.*, 178 Pa. St. 444; *Consolidated Roller-Mill Co. v. Coombs*, 39 Fed. Rep. 25.

Too Late After Answer and General Replication. — After an answer to a bill in equity and a general replication have been filed, and evidence has been taken, and the cause has come on for hearing, it is too late to object to the jurisdiction of the court on the ground that the plaintiff has an adequate remedy at law, provided it is competent to the court to grant relief and it has jurisdiction of the subject-matter. *Clark v. Flint*, 22 Pick. (Mass.) 231. In this case the court said: "This seems to be a reasonable rule, for after the defendants had answered to the merits of the bill, and consequently great expenses had been incurred, it would seem to be unreasonable to allow them to interpose with an objection which ought to have been made on demurrer to the bill, and before answering to the merits. Under such circumstances a court of equity ought to retain the cause, provided it be competent to grant relief and have jurisdiction of the subject-matter." *Citing Ludlow v. Simond*, 2 Cai. Cas. (N. Y.) 56; *Underhill v. Van Cortlandt*, 2 Johns. Ch. (N. Y.) 369; *M'Donald v. Crockett*, 2 McCord Eq. (S. Car.) 135.

2. *St. Paul, etc., R. Co. v. Robinson*, 41 Minn. 394.

3. *St. Paul, etc., R. Co. v. Robinson*, 41 Minn. 394; *Newton v. Newton*, 46 Minn. 33; *Sherwin v. Gaghagen*, 39 Neb. 238; *Baron v. Korn*, 127 N. Y. 224; *Watts v. Adler*, 130 N. Y. 646, 41 N. Y. St. Rep. 325; *Mentz v. Cook*, 108 N. Y. 504; *Ostrander v. Weber*, 114 N. Y. 95; *Hyatt v. Ingalls*, 124 N. Y. 93; *Nicholson v. Pim*, 5 Ohio St. 25; *Kitcherside v. Myers*, 10 Oregon 21; *O'Hara v. Parker*, 27 Oregon 156; *Meyer v. Garthwaite*, 92 Wis. 571.

4. *Wilkeson Coal, etc., Co. v. Driver*, 9 Wash. 177.

5. *Dodge v. Wright*, 48 Ill. 382; *Hickey v. Forristal*, 49 Ill. 255; *Cumming v. Brooklyn*, 11 Paige (N. Y.) 596; *Shillito v. Shillito*, 160 Pa. St. 167; *Searight v. Carlisle Deposit Bank*, 162 Pa. St. 504; *Dederick v. Fox*, 56 Fed. Rep. 714.

6. *Alabama*. — *Tubb v. Fort*, 58 Ala. 278; *Norton v. Norton*, 94 Ala. 481.

Arkansas. — *Sexton v. Pike*, 13 Ark. 193; *Moss v. Adams*, 32 Ark. 562; *Talbot v. Wilkins*, 31 Ark. 411; *Daniels v. Street*, 15 Ark. 307; *Mooney v. Brinkley*, 17 Ark. 340; *King v. Payan*, 18 Ark. 583.

Colorado. — *Strousse v. Clear Creek County Bank*, 9 Colo. App. 478.

Connecticut. — *Niles v. Williams*, 24 Conn. 284.

Florida. — *Griffin v. Orman*, 9 Fla. 22; *Gordon v. Clarke*, 10 Fla. 179.

Illinois. — *Dodge v. Wright*, 48 Ill.

appeal, the court will lay hold of any vestige of chancery jurisdiction before it will dismiss the cause and send the plaintiff to begin anew in a court of law.¹

VIII. MANNER OF RAISING OBJECTION — 1. By Demurrer —
a. WHEN PROPER. — If it appears from the face of the bill or complaint that the plaintiff can have as effectual and complete

384; *Schmohl v. Fiddick*, 34 Ill. App. 190; *Darby v. Dixon*, 4 Ill. App. 187; *Soldiers' Orphans' Home v. Lyon*, 42 Ill. App. 615; *Anderson v. Montgomery*, 47 Ill. App. 79; *Stout v. Cook*, 41 Ill. 447; *Magee v. Magee*, 51 Ill. 500; *Turpin v. Dennis*, 139 Ill. 274; *Prettyman v. Irwin*, 29 Ill. App. 122; *Hickey v. Forristal*, 49 Ill. 255; *Darby v. Dixon*, 4 Ill. App. 187; *Hay v. Bennett*, 153 Ill. 271; *Roche v. Norfleet*, 63 Ill. App. 612; *Joliet Gas Light Co. v. Sutherland*, 68 Ill. App. 230; *Baker v. Baker*, 69 Ill. App. 461; *Black v. Miller*, 71 Ill. App. 342; *Hazle v. Bondy*, 173 Ill. 302; *Ohling v. Luitjens*, 32 Ill. 28; *Kimball v. Walker*, 30 Ill. 503; *Vermont v. Miller*, 161 Ill. 210.

Iowa. — *Tugel v. Tugel*, 38 Iowa 349; *Phinny v. Warren*, 52 Iowa 332; *Gould v. Hurto*, 61 Iowa 45; *Hintrager v. Sumbargo*, 54 Iowa 604; *Linden v. Green*, 81 Iowa 366; *Benjamin v. Vieth*, 80 Iowa 149; *Corey v. Sherman*, 96 Iowa 114; *O'Brien v. Putney*, 55 Iowa 295; *Savery v. Browning*, 18 Iowa 246; *Matter of Knapp*, 101 Iowa 488; *Logan v. McCahan*, 102 Iowa 241; *Adams County v. Hunter*, 78 Iowa 328; *Bull v. Keenan*, 100 Iowa 144.

Maryland. — *Gough v. Manning*, 26 Md. 347.

Massachusetts. — *Clark v. Flint*, 22 Pick. (Mass.) 237; *Creely v. Bay State Brick Co.*, 103 Mass. 515; *Dearth v. Hide*, etc., Nat. Bank, 100 Mass. 540; *Russell v. Loring*, 3 Allen (Mass.) 125; *Page v. Young*, 106 Mass. 313; *Jones v. Keen*, 115 Mass. 170; *Crocker v. Dillon*, 133 Mass. 91.

Michigan. — *Stockton v. Williams*, *Walk. (Mich.)* 120; *Wallace v. Harris*, 32 Mich. 380.

Mississippi. — *Barrett v. Carter*, 69 Miss. 593.

Missouri. — *Blair v. Chicago*, etc., R. Co., 89 Mo. 383.

Nebraska. — *Stahlhut v. Bauer*, 51 Neb. 64; *Morris v. Haas*, 54 Neb. 579; *Sherwin v. Gaghagen*, 39 Neb. 238; *Dorsey v. Nichols*, 43 Neb. 241.

New Jersey. — *Bates v. Conrow*, 11 N. J. Eq. 137; *Lehigh Zinc*, etc., Co. v. *Trotter*, 43 N. J. Eq. 185.

New York. — *Clarke v. Sawyer*, 2 N. Y. 498; *Bruce v. Kelly*, 39 N. Y. Super. Ct. 27; *Wiswall v. Hall*, 3 Paige (N. Y.) 313; *Livingston v. Livingston*, 4 Johns. Ch. (N. Y.) 290; *Utica Bank v. Utica*, 4 Paige (N. Y.) 399; *Cunningham v. Fitzgerald*, 138 N. Y. 165; *Utica Bank v. Mersereau*, 3 Barb. Ch. (N. Y.) 533; *Steffin v. Steffin*, (Supm. Ct. Gen. T.) 4 Civ. Pro. (N. Y.) 179; *Wakeman v. Wilbur*, 147 N. Y. 657; *Witherbee v. Meyer*, 84 Hun (N. Y.) 146; *Post v. Ketchum*, 1 N. Y. Leg. Obs. 261; *Metropolitan El. R. Co. v. Johnston*, 84 Hun (N. Y.) 83; *Powell v. Waldron*, 89 N. Y. 332.

North Carolina. — *Burroughs v. McNeill*, 2 Dev. & B. Eq. (N. Car.) 297.

Ohio. — *Culver v. Rodgers*, 33 Ohio St. 537.

Oregon. — *O'Hara v. Parker*, 27 Oregon 156; *Kitcherside v. Myers*, 10 Oregon 23.

Pennsylvania. — *Evans v. Goodwin*, 132 Pa. St. 136; *Searight v. Carlisle Deposit Bank*, 162 Pa. St. 504.

Tennessee. — *Stockley v. Rowley*, 2 Head (Tenn.) 493.

Washington. — *Morgan v. Bell*, 3 Wash. 554.

Wisconsin. — *Ellis v. Allen*, 99 Wis. 598; *Jones v. Collins*, 16 Wis. 594.

United States. — *Lone Jack Min. Co. v. Megginson*, 82 Fed. Rep. 89; *Reynolds v. Watkins*, 60 Fed. Rep. 824; *Fisher v. Knight*, 61 Fed. Rep. 491; *Foltz v. St. Louis*, etc., R. Co., 60 Fed. Rep. 316; *Preteca v. Maxwell Land Grant Co.*, 50 Fed. Rep. 674; *Wylie v. Coxe*, 15 How. (U. S.) 415; *Boyce v. Grundy*, 3 Pet. (U. S.) 210; *Kilbourn v. Sunderland*, 130 U. S. 505; *Oelrichs v. Spain*, 15 Wall. (U. S.) 211; *Brown v. Lake Superior Iron Co.*, 134 U. S. 530; *Allen v. Pullman's Palace Car Co.*, 139 U. S. 658; *Amis v. Myers*, 16 How. (U. S.) 492; *Tyler v. Savage*, 143 U. S. 79; *Reynes v. Dumont*, 130 U. S. 354; *Crosby v. Buchanan*, 23 Wall. (U. S.) 420; *Union Pac. R. Co. v. Harris*, 63 Fed. Rep. 800; *Hollins v. Brierfield Coal*, etc., Co., 150 U. S. 371.

1. *Daniels v. Street*, 15 Ark. 307.

a remedy at law as in a court of equity, and that such remedy is clear and certain, the defendant may raise the objection by a demurrer.¹

b. FORM OF DEMURRER. — A demurrer on the ground of insufficient facts is sufficient to raise the objection that there is an adequate remedy at law.²

Demurrer Ore Tenus Insufficient. — The objection to the jurisdiction of a court of equity on the ground that the plaintiff has an adequate remedy at law cannot be raised by a demurrer *ore tenus*

1. *Alabama.* — Tubb *v.* Fort, 58 Ala. 278; Norton *v.* Norton, 94 Ala. 481; Bunn *v.* Timberlake, 104 Ala. 263.

Arkansas. — Price *v.* State Bank, 14 Ark. 50.

Connecticut. — Munson *v.* Munson, 30 Conn. 425; New-London Bank *v.* Lee, 11 Conn. 112; Stannard *v.* Whittlesey, 9 Conn. 556; Norwich, etc., *R. Co. v.* Storey, 17 Conn. 364; Salem, etc., Turnpike Co. *v.* Lynn, 18 Conn. 451; Brewster *v.* Colegrove, 46 Conn. 105; Mowry *v.* Hawkins, 57 Conn. 453.

Georgia. — May *v.* Goodwin, 27 Ga. 352; Bell *v.* McGrady, 32 Ga. 257.

Illinois. — Stout *v.* Cook, 41 Ill. 447; Turpin *v.* Dennis, 139 Ill. 274; Monson *v.* Bragdon, 159 Ill. 61; Dodge *v.* Wright, 48 Ill. 384; Magee *v.* Magee, 51 Ill. 500; Ryan *v.* Duncan, 88 Ill. 144.

Indiana. — Bottorf *v.* Conner, 1 Blackf. (Ind.) 287.

Kentucky. — Reed *v.* Clarke, 4 T. B. Mon. (Ky.) 19.

Maine. — Coombs *v.* Warren, 17 Me. 404.

Maryland. — Bosley *v.* M'Kim, 7 Har. & J. (Md.) 468.

Massachusetts. — Russell *v.* Loring, 3 Allen (Mass.) 125; Dearth *v.* Hide, etc., Nat. Bank, 100 Mass. 540; Creely *v.* Bay State Brick Co., 103 Mass. 515; Clark *v.* Flint, 22 Pick. (Mass.) 231.

Minnesota. — St. Paul, etc., *R. Co. v.* Robinson, 41 Minn. 394.

Missouri. — Blair *v.* Chicago, etc., *R. Co.*, 89 Mo. 388.

New York. — Livingston *v.* Livingston, 4 Johns. Ch. (N. Y.) 290; Wiswall *v.* Hall, 3 Paige (N. Y.) 313; Reed *v.* Newburgh Bank, 1 Paige (N. Y.) 215; Le Roy *v.* Platt, 4 Paige (N. Y.) 81; Lynch *v.* Willard, 6 Johns. Ch. (N. Y.) 342; Fulton Bank *v.* New-York, etc., Canal Co., 4 Paige (N. Y.) 127; Underhill *v.* Van Cortlandt, 2 Johns. Ch. (N. Y.) 369; Hawley *v.* Cramer, 4 Cow. (N. Y.) 727; Whitlock *v.* Duffield, Hoffm. (N. Y.) 122; Bradley *v.* Root, 5 Paige

(N. Y.) 632; Grandin *v.* Le Roy, 2 Paige (N. Y.) 509.

North Carolina. — Smith *v.* Morehead, 6 Jones Eq. (N. Car.) 360.

Ohio. — Culver *v.* Rodgers, 33 Ohio St. 537; Nicholson *v.* Pim, 5 Ohio St. 25.

Oregon. — O'Hara *v.* Parker, 27 Oregon 156.

Pennsylvania. — Harrington *v.* Florence Oil Co., 178 Pa. St. 444.

Tennessee. — Caldwell *v.* Knott, 10 Yerg. (Tenn.) 209.

Vermont. — Bellows Falls Bank *v.* Rutland, etc., *R. Co.*, 28 Vt. 470.

Virginia. — Washington City Sav. Bank *v.* Thornton, 83 Va. 157.

Wisconsin. — Peck *v.* School Dist. No. 4, 21 Wis. 523; Gullickson *v.* Madsen, 87 Wis. 19; Tenney *v.* State Bank, 20 Wis. 161; Kelley *v.* Kelley, 80 Wis. 486; Pierstoff *v.* Jorge, 86 Wis. 128; Kilbourn Lodge Number Three *v.* Kilbourn, 74 Wis. 453; Stein *v.* Benedict, 83 Wis. 616.

United States. — Consolidated Roller-Mill Co. *v.* Coombs, 39 Fed. Rep. 25.

England. — Roberdeau *v.* Rous, 1 Atk. 543; Kemp *v.* Tucker, L. R. 8 Ch. 369.

Demurrer After Withdrawal of Answer. — In Lowe *v.* Morris, 4 Sneed (Tenn.) 69, it was held that the court may, before the cause is set down for hearing on bill and answer, permit the defendant to withdraw his answer and file a demurrer to the jurisdiction of a court of equity.

2. Gullickson *v.* Madsen, 87 Wis. 19; Kilbourn Lodge Number Three *v.* Kilbourn, 74 Wis. 453; Stein *v.* Benedict, 83 Wis. 616.

Contra. — In Peck *v.* School Dist. No. 4, 21 Wis. 523, it was held that the objection that the plaintiff has an adequate remedy at law is not raised by a demurrer that the complaint does not state facts sufficient to constitute a cause of action, but that the objection should be made a distinct ground of demurrer.

at the trial,¹ since the only question which may properly be raised by such a demurrer is whether the complaint states a cause of action in equity.²

2. By Answer — *a.* WHEN PROPER. — When the bill or complaint does not disclose facts showing the existence of an adequate remedy at law, the objection that there is in fact such a remedy should be raised by the defendant in his plea or answer.³

b. EFFECT OF OBJECTION. — It has been held that if the objection that there is an adequate remedy at law is made in the answer, the complainant proceeds at the peril of costs if the objection is sustained at the hearing.⁴

1. *Meyer v. Garthwaite*, 92 Wis. 571.

2. *Meyer v. Garthwaite*, 92 Wis. 571; *Pierstoff v. Jorge*s, 86 Wis. 128; *Sherry v. Smith*, 72 Wis. 339; *Becker v. Trickel*, 80 Wis. 484.

Objection to Admission of Evidence Insufficient. — In *Pierstoff v. Jorge*s, 86 Wis. 128, the court, in holding that the objection to the admission of evidence under the complaint did not raise the question of an adequate remedy at law, said: "It is contended that the plaintiff had an adequate remedy at law. But no such issue is raised by the answer. Counsel contends that his objection to any evidence under the complaint did raise the question, and in support of such contention he cites *Kilbourn Lodge Number Three v. Kilbourn*, 74 Wis. 452; *Mackey v. Michelstetter*, 77 Wis. 210. But in each of those cases the question was raised by regular demurrer. This court has repeatedly held that 'where the subject-matter of an action is of equitable cognizance, a demurrer *ore tenus* does not go to the point that the plaintiff has an adequate remedy at law, but only raises the question whether the complaint states a cause of action in equity.'"

3. *Alabama*. — *Bunn v. Timberlake*, 104 Ala. 263.

Arkansas. — *Price v. State Bank*, 14 Ark. 50.

Connecticut. — *Munson v. Munson*, 30 Conn. 425.

Illinois. — *Ryan v. Duncan*, 88 Ill. 144; *Black v. Miller*, 173 Ill. 489; *Stout v. Cook*, 41 Ill. 447; *Turpin v. Dennis*, 139 Ill. 274; *Monson v. Bragdon*, 159 Ill. 61; *Harley v. Sanitary Dist.*, 54 Ill. App. 337.

Massachusetts. — *Creely v. Bay State Brick Co.*, 103 Mass. 515. See also *Clark v. Flint*, 22 Pick. (Mass.) 237; *Russell v. Loring*, 3 Allen (Mass.) 121.

New York. — *Wiswall v. Hall*, 3 Paige (N. Y.) 313; *Fulton Bank v. New York, etc., Canal Co.*, 4 Paige (N. Y.) 127; *Hawley v. Cramer*, 4 Cow. (N. Y.) 727; *Bradley v. Root*, 5 Paige (N. Y.) 632; *Livingston v. Livingston*, 4 Johns. Ch. (N. Y.) 290.

Ohio. — *Culver v. Rodgers*, 33 Ohio St. 537; *Nicholson v. Pim*, 5 Ohio St. 25.

Vermont. — *Bellows Falls Bank v. Rutland, etc., R. Co.*, 28 Vt. 470.

Wisconsin. — *Peck v. School Dist. No. 4*, 21 Wis. 523.

United States. — *Consolidated Roller-Mill Co. v. Coombs*, 39 Fed. Rep. 25.

England. — *Roberdeau v. Rous*, 1 Atk. 543.

See also cases cited *supra*, in note —, p. 111.

The Objection Must Be Specifically Set Up, and will not be availing, even though the defendant reserves by his answer his right to object to relief in the particular court, unless he specifies the ground of his objection in his answer. *Holmes v. Dole, Clarke* (N. Y.) 71.

Objection Not Available by Answer. — It has been held that the objection that there is an adequate remedy at law is restricted to demurrer, plea, or motion, and is not available by answer. *Holcomb v. Canady*, 2 Heisk. (Tenn.) 610; *Vincent v. Vincent*, 1 Heisk. (Tenn.) 333; *Leverson v. Waters*, 7 Coldw. (Tenn.) 20; *Kirkman v. Snodgrass*, 3 Head (Tenn.) 370; *Brazelton v. Brooks*, 2 Head (Tenn.) 194.

"Under the Practice Act the plea of remedy at law in a suit in equity is unknown. It has no place under our system of pleading." *Humphreys v. Atlantic Milling Co.*, 98 Mo. 542.

4. *Fulton Bank v. New York, etc., Canal Co.*, 4 Paige (N. Y.) 127, in which case the court said: "If improper and untrue allegations are in-

3. By Motion to Transfer to Proper Docket. — In some jurisdictions it is held that the fact that the plaintiff has an adequate remedy at law, is not a ground of demurrer to the petition or complaint, but that a motion should be made to transfer the action to the proper docket.¹

IX. WAIVER OF OBJECTION — General Rule as to Waiver. — It may be laid down as a general rule that if the objection that the plaintiff has an adequate remedy at law is not raised by the defendant in the proper manner and at the proper time, he will be considered to have waived it,² except in those cases where the sub-

serted in a bill for the purpose of preventing a demurrer and to give apparent jurisdiction to a court of equity, the defendant may, by his answer, deny those allegations and insist that as to the other matters the complainant has a remedy at law. Although such an objection in an answer will not save the necessity of a full discovery as to all the matters charged in the bill, it will, at the hearing, be sufficient to prevent the complainant from obtaining his relief in this court. The court of chancery is constantly burdened with the investigation of facts, upon written depositions and at great expense, when from the face of the bill itself, or from the testimony in the case, it is perfectly evident that the complainant's appropriate remedy was in a court of law and not in this court. But if the defendant will not make his objection in season he must be subjected to the extra expense of a litigation here. Where the objection is made in the answer, the complainant proceeds at the peril of costs if that objection is sustained at the hearing."

1. *Crawford v. Carson*, 35 Ark. 505; *Conger v. Cotton*, 37 Ark. 286; *Gibbs v. McFadden*, 39 Iowa 371. See also *Latham v. Harby*, 50 S. Car. 428.

The Code — "Error as to Kind of Proceedings." — In *Gibbs v. McFadden*, 39 Iowa 371, it was insisted by the counsel for the appellee that the plaintiffs had a plain, speedy, and adequate remedy at law for the injuries complained of, and for that reason they could not have brought a suit in equity. Miller, C. J., said: "If it were conceded that the plaintiffs did have a full, speedy, and complete remedy at law, still that fact is no ground for a demurrer to the petition. The statute provides that 'an error of the plaintiff as to the kind of proceedings adopted shall not cause the abatement or dismissal of the action, but merely a

change into the proper proceedings, and a transfer of the action to the proper docket.' Code, § 2514; Rev. Stat., § 2613. It has been frequently held by this court, under this provision of the statute, that it is not ground of demurrer that the plaintiff has commenced his action in equity when it should have been at law, or *vice versa*; that the appropriate remedy is by motion to have the action changed into the proper proceedings." *Citing Conyngnam v. Smith*, 16 Iowa 471; *Byres v. Rodabaugh*, 17 Iowa 53; *Brown v. Mallory*, 26 Iowa 469.

2. *Alabama*. — *Tubb v. Fort*, 58 Ala. 277.

Arkansas. — *Cockrell v. Warner*, 14 Ark. 345; *Sexton v. Pike*, 13 Ark. 193.

Colorado. — *Strousse v. Clear Creek County Bank*, 9 Colo. App. 478.

Georgia. — *May v. Goodwin*, 27 Ga. 352; *Bell v. McGrady*, 32 Ga. 257.

Illinois. — *Johnson v. Miller*, 50 Ill.

App. 60; *Dodge v. Wright*, 48 Ill. 384;

Stout v. Cook, 41 Ill. 447; *Magee v.*

Magee, 51 Ill. 500; *Turpin v. Denis*,

139 Ill. 274; *Prettyman v. Irwin*, 29

Ill. App. 122; *Hickey v. Forristal*, 49 Ill.

255; *Harding v. Olson*, 76 Ill. App. 475;

Roche v. Norfleet, 63 Ill. App. 612;

Vermont v. Miller, 161 Ill. 210; *Mon-*

son v. Bragdon, 159 Ill. 61; *Hazle*

v. Bondy 173 Ill. 302; *Ohling v. Luit-*

jens, 32 Ill. 28; *Kimball v. Walker*, 30

Ill. 503; *Joliet Gas Light Co. v. Suther-*

land, 68 Ill. App. 230; *Baker v. Baker*,

69 Ill. App. 461; *Black v. Miller*, 71 Ill.

App. 342; *Hay v. Bennett*, 153 Ill. 271.

Iowa. — *Corey v. Sherman*, (Iowa

1894) 60 N. W. Rep. 232; *Bull v.*

Keenan, 100 Iowa 144; *Savery v.*

Browning, 18 Iowa 246; *Matter*

of Knapp, 101 Iowa 488; *Tugel v.*

Tugel, 38 Iowa 349; *Phinny v. War-*

ren, 52 Iowa 332; *Hintrager v. Sum-*

bargo, 54 Iowa 604.

Massachusetts. — *Dearth v. Hide*, etc.,

Nat. Bank, 100 Mass. 540; *Creely v.*

ject-matter is wholly foreign to the jurisdiction of a court of chancery, and incapable of being properly brought before it, even by consent.¹

Bay State Brick Co., 103 Mass. 515; Page v. Young, 106 Mass. 313; Crocker v. Dillon, 133 Mass. 91; Massachusetts Gen. Hospital v. State Mut. L. Assur. Co., 4 Gray (Mass.) 227.

Michigan.—Stockton v. Williams, Walk. (Mich.) 120.

Minnesota.—St. Paul, etc., R. Co. v. Robinson, 41 Minn. 394; Newton v. Newton, 46 Minn. 33.

Mississippi.—Cable v. Martin, 1 How. (Miss.) 558.

Nebraska.—Stahlhut v. Bauer, 51 Neb. 64; Morris v. Haas, 54 Neb. 579; Tulleys v. Keller, 45 Neb. 220.

New York.—Clarke v. Sawyer, 2 N. Y. 498; Steffin v. Steffin. (Supm. Ct. Gen. T.) 4 Civ. Pro. (N. Y.) 179; Witherbee v. Meyer, 84 Hun (N. Y.) 146; Metropolitan El. R. Co. v. Johnston, 84 Hun (N. Y.) 83; Thomas v. Grand View Beach R. Co., 76 Hun (N. Y.) 601; Watts v. Adler, 130 N. Y. 646, 41 N. Y. St. Rep. 325; Underhill v. Van Cortlandt, 2 Johns. Ch. (N. Y.) 339; Bruce v. Kelly, 39 N. Y. Super. Ct. 27; Ketchum v. Depew, 81 Hun (N. Y.) 278; Baron v. Korn, 127 N. Y. 224; Ostrander v. Weber, 114 N. Y. 95; Buffalo Stone, etc., Co. v. Delaware, etc., R. Co., 130 N. Y. 152; Atty.-Gen. v. Purmort, 5 Paige (N. Y.) 620; Bradley v. Root, 5 Paige (N. Y.) 632; Wolcott v. Sullivan, 6 Paige (N. Y.) 117; Gable v. Miller, 10 Paige (N. Y.) 627.

Ohio.—Culver v. Rodgers, 33 Ohio St. 537.

Oregon.—O'Hara v. Parker, 27 Oregon 156; Kitcherside v. Myers, 10 Oregon 121.

Pennsylvania.—Searight v. Carlisle Deposit Bank, 162 Pa. St. 504; Harrington v. Florence Oil Co., 178 Pa. St. 444; Shillito v. Shillito, 160 Pa. St. 167.

South Carolina.—Bomar v. Means, 47 S. Car. 190.

Virginia.—Stoneburger v. Roller, (Va. 1896) 25 S. E. Rep. 1012.

Wisconsin.—Peck v. School Dist. No. 4, 21 Wis. 523; Sweetser v. Silber, 87 Wis. 102; Kelley v. Kelley, 80 Wis. 486; State v. Circuit Ct., 98 Wis. 143; Remington v. Foster, 42 Wis. 608; Ellis v. Allen, 99 Wis. 598.

United States.—Waite v. O'Neil, 72 Fed. Rep. 348; Preteca v. Maxwell Land Grant Co., 50 Fed. Rep. 674; Schoolfield v. Rhodes, 82 Fed. Rep.

153; Lone Jack Min. Co. v. Megginson, 82 Fed. Rep. 89; Pollock v. Farmers' L. & T. Co., 157 U. S. 429; Foltz v. St. Louis, etc., R. Co., 60 Fed. Rep. 316; Reynolds v. Watkins, 60 Fed. Rep. 824; Consolidated Roller-Mill Co. v. Coombs, 39 Fed. Rep. 25.

Rule where Equitable Jurisdiction Is Doubtful.—Though there may be a doubt whether the case made by a bill is one of equitable jurisdiction, because of the remedy that the complainant may have at law, the doubt will, on appeal, be resolved in favor of the jurisdiction, where the question was not raised below. Preteca v. Maxwell Land Grant Co., 50 Fed. Rep. 674, 4 U. S. App. 326.

Acquiescence in Reference to Master.—Where the defendant in a bill in equity has conceded the jurisdiction, so far as may be implied from his failure to demur and his subsequent acquiescence in the reference of the cause upon answer and replication to a master, after such reference, involving heavy costs, the case should be very clear to justify setting aside the proceedings for want of jurisdiction. Evans v. Goodwin, 132 Pa. St. 136.

1. *Alabama*.—Tubb v. Fort, 58 Ala. 277.

Illinois.—Stout v. Cook, 41 Ill. 447; Dodge v. Wright, 48 Ill. 384.

Minnesota.—St. Paul, etc., R. Co. v. Robinson, 41 Minn. 394.

New York.—Ketchum v. Depew, 81 Hun (N. Y.) 278.

Wisconsin.—Peck v. School Dist. No. 4, 21 Wis. 523.

United States.—Preteca v. Maxwell Land Grant Co., 4 U. S. App. 326.

Rule in Federal Courts.—"The rule as stated in 1 Daniell's Chancery Practice 555, 4th Am. ed., is that if the objection of want of jurisdiction in equity is not taken in proper time, namely, before the defendant enters into his defense at large, the court, having the general jurisdiction, will exercise it; and in a note on page 550 many cases are cited to establish that 'if a defendant in a suit in equity answers and submits to the jurisdiction of the court, it is too late for him to object that the plaintiff has a plain and adequate remedy at law. This objection should be taken at the earliest opportunity.

Limitation of Rule. — The rule just stated applies only in cases of concurrent jurisdiction,¹ and has no application where the cause is not a proper one for equity,² or where from the nature of its subject-matter the cause cannot be brought within the jurisdiction of a court of equity.³ In such cases the objection may be

The above rule must be taken with the qualification that it is competent for the court to grant the relief sought, and that it has jurisdiction of the subject-matter.' * * * It was held in *Lewis v. Cocks*, 23 Wall. (U. S.) 466, that if the court, upon looking at the proofs, found none at all of the matters which would make a proper case for equity, it would be the duty of the court to recognize the fact and give it effect, though not raised by the pleadings nor suggested by counsel. To the same effect is *Oelrichs v. Spain*, 15 Wall. (U. S.) 211. The doctrine of these and similar cases is that the court, for its own protection, may prevent matters purely cognizable at law from being drawn into chancery at the pleasure of the parties interested; but it by no means follows, where the subject-matter belongs to the class over which a court of equity has jurisdiction, and the objection that the complainant has an adequate remedy at law is not made until the hearing in the appellate tribunal, that the latter can exercise no discretion in the disposition of such objection. Under the circumstances of this case it comes altogether too late, even though, if taken *in limine*, it might have been worthy of attention." *Reynes v. Dumont*, 130 U. S. 354, *quoted in* *Brown v. Lake Superior Iron Co.*, 134 U. S. 530. See also *Kilbourn v. Sunderland*, 130 U. S. 505; *Union Trust Co. v. Illinois Midland R. Co.*, 117 U. S. 468.

1. *Green v. Creighton*, 10 Smed. & M. (Miss.) 159; *Ketchum v. Depew*, 81 Hun (N. Y.) 278; *Marsh v. Haywood*, 6 Humph. (Tenn.) 213.

The Doctrine Explained. — In *Ketchum v. Depew*, 81 Hun (N. Y.) 278, it was said: "It is claimed that the defendant has waived the right to object to a trial at the special term, because he has failed to set up in his answer that the plaintiff had an adequate remedy at law, and several cases are cited which hold that a defendant cannot, when sued in equity, avail himself of the defense that an adequate remedy at law exists, unless he pleads that defense in his answer. That doctrine was es-

tablished when equitable jurisdiction was vested in the Court of Chancery and legal jurisdiction in the court of law, and it was applied in cases where the jurisdiction of the two courts was concurrent. In such cases, when the plaintiff might have sued at law and obtained some sort of a remedy, or might have brought his action in the equity courts and obtained a more complete remedy, it was held that if the defendant permitted him to proceed to a hearing in the equity action without raising the point that he had a sufficient remedy at law, he had waived it. The reason was that the court of equity has jurisdiction, because, upon the facts proved, the plaintiff would be entitled to equitable relief, and that to permit the defendant to allow the case to proceed to a hearing before attempting to oust the court of its jurisdiction would result in a great injustice to the plaintiff. But it will be found that the rule was applied only in cases where the remedy was concurrent, and it was only in such cases that the defendant was obliged to assert, at the threshold of the case, his claim that the action was not an action in equity. The rule was then, as it is laid down in the case of *Bradley v. Aldrich*, 40 N. Y. 504, that where the plaintiff came into court invoking the jurisdiction of the court of equity upon matters as to which a court of law had no jurisdiction, he was obliged to prove a cause of action in equity, and failing in that, he lost his case."

2. *Ketchum v. Depew*, 81 Hun (N. Y.) 278; *Allen v. Pullman's Palace Car Co.*, 139 U. S. 658; *Lewis v. Cocks*, 23 Wall. (U. S.) 466; *Parker v. Winnipiseogee Lake Cotton, etc., Co.*, 2 Black (U. S.) 545; *New York Guaranty Co. v. Memphis Water Co.*, 107 U. S. 205.

3. *Griffin v. Orman*, 9 Fla. 22; *Stout v. Cook*, 41 Ill. 447; *Prettyman v. Irwin*, 29 Ill. App. 122; *Hickey v. Forristal*, 49 Ill. 255; *Keokuk, etc., R. Co. v. Donnell*, 77 Iowa 221; *Green v. Creighton*, 10 Smed. & M. (Miss.) 159; *Sherwin v. Gaghagen*, 39 Neb. 238; *Grandin v. Le Roy*, 2 Paige (N. Y.) 509;

raised at any stage of the proceedings,¹ or upon appeal.²

X. EFFECT OF DISMISSAL OF BILL. — If a court does not take jurisdiction of a suit in equity, but dismisses the bill because the plaintiff has an adequate remedy at law, such dismissal should be without prejudice to the right to maintain any action at law or other proceeding to which the plaintiff may be advised;³ and the dismissal should be with such words of qualification as will show that it is without prejudice, as otherwise the presumption will be that the dismissal was upon the merits.⁴

Edgett v. Douglass, 144 Pa. St. 95; M'Donald v. Crockett, 2 McCord Eq. (S. Car.) 130.

In *Heyer v. Burger, Hoffm.* (N. Y.) 14, the court said: "It is settled in our court that where there is a full and adequate remedy at law, the objection must be taken in a pleading. It is too late to raise it at the hearing. *Grandin v. Le Roy*, 2 Paige (N. Y.) 509, and the cases cited. But the chancellor in the case cited, as well as in *Hawley v. Cramer*, referred to 4 Cow. (N. Y.) 727, adds the qualification, 'unless this court be wholly incompetent to grant the relief sought by the bill.' This doctrine is repeated by him in *Wiswall v. Hall*, 3 Paige (N. Y.) 316, and more deliberately in *Utica Bank v. Utica*, 4 Paige (N. Y.) 400, where there was a written stipulation to submit the case upon the bill alone, and he held this to be a waiver of the objection. See also *Underhill v. Van Cortlandt*, 2 Johns. Ch. (N. Y.) 339. In *Ireland*, Lord Manners has admitted the objection of a full remedy at law to be raised at the hearing. *King v. Barrett*, 2 Molloy 319."

1. *Stout v. Cook*, 41 Ill. 447.

2. *Allen v. Pullman's Palace Car Co.*, 139 U. S. 658. See also in this connection, *supra*, p. 115.

3. *Van Norden v. Morton*, 99 U. S. 378; *Thompson v. Central Ohio R. Co.*,

6 Wall. (U. S.) 134; *Foot v. Gibbs*, 1 Gray (Mass.) 412. See also *Pittsburgh, etc., Droveyard Co.'s Appeal*, 123 Pa. St. 250.

4. *Foot v. Gibbs*, 1 Gray (Mass.) 412; *Van Norden v. Morton*, 99 U. S. 382. See also *Bigelow v. Winsor*, 1 Gray (Mass.) 301.

"It is a fundamental rule in the administration of justice that a question once litigated and determined between the parties, in a court of competent jurisdiction, is to be considered as at rest. But if a court does not take jurisdiction of a suit in equity, but dismisses the bill because the plaintiff has an adequate remedy at law, or for want of prosecution, or otherwise, for some cause not embracing an adjudication on the merits, such dismissal is not a bar. There is nothing to indicate the grounds of dismissal in this case except the fact of dismissal, after an appearance for the defendants. But the authorities, both in England and in this country, are decisive that a general entry of 'bill dismissed,' with no words of qualification, such as 'dismissed without prejudice' or 'without prejudice to an action at law,' or the like, is conclusively presumed to be upon the merits, and is a final determination of the controversy." *Per Shaw, C. J.*, in *Foot v. Gibbs*, 1 Gray (Mass.) 412.

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BY ARCHIBALD C. BOYD.

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CROSS-REFERENCES.

As to *Remittitur as process issued by appellate court on the decision of an appeal or writ of error*, see article *MANDATE AND PROCEEDINGS THEREON*, vol. 13, p. 835.

I. DEFINITION. — A remittitur of damages is the relinquishment or surrender of a part of the damages awarded in a cause.¹

II. POWER OF COURT TO ENTER REMITTITUR — 1. **In General.** — The power of a court, in actions where there is an established standard of valuation, to eliminate by a remittitur any excess in the recovery above what the evidence satisfactorily establishes, is well settled.²

The Practice Justified. — The exercise of such power is sanctioned on the theory that the excess arises from misapprehension of the law or the facts, or error in computation, not necessarily permeating and vitiating the entire verdict, and which it is competent to

1. Where one of the parties to an action obtains a judgment for damages, which he is either not entitled to or is willing to abandon, he makes an entry on the record called *remittitur damna*, by which he gives up or remits those damages. Archbold Prac. 805, 1209.

2. *Nudd v. Wells*, 11 Wis. 415, wherein it was said: "The practice of remitting where the illegal part is clearly distinguishable from the rest, and may be ascertained by the court without assuming the functions of the jury and substituting its judgment for theirs, is well settled."

See also the following cases:

Georgia. — *Whaley v. Broadwater*, 78 Ga. 336.

Illinois. — *Glos v. McKeown*, 141 Ill. 288.

Indiana. — *Cleveland, etc., R. Co. v. Beckett*, 11 Ind. App. 547.

Iowa. — *Bloom v. State Ins. Co.*, 94 Iowa 359.

Kansas. — *George R. Barse Live Stock, etc., Co. v. Guthrie*, 50 Kan. 476; *Atchison, etc., R. Co. v. Richards*, 58 Kan. 344.

Maine. — *Ekstrom v. Hall*, 90 Me. 186.

Missouri. — *Zurfluh v. People's R. Co.*, 46 Mo. App. 636; *Schmitz v. St. Louis, etc., R. Co.*, 46 Mo. App. 380.

New York. — *Willetts v. New York*

El. R. Co., 61 Hun (N. Y.) 626, 15 N. Y. Supp. 923; *Kelly v. Leggett*, 122 N. Y. 633, 33 N. Y. St. Rep. 264.

Ohio. — *Cleveland, etc., R. Co. v. Himrod Furnace Co.*, 37 Ohio St. 434.

Texas. — *Thomas v. Womack*, 13 Tex. 580; *Gulf, etc., R. Co. v. Redeker*, 75 Tex. 310; *McCormick Harvesting Mach. Co. v. Wesson*, (Tex. Civ. App. 1897) 41 S. W. Rep. 725; *Nunnally v. Taliaferro*, 82 Tex. 286; *Clifford v. Lee*, (Tex. Civ. App. 1893) 23 S. W. Rep. 843.

West Virginia. — *Vinal v. Core*, 18 W. Va. 1.

Wisconsin. — *Ketchum v. Mukwa*, 24 Wis. 303.

In Illinois the Appellate Court may allow a remittitur of damages recovered and enter judgment for the remainder. *Chicago, etc., R. Co. v. Walsh*, 157 Ill. 672; *Elgin City R. Co. v. Salisbury*, 162 Ill. 187.

In Louisiana the supreme court on appeal may reduce the amount of a recovery to a sum which will cover the actual damages sustained by the prevailing party. *Jackson v. Schmidt*, 14 La. Ann. 818; *Benagam v. Plassan*, 15 La. Ann. 703; *Block v. Bannerman*, 10 La. Ann. 1; *Black v. Carrollton R. Co.*, 10 La. Ann. 33; *King v. Ballard*, 10 La. Ann. 557.

correct, with the assent of the party whom alone the correction could prejudice, by striking therefrom any distinct item, or excess in the computation of its value, appearing to be unsupported by the evidence.¹

When by Statute a New Trial Is Given as of right to the defendant and the recovery is excessive, a remittitur cannot be entered without his consent.²

2. In Actions for Unliquidated Damages for Torts.—The power of a court to permit or require the entry of a remittitur in actions for unliquidated damages for torts has often been drawn in question and even denied,³ but by the great weight of authority the power exists.⁴

1. *Pendleton St. R. Co. v. Rahmann*, 22 Ohio St. 446.

2. *Strean v. Lloyd*, 128 Ill. 493; *Lowe v. Foulke*, 103 Ill. 58. See also *East St. Louis v. Hackett*, 85 Ill. 382. These were actions in ejectment decided under a statute permitting one new trial in such actions as a matter of right.

3. *Gurley v. Missouri Pac. R. Co.*, 104 Mo. 211, wherein the court said: "We have no scales by which we can determine what portion is just, and the result of reason based upon the evidence, and what part is poisoned with prejudice and passion. We do not think it within our province to assess the damages. When we set aside any part of the verdict, we destroy its integrity, and we have no right to set ourselves up as triers of facts, and render another and different verdict. We think the only logical course in such cases is to let the verdict stand or set it aside as an entirety." See also *St. Louis, etc., R. Co. v. Hall*, 53 Ark. 7; *Brunswick Light, etc., Co. v. Gale*, 91 Ga. 813; *Savannah, etc., R. Co. v. Harper*, 70 Ga. 119; *Brown v. Morris*, 3 Bush (Ky.) 81; *Franklin v. Fischer*, 51 Mo. App. 345; *Rodney v. St. Louis Southwestern R. Co.*, 127 Mo. 676; *Cassin v. Delany*, 38 N. Y. 178; *Crummiell v. Hill*, 14 Daly (N. Y.) 409; *Clifford v. Lee*, (Tex. Civ. App. 1893) 23 S. W. Rep. 843; *Vinal v. Core*, 18 W. Va. 1; *Unfried v. Baltimore, etc., R. Co.*, 34 W. Va. 260; *Potter v. Chicago, etc., R. Co.*, 22 Wis. 615.

Practice Disapproved.—In *Unterberger v. Scharff*, 51 Mo. App. 102, it was held that though the trial court had the power to require a remittitur of a part of the verdict as a condition to the overruling of a motion for a new trial, the exercise of the power in actions for

unliquidated damages for torts was not to be approved, as the better practice was to sustain or set aside the verdict as a whole.

4. *Arkansas*.—*Little Rock, etc., R. Co. v. Barker*, 39 Ark. 491.

California.—*George v. Law*, 1 Cal. 363; *Benedict v. Cozzens*, 4 Cal. 381; *Tarbell v. Central Pac. R. Co.*, 34 Cal. 616; *Kinsey v. Wallace*, 36 Cal. 462; *Gregg v. San Francisco, etc., R. Co.*, 59 Cal. 312; *Phelps v. Cogswell*, 70 Cal. 201.

Colorado.—*Duncan v. Whedbee*, 4 Colo. 143.

District of Columbia.—*Flannery v. Baltimore, etc., R. Co.*, 4 Mackey (D. C.) 111.

Illinois.—*Kolb v. Klages*, 27 Ill. App. 531; *Chicago, etc., R. Co. v. Des Lauriers*, 40 Ill. App. 654; *McCausland v. Wonderly*, 56 Ill. 410; *Clayton v. Brooks*, 31 Ill. App. 62; *Thomas v. Fischer*, 71 Ill. 576; *Illinois Cent. R. Co. v. Ebert*, 74 Ill. 399; *Albin v. Kinney*, 96 Ill. 214; *Union Rolling Mill Co. v. Gillen*, 100 Ill. 52; *Libby v. Scherman*, 146 Ill. 554; *Chicago, etc., R. Co. v. Dickson*, 88 Ill. 431; *North Chicago St. R. Co. v. Wrixon*, 150 Ill. 532; *Chicago, etc., R. Co. v. Walsh*, 157 Ill. 672; *Elgin City R. Co. v. Salisbury*, 162 Ill. 187.

Indiana.—*Cleveland, etc., R. Co. v. Beckett*, 11 Ind. App. 547.

Indian Territory.—*Kansas, etc., Coal Co. v. Reid*, (Indian Ter. 1897) 40 S. W. Rep. 898.

Iowa.—*Collins v. Council Bluffs*, 35 Iowa 432; *Sherman v. Western Stage Co.*, 24 Iowa 515; *Cooper v. Mills County*, 69 Iowa 350; *Keyser v. Kansas City, etc., R. Co.*, 56 Iowa 440; *Campbell v. Chicago, etc., R. Co.*, 35 Iowa 334; *Union Mercantile Co. v. Chandler*, 90 Iowa 650.

Indication by Appellate Court of Amount. — An appellate court having the power to declare a recovery excessive may also determine the amount of the excess.¹

3. Necessity of Consent of Prevailing Party. — But a court has no power to reduce a verdict and render judgment for the reduced amount unless the prevailing party consents to the reduction.²

Kansas. — *Missouri Pac. R. Co. v. Dwyer*, 36 Kan. 58.

Louisiana. — *Donnell v. Sandford*, 11 La. Ann. 645; *Caldwell v. Vicksburg, etc.*, R. Co., 41 La. Ann. 624; *Black v. Carrollton R. Co.*, 10 La. Ann. 33; *Keller v. Vernon*, 23 La. Ann. 165.

Maine. — *Howard v. Grover*, 28 Me. 97, 48 Am. Dec. 478.

Minnesota. — *Pratt v. Pioneer-Press Co.*, 35 Minn. 251; *Craig v. Cook*, 28 Minn. 232; *Hall v. Chicago, etc.*, R. Co., 46 Minn. 439.

Missouri. — *Furnish v. Missouri Pac. R. Co.*, 102 Mo. 456; *Burdick v. Missouri Pac. R. Co.*, 123 Mo. 221; *Hahn v. Sweazee*, 29 Mo. 199; *Nicholds v. Crystal Plate Glass Co.*, 126 Mo. 55; *Barbour v. McKee*, 7 Mo. App. 587; *Waldhier v. Hannibal, etc.*, R. Co., 87 Mo. 37.

Montana. — *Hamilton v. Great Falls St. R. Co.*, 17 Mont. 334; *Kennon v. Gilmer*, 5 Mont. 257.

New Hampshire. — *Belknap v. Boston, etc.*, R. Co., 49 N. H. 358.

New Jersey. — *Union v. Durkes*, 38 N. J. L. 21.

New York. — *Cummings v. Line*, 63 Hun (N. Y.) 636, 18 N. Y. Supp. 469; *Turton v. New York Recorder*, (C. Pl. Gen. T.) 3 Misc. (N. Y.) 314; *Klemm v. New York Cent., etc.*, R. Co., 78 Hun (N. Y.) 277; *Bailey v. Rome, etc.*, R. Co., 80 Hun (N. Y.) 4; *McIntyre v. New York Cent. R. Co.*, 47 Barb. (N. Y.) 515; *Murray v. Hudson River R. Co.*, 47 Barb. (N. Y.) 196, *affirmed* in 48 N. Y. 655; *Laning v. New York Cent. R. Co.*, 49 N. Y. 538; *Ryder v. New York*, 50 N. Y. Super. Ct. 220; *Lockwood v. Twenty-third St. R. Co.*, 15 Daly (N. Y.) 374; *Vail v. Reynolds*, 118 N. Y. 297; *Collins v. Albany, etc.*, R. Co., 12 Barb. (N. Y.) 492; *Clapp v. Hudson River R. Co.*, 19 Barb. (N. Y.) 461; *Whitehead v. Kennedy*, 69 N. Y. 462.

Pennsylvania. — *Emerson v. Schoonmaker*, 135 Pa. St. 437.

South Carolina. — *Guerry v. Kerton*, 2 Rich. L. (S. Car.) 507.

Tennessee. — *Branch v. Bass*, 5 Sneed (Tenn.) 366.

Texas. — *Gulf, etc.*, R. Co. *v. McFadden*, (Tex. Civ. App. 1894) 25 S. W. Rep. 451.

Utah. — *Brown v. Southern Pac. R. Co.*, 7 Utah 288.

Wisconsin. — *Corcoran v. Harran*, 55 Wis. 120; *Baker v. Madison*, 62 Wis. 137.

United States. — *Blunt v. Little*, 3 Mason (U. S.) 102.

1. *Hennessy v. District of Columbia*, 19 D. C. 220; *Florida R., etc.*, Co. *v. Webster*, 25 Fla. 394; *Nicholds v. Crystal Plate Glass Co.*, 126 Mo. 55; *Burdick v. Missouri Pac. R. Co.*, 123 Mo. 221; *Kennon v. Gilmer*, 9 Mont. 108; *Baker v. Madison*, 62 Wis. 137. But see *Savannah, etc.*, R. Co. *v. Harper*, 70 Ga. 119; *Brunswick Light, etc.*, Co. *v. Gale*, 91 Ga. 813; *Pidgeon v. School Trustees*, 44 Ill. 501; *Rodney v. St. Louis Southwestern R. Co.*, 127 Mo. 676; *Franklin v. Fischer*, 51 Mo. App. 345; *Cassin v. Delany*, (Ct. App.) 6 Abb. Pr. N. S. (N. Y.) 1.

2. *Massadillo v. Nashville, etc.*, R. Co., 89 Tenn. 661. In this case the jury rendered a verdict for the plaintiff for \$5,500. The defendant moved for a new trial. The court overruled all the causes except the one which assigned that the verdict was excessive, and stated "that ground was well taken, * * * and the court would grant a new trial * * * unless the plaintiff will remit the sum of \$2,500;" but "if the plaintiff will remit the sum of \$2,500, the judgment for \$3,000 will be allowed to stand." Thereupon plaintiff moved the court for leave to remit \$2,500 "under protest, and excepted to the action of the court," and appealed from so much of the judgment as required him to remit. It was said: "The action of the court was virtually compelling the plaintiff to remit. When plaintiff would only remit under protest and objection, the court should have granted a new trial, being satisfied, as he said, the judgment was excessive. We would not be understood as intimating that the court might not suggest a remittitur, and if plaintiff accepted it without pro-

4. Necessity of Giving Option of New Trial. — And a court cannot render judgment for a less sum than the verdict without giving the prevailing party the option of accepting such less sum, or submitting to a new trial.¹

5. As Invasion of Right of Trial by Jury. — The practice of directing or permitting a remittitur has been held by high authority not to be an impairment of the constitutional right of trial by jury.²

test or objection, then, on application of plaintiff to remit, a new trial might be refused; but a remittitur 'under protest and over the objection' of the plaintiff should not be entered." See also *Thompson v. Thompson*, 5 Ark. 18; *George v. Law*, 1 Cal. 363; *Brown v. McLeish*, 71 Iowa 381; *Roberts v. Smith*, 1 Morr. (Iowa) 417; *McCausland v. Wonderly*, 56 Ill. 410; *Willetts v. New York El. R. Co.*, (Supm. Ct. Gen. T.) 15 N. Y. Supp. 923; *Hook v. Turnbull*, 6 Call (Va.) 85.

1. *Kennon v. Gilmer*, 131 U. S. 22, wherein the court by Gray, J., said: "By the action of the court in entering an absolute judgment for the lesser sum, instead of ordering that a judgment for that sum should be entered if the plaintiff elected to remit the rest of the damages, and that if he did not so remit there should be a new trial of the whole case, each party was prejudiced; and either, therefore, is entitled to have the judgment reversed by writ of error. The plaintiff was prejudiced, because he was deprived of the election to take a new trial upon the whole case. The defendants were prejudiced, because if the judgment for the lesser sum had been conditional upon a remittitur by the plaintiff, the defendants, if the plaintiff had not remitted, would have had a new trial generally; and if the plaintiff had filed a remittitur, and thereby consented to the judgment, he could not have sued out a writ of error, and the defendants would have been protected from the possibility of being obliged in any event to pay the larger sum. Whereas upon the absolute judgment entered by the court, without any election or consent of the plaintiff, the plaintiff had the right to sue out a writ of error; and he availed himself of that right, and docketed his writ of error in this court before the defendants docketed their writ of error. The defendants were thus put in the position of being obliged to contest the plaintiff's writ of

error, in order to defend themselves against being held liable for the larger sum, as the plaintiff contended that they must be upon this record."

See also *Noel v. Dubuque*, etc., R. Co., 44 Iowa 293; *Thaule v. Krekeler*, 17 Hun (N. Y.) 338; *Crumieff v. Hill*, 14 Daly (N. Y.) 409; *Hudson v. Applegate*, 87 Iowa 605; *Massadillo v. Nashville*, etc., R. Co., 89 Tenn. 661.

Voluntary Remittitur. — A party voluntarily remitting a portion of his recovery is not entitled to the option of a new trial. *McCoy v. Treichler*, 90 Iowa 1.

Trial by Court. — In *Flickinger v. Omaha Bridge*, etc., Co., 98 Iowa 358, it was held that the rule that the trial judge cannot remit a portion of the verdict without giving the election to have a new trial, was not applicable where the case is brought to the court without a jury. In such cases the judge may change his conclusions as to the amount to be allowed without giving any such election.

2. *Arkansas Valley Land*, etc., Co. v. *Mann*, 130 U. S. 69, wherein the court said: "The practice (of requiring a remittitur) is sustained by sound reason, and does not, in any just sense, impair the constitutional right of trial by jury. It cannot be disputed that the court is within the limits of its authority when it sets aside the verdict of the jury and grants a new trial where the damages are palpably or outrageously excessive. But in considering whether a new trial should be granted upon that ground, the court necessarily determines, in its own mind, whether a verdict for a given amount would be liable to the objection that it was excessive. The authority of the court to determine whether the damages are excessive implies authority to determine when they are not of that character. To indicate, before passing upon the motion for a new trial, its opinion that the damages are excessive, and to require a plaintiff to

6. When Power Exercised — *a.* **EXCESS APPARENT OR ASCERTAINABLE.** — The power of a court to permit or require the entry of a remittitur is, however, only exercised in cases where the amount of the excess is apparent or is readily ascertainable.¹

submit to a new trial, unless, by remitting a part of the verdict, he removes that objection, certainly does not deprive the defendant of any right, or give him any cause for complaint. Notwithstanding such remission, it is still open to him to show in the court which tried the case that the plaintiff was not entitled to a verdict in any sum, and to insist either in that court, or in the appellate court, that such errors of law were committed as entitled him to have a new trial of the whole case." See also to the same effect *Burdick v. Missouri Pac. R. Co.*, 123 Mo. 221; *Branch v. Bass*, 5 Sneed (Tenn.) 366. But see *Gulf, etc., R. Co. v. Coon*, 69 Tex. 730.

1. *Arkansas*. — *St. Louis, etc., R. Co. v. Hall*, 53 Ark. 7; *Dodds v. Roane*, 36 Ark. 511.

California. — *Loveland v. Gardner*, 79 Cal. 317.

Colorado. — *Salida v. McKinna*, 16 Colo. 523.

Dakota. — *Cady v. Chicago, etc., R. Co.*, 5 Dak. 97.

Florida. — *McLean v. Spratt*, 20 Fla. 515.

Georgia. — *Lary v. Lewis*, 76 Ga. 46; *Miller v. Wilkins*, 79 Ga. 675; *Dillard v. Ellington*, 62 Ga. 389.

Illinois. — *Toledo, etc., R. Co. v. Beals*, 50 Ill. 150; *Giddings v. McCumber*, 51 Ill. App. 373; *Chicago, etc., R. Co. v. Hall*, 90 Ill. 42; *Clapp v. Herdman*, 25 Ill. App. 509; *Erie, etc., Dispatch v. Stanley*, 22 Ill. App. 459.

Indiana. — *Tucker v. Hyatt*, 151 Ind. 332; *Conwell v. Jeger*, 21 Ind. App. 110; *Giles v. Law*, 14 Ind. 16; *Parrish v. Heikes*, 14 Ind. 194; *Line v. State*, 131 Ind. 468; *Terre Haute, etc., R. Co. v. Jarvis*, 9 Ind. App. 438.

Iowa. — *Union Mercantile Co. v. Chandler*, 90 Iowa 650; *Austin v. Burgett*, 10 Iowa 302; *Payne v. Billingham*, 10 Iowa 360; *Miller v. Keokuk, etc., R. Co.*, 63 Iowa 680; *Fuller v. Chicago, etc., R. Co.*, 31 Iowa 211; *Anderson v. Kerr*, 10 Iowa 233; *Van Valtenburg v. Alberry*, 10 Iowa 264.

Kansas. — *Southwestern Mineral R. Co. v. Cross*, 7 Kan. App. 506.

Massachusetts. — *Doyle v. Dixon*, 97

Mass. 208; *Lambert v. Craig*, 12 Pick. (Mass.) 199; *Hodges v. Hodges*, 5 Met. (Mass.) 205.

Michigan. — *Wanner v. Mears*, 102 Mich. 554.

Minnesota. — *Bond v. Corbett*, 2 Minn. 248; *Sanborn v. Webster*, 2 Minn. 323; *Smith v. Dukes*, 5 Minn. 373; *Seeman v. Feeney*, 19 Minn. 79.

Mississippi. — *Newman v. Mackin*, 13 Smed. & M. (Miss.) 383; *Louisville, etc., R. Co. v. Day*, 67 Miss. 227; *Louisville, etc., R. Co. v. McCollister*, 66 Miss. 106.

Missouri. — *Hunter v. Mexico*, 49 Mo. App. 17; *Berthold v. Gruner*, 12 Mo. App. 575; *Ibers v. O'Donnell*, 25 Mo. App. 120; *Pierce v. Lowder*, 54 Mo. App. 25; *Atwood v. Gillespie*, 4 Mo. 423; *Pucket v. St. Louis, etc., R. Co.*, 25 Mo. App. 650; *Slattery v. St. Louis*, 120 Mo. 183; *Zerbe v. Missouri, etc., R. Co.*, 70 Mo. App. 644; *West v. Moser*, 49 Mo. App. 201; *State v. McKeon*, 25 Mo. App. 667; *Pendergast v. Dodge*, 21 Mo. App. 138; *Chitty v. St. Louis, etc., R. Co.*, (Mo. 1899) 49 S. W. Rep. 868; *Warder v. Henry*, 117 Mo. 530; *Priest v. Deaver*, 22 Mo. App. 276; *Hartman v. Louisville, etc., R. Co.*, 48 Mo. App. 619.

Nebraska. — *Gerber v. Jones*, 36 Neb. 126.

New Hampshire. — *Cram v. Hadley*, 48 N. H. 191; *Sanborn v. Emerson*, 12 N. H. 58; *Pierce v. Wood*, 23 N. H. 519; *Willard v. Stevens*, 24 N. H. 271; *Cross v. Wilkins*, 43 N. H. 332.

New York. — *Whitehead v. Kennedy*, 69 N. Y. 462; *Kalfur v. Broadway Ferry, etc., R. Co.*, 34 N. Y. App. Div. 267; *Lieberman v. Third Ave. R. Co.*, (Supm. Ct. App. T.) 25 Misc. (N. Y.) 704; *Lyddy v. Chamberlain*, 98 N. Y. 677; *Sears v. Conover*, 3 Keyes (N. Y.) 113; *Godfrey v. Moser*, 66 N. Y. 250; *Andrews v. Tyng*, 94 N. Y. 16; *Cuff v. Dorland*, 57 N. Y. 560; *Cockerill v. Loonam*, 36 Hun (N. Y.) 353; *Leach v. Flack*, (Supm. Ct. Gen. T.) 4 N. Y. St. Rep. 564; *Zung v. Howland*, 5 Daly (N. Y.) 136; *Chouteau v. Suydam*, 21 N. Y. 179; *Boyd v. Foot*, 5 Bosw. (N. Y.) 110; *Thompson v. Lumley*, 7 Daly (N. Y.) 74; *Andrews v. Brewster*, (Supm. Ct. Gen. T.) 11 N. Y. Supp.

Data Furnished by Record.—It is accordingly often held that a remittitur of excessive damages will only be allowed where the record furnishes the data for determining the amount of the excess.¹

b. TO PREVENT APPEAL.—Though a remittitur is often permitted where its effect will be to cut off the right to an appeal or writ of error,² it has been held that a remittitur cannot be entered

324, 58 Hun (N. Y.) 603; McGrath v. Third Ave. R. Co., 9 N. Y. App. Div. 141.

Ohio.—Dolittle v. McCullough, 7 Ohio St. 299; Cleveland, etc., R. Co. v. Himrod Furnace Co., 37 Ohio St. 434.

Oregon.—Mackey v. Olssen, 12 Oregon 429.

Pennsylvania.—Glenn v. Davis, 2 Grant's Cas. (Pa.) 153.

Rhode Island.—Forbes v. Howard, 4 R. I. 364.

Tennessee.—Memphis v. Kimbrough, 12 Heisk. (Tenn.) 133.

Texas.—International, etc., R. Co. v. Overton, (Tex. Civ. App. 1896) 34 S. W. Rep. 165; Thomas v. Womack, 13 Tex. 580; Ft. Worth, etc., R. Co. v. Viney, (Tex. Civ. App. 1895) 30 S. W. Rep. 252; Missouri, etc., R. Co. v. Perry, 8 Tex. Civ. App. 78; Gulf, etc., R. Co. v. Trawick, 80 Tex. 270; Galveston, etc., R. Co. v. Duellm (Tex. Civ. App. 1893) 23 S. W. Rep. 596; Galveston, etc., R. Co. v. Wesch, (Tex. Civ. App. 1893) 21 S. W. Rep. 1014, 85 Tex. 593; Galveston, etc., R. Co. v. Duellin, 86 Tex. 450; The Oriental v. Barclay, 16 Tex. Civ. App. 193; Ft. Worth, etc., R. Co. v. Measles, 81 Tex. 474.

Vermont.—Chandler v. Spear, 22 Vt. 388.

West Virginia.—Vinal v. Core, 18 W. Va. 1.

Wisconsin.—Pavey v. American Ins. Co., 56 Wis. 221; Sprague v. Brown, 40 Wis. 612; Potts v. Cooley, 56 Wis. 45; Kavanaugh v. Janesville, 24 Wis. 618; Stone v. Chicago, etc., R. Co., 88 Wis. 98.

United States.—Hazard Powder Co. v. Volger, 58 Fed. Rep. 152, 158, 12 U. S. App. 665, 675; Hansen v. Boyd, 161 U. S. 397.

1. Andrews v. Brewster, 58 Hun (N. Y.) 603, 11 N. Y. Supp. 324; Johnson v. Mullin, 12 Ohio 10; Ft. Worth, etc., R. Co. v. Measles, 81 Tex. 474; International, etc., R. Co. v. Wilkes, 68 Tex. 677; International, etc., R. Co. v. Brazzil, 78 Tex. 314.

2. Thompson v. Butler, 95 U. S. 694, wherein it was said: "Undoubtedly the trial court may refuse to permit a verdict to be reduced by a plaintiff upon his own motion; and if the object of the reduction is to deprive an appellate court of jurisdiction in a meritorious case, it is to be presumed the trial court will not allow it to be done. If, however, the reduction is permitted, the errors in the record will be shut out from our re-examination in cases where our jurisdiction depends upon the amount in controversy." See also Pacific Postal Tel. Cable Co. v. O'Connor, 128 U. S. 394; Alabama Gold L. Ins. Co. v. Nichols, 109 U. S. 232; Omaha First Nat. Bank v. Redick, 110 U. S. 224; Northwestern L. Ins. Co. v. Martin, 154 U. S. 640; Maine v. Gilman, 11 Fed. Rep. 215; Texas, etc., R. Co. v. Saunders, 151 U. S. 105; Texas, etc., R. Co. v. Horn, 151 U. S. 110; Nevada v. Klum, 76 Iowa 428; Vorwald v. Marshall, 71 Iowa 576; Milner v. Gross, 66 Iowa 252; Schultz v. Chicago, etc., R. Co., 75 Iowa 240; Bate-man v. Sisson, 70 Iowa 518.

In Iowa it has been held that an amendment may be made to the petition after verdict and before adjournment of the term reducing the amount claimed to less than one hundred dollars, and thus defeat the right of appeal. Wilson v. Hawkeye Ins. Co., 74 Iowa 212; Giger v. Chicago, etc., R. Co., 80 Iowa 492.

The rule, however, is otherwise after the adjournment of the term. Sharp v. Nelson, 93 Iowa 466.

In Louisiana it has been held that the plaintiff may render the case unappealable by making a remittitur before judgment, but cannot do so after judgment. State v. Lazarus, 34 La. Ann. 864, 1117; Wolf v. Munzenheimer, 14 La. Ann. 114; Le Blanc v. Pittman, 16 La. Ann. 430; State v. Judge, 21 La. Ann. 728. But see Gayden v. Louisville, etc., R. Co., 39 La. Ann. 269; New Orleans, etc., R. Co. v. McNeely, 47 La. Ann. 1298.

for the sole purpose of defeating an appeal.¹

Remission of Interest. — Where a suit is brought upon a special contract for a fixed sum upon which interest is legally due, the plaintiff cannot remit the interest, thus reducing the claim, so as to deprive the defendant of his right to appeal.²

c. AS AGAINST OBJECTION OF LOSING PARTY. — The losing party cannot complain of the action of the court in directing or permitting the prevailing party to remit a part of his recovery.³

III. VOLUNTARY REMITTITUR — 1. Allowance as Matter of Course. — A remittitur of a part of a recovery will be allowed as a matter of course when offered voluntarily.⁴

1. *Hansbrough v. Stinnett*, 22 Gratt. (Va.) 593. In this case there was a verdict for five hundred dollars, the jurisdictional amount on appeal. The plaintiff, to defeat an appeal, entered a remittitur of five dollars. It was said: "The court is of opinion that the release given by the attorney of the plaintiff in the court below, of five dollars of the damages, amounting to five hundred dollars found by the verdict of the jury, was given for the purpose of depriving this court of appellate jurisdiction in this case; that the said release for the said purpose is unlawful and void; and that in regard to the question of such jurisdiction, the judgment of the court below must be considered as having been rendered for the said sum of five hundred dollars, the damages aforesaid, instead of for the sum of four hundred and ninety-five dollars, the residue of the said damages after deducting the said sum of five dollars." See also *Finch v. Hartpence*, 29 Neb. 368; *North v. Holroyd*, L. R. 3 Exch. 69.

Judgment for Alimony. — A judgment for alimony for two hundred and fifty dollars per month, pending a suit for divorce, is appealable, and cannot be defeated by a remittitur on the part of the judgment creditor so that it shall not exceed five hundred dollars, the jurisdictional amount on appeal. *State v. Judge*, 24 La. Ann. 601.

Filing of Counterclaim. — The amount in dispute in a case where the defendant files a counterclaim, being the aggregate of what is claimed by both sides, and that being within the jurisdiction of the United States Supreme Court, on the disallowance of the defendant's counterclaim, the plaintiff cannot defeat the defendant's right to a writ of error by remitting enough of his judgment to bring it below the

jurisdictional amount of the supreme court. *Block v. Darling*, 140 U. S. 234.

After Jurisdiction on Appeal Has Attached. — When the jurisdiction of the supreme court on appeal has once attached, it cannot be defeated by a waiver or release of the amount of the judgment below in excess of the jurisdictional amount on appeal. *New York El. R. Co. v. New York Fifth Nat. Bank*, 118 U. S. 608.

2. *Howard v. Chamberlin*, 64 Ga. 684.

3. *Georgia*. — *Central R. Co. v. Crosby*, 74 Ga. 739.

Illinois. — *Elgin v. Joslyn*, 36 Ill. App. 301.

Iowa. — *McCoy v. Treichler*, 90 Iowa 1; *Van Winter v. Henry County*, 61 Iowa 684; *Duffy v. Dubuque*, 63 Iowa 171; *Hurlbut v. Hardenbrook*, 85 Iowa 606.

Massachusetts. — *Trischet v. Hamilton Mut. Ins. Co.*, 14 Gray (Mass.) 456.

Missouri. — *Mueller v. Hegney*, 13 Mo. App. 587.

New York. — *Carter v. Beckwith*, 128 N. Y. 312.

Ohio. — *Pendleton St. R. Co. v. Rahmann*, 22 Ohio St. 446; *Durrell v. Boyd*, 9 Ohio St. 72.

Tennessee. — *Branch v. Bass*, 5 Sneed (Tenn.) 366.

Virginia. — *James River, etc., Co. v. Adams*, 17 Gratt. (Va.) 435.

West Virginia. — *Vinal v. Core*, 18 W. Va. 1.

Wisconsin. — *Corcoran v. Harran*, 55 Wis. 121.

United States. — *Arkansas Valley Land, etc., Co. v. Mann*, 130 U. S. 69; *Clark v. Sidway*, 142 U. S. 682.

4. *Alabama*. — *Hinson v. Williamson*, 74 Ala. 180.

California. — *De Costa v. Massachusetts Flat Water, etc., Co.*, 17 Cal. 613.

Colorado. — *Chapin v. Goodell*, 2 Colo. 608.

Remittitur as to Joint Defendants. — It has been held that a remittitur of different sums in favor of different defendants on a joint judgment against them and the rendition of separate judgments against them cannot be allowed.¹

In Appellate Court. — The offer of a remittitur may be made as well in the appellate as in the trial court.²

Florida. — Schnabel *v.* Betts, 23 Fla. 178.

Georgia. — Augusta R. Co. *v.* Glover, 92 Ga. 132.

Illinois. — Locke *v.* Duncan, 47 Ill. App. 110; Marshall *v.* Freeman, 52 Ill. App. 42; Chicago, etc., R. Co. *v.* Grimes, 71 Ill. App. 397.

Indiana. — Culbertson *v.* Munson, 104 Ind. 451; Harris *v.* State, 123 Ind. 272.

Iowa. — Rowell *v.* Williams, 29 Iowa 210; Bloom *v.* State Ins. Co., 94 Iowa 359; McCoy *v.* Treichler, 90 Iowa 1; Pelley *v.* Walker, 79 Iowa 142.

Kansas. — Taggart *v.* Hunter, 5 Kan. App. 7.

Kentucky. — Williams *v.* Murrell, (Ky. 1890) 13 S. W. Rep. 1075.

Louisiana. — Dicks *v.* Cash, 7 Mart. N. S. (La.) 361; Fitzgerald *v.* Boulat, 13 La. Ann. 116.

Missouri. — Waldhier *v.* Hannibal, etc., R. Co., 87 Mo. 37; State *v.* Hope, 121 Mo. 34.

Nebraska. — McKay *v.* Hinman, 13 Neb. 33; St. John *v.* Swanback, 39 Neb. 841.

New York. — La Motte *v.* Archer, 4 E. D. Smith (N. Y.) 46; Lawrence *v.* Church, 129 N. Y. 635.

North Dakota. — Loverin-Browne Co. *v.* Buffalo Bank, 7 N. Dak. 569.

Pennsylvania. — Furry *v.* Stone, 1 Yeates (Pa.) 186; Glenn *v.* Davis, 2 Grant Cas. (Pa.) 153; Emerson *v.* Schoonmaker, 135 Pa. St. 437.

South Dakota. — Kidder *v.* Aaron, 10 S. Dak. 256.

Tennessee. — Young *v.* Cowden, 98 Tenn. 577.

Texas. — Underwood *v.* Parrott, 2 Tex. 168; Robson *v.* Watts, 11 Tex. 764; Hardison *v.* Hooker, 25 Tex. 91; Gulf, etc., R. Co. *v.* Trawick, 80 Tex. 275; Russell *v.* Nall, 79 Tex. 664; International, etc., R. Co. *v.* Wilkes, 68 Tex. 617; Barnes *v.* Darby, 18 Tex. Civ. App. 468; Beard *v.* Miller, (Tex. App. 1890) 16 S. W. Rep. 655; Thome *v.* Zushlag, 25 Tex. Supp. 226; Ft. Worth, etc., R. Co. *v.* Measles, 81 Tex. 474.

Wisconsin. — Baker *v.* Madison, 62 Wis. 137.

United States. — Kentucky Bank *v.* Ashley, 2 Pet. (U. S.) 327.

An Assignee in Bankruptcy who becomes a party to an attachment sued out against the bankrupt before his adjudication may, after the attachment is defeated, remit excessive damages recovered in an action on the attachment bond. Darcy *v.* Spivey, 57 Miss. 527.

1. Chils *v.* Gronlund, 41 Fed. Rep. 505.

Remittitur as to Part of Defendants. — But where judgment is rendered *in solido* against all the defendants, a part of whom are infants and not liable for the entire amount of the judgment, the plaintiff will be permitted to remit in the appellate court that part of the judgment for which the infants are not properly holden. Horstmeyer *v.* Connors, 56 Mo. App. 115.

2. *California.* — De Costa *v.* Massachusetts Flat Water, etc., Co., 17 Cal. 613.

Florida. — Schnabel *v.* Betts, 23 Fla. 178.

Illinois. — Chicago, etc., R. Co. *v.* Grimes, 71 Ill. App. 397.

Indiana. — Culbertson *v.* Munson, 104 Ind. 451; Harris *v.* State, 123 Ind. 272.

Iowa. — Pelley *v.* Walker, 79 Iowa 142; Bloom *v.* State Ins. Co., 94 Iowa 359; Rowell *v.* Williams, 29 Iowa 210.

Kentucky. — Williams *v.* Murrell, (Ky. 1890) 13 S. W. Rep. 1075.

Louisiana. — Fitzgerald *v.* Boulat, 13 La. Ann. 116.

Missouri. — State *v.* Hope, 121 Mo. 34; Waldhier *v.* Hannibal, etc., R. Co., 87 Mo. 37.

Nebraska. — McKay *v.* Hinman, 13 Neb. 33.

New York. — La Motte *v.* Archer, 4 E. D. Smith (N. Y.) 46; Lawrence *v.* Church, 129 N. Y. 635, 41 N. Y. St. Rep. 513.

North Dakota. — Loverin-Browne Co. *v.* Buffalo Bank, 7 N. Dak. 569.

Pennsylvania. — Furry *v.* Stone, 1 Yeates (Pa.) 186; Glenn *v.* Davis, 2

2. Requisites of Offer — Must State Amount. — An offer to remit a portion of a verdict should state the amount the prevailing party is willing to remit.¹

Must Be Whole Amount of Excess. — The offer, of course, should be for the whole amount of the excess.²

Grant Cas. (Pa.) 153; Emerson v. Schoonmaker, 135 Pa. St. 437.

Texas. — Ft. Worth, etc., R. Co. v. Measles, 81 Tex. 474; Barnes v. Darby, 18 Tex. Civ. App. 468; Hardison v. Hooker, 25 Tex. 91.

The Doctrine Limited. — In Orange, etc., R. Co. v. Fulvey, 17 Gratt. (Va.) 366, it was said: "Where a plaintiff who has recovered a judgment which, as rendered, is clearly erroneous, seeks to avoid a reversal by striking out part of the judgment, it is incumbent on him to satisfy the court, either by the materials in the record, or by fair presumption, that this can be done without injustice to the defendant. If he cannot do this, the defendant is entitled to have the erroneous judgment reversed."

Objection of Sureties on Appeal Bond. — Sureties on the appeal bond will not be permitted to interpose an objection to a remittitur on the ground that the appellant is insolvent and refuses to indemnify them on the appeal bond as he had agreed to do. Warder v. Henry, 117 Mo. 530.

Record for Purposes of Remittitur. — In an action in the circuit court on several written instruments where the court has no jurisdiction as to one because it is for twenty dollars only, but renders judgment for the aggregate amount of all the instruments, on error to the supreme court the fact that only the transcript and not the original record is before the court will not prevent it from entering a remittitur after error joined argument and submission to the court as to the amount of the instrument of which the circuit court had no jurisdiction. Fulton v. Hunt, 3 Ark. 280.

1. La Salle v. Tift, 52 Iowa 164, wherein the court said: "The plaintiff did not state the amount which he was willing to remit; nor for what sum he was willing to take judgment. The court might have fixed a certain sum for which the plaintiff should accept judgment, or submit to a new trial, but it was entirely within the discretion of the court whether it would do so or not. The plaintiff, by an offer to remit so much of the verdict as the court

should deem excessive, could not cast upon the court the duty of performing the functions of the jury."

Uncertainty as to Basis of Proposed Judgment. — See also Central City v. Wilcoxon, 3 Colo. 566, wherein the court said: "The remittitur filed in this cause is not of a character to entitle it to consideration. It is not for a sum certain. * * * The element of uncertainty as to the exact basis upon which the judgment is founded and as to the amount proposed to be remitted is so great that if we were to allow a remittitur in this case an unsafe precedent would be established. When a remittitur is filed for no certain sum it will be disregarded."

Stating What Remittitur Is For. — It is not necessary that the prevailing party shall state specifically upon the record what the remittitur is for; a general remittitur is sufficient. Elgin v. Joslyn, 136 Ill. 525.

Mere Offer to Remit. — Where a sum has been erroneously found by the jury against the defendant it will not cure the error for the plaintiff to offer to remit the amount thus erroneously allowed without actually doing so. Dula v. Cowles, 4 Jones L. (N. Car.) 519.

2. Warder v. Henry, 117 Mo. 530; Allen v. Claybrook, 58 Mo. 124; Ehrlich v. Aetna L. Ins. Co., 15 Mo. App. 579.

Improper Cause of Action. — Where a judgment improperly embraces a cause of action set up by an amended petition, if a remittitur is entered to cure the error in the judgment, it must clearly appear that the remittitur covers all of the judgment that was founded on the new cause of action. Texas, etc., R. Co. v. White, 55 Tex. 251.

Excessive Remittitur. — Where upon a plea of set-off of unliquidated damages the jury find for the defendant a certain sum, a new trial should be granted if the defendant remits more than that sum, as he cannot remit more without admitting that the verdict cannot be sustained. Harms v. Jacobs, 4 Ill. App. 169.

Curing Insufficient Offer. — Where, however, the prevailing party undertakes to avoid a new trial by entering a remittitur in the lower court, but fails to remit enough, he will be permitted to remit in the appellate court the correct amount.¹

3. Manner of Making — **Filing with Clerk.** — A party desiring to write off a portion of his recovery, should file a remittitur of such portion with the clerk of the court.²

4. Notice. — A party voluntarily remitting a portion of his recovery should give notice thereof to the losing party.³

5. Necessity of Order of Court. — No order of court is necessary for the remission by the prevailing party of a portion of his recovery.⁴

6. Time of Making. — No general rule as to the time in which a remittitur should be made can be drawn from the authorities as the practice in this respect varies in the different jurisdictions.

Before Entry of Judgment. — In some jurisdictions it is held that a remittitur should be made before the entry of judgment.⁵

1. *Warder v. Henry*, 117 Mo. 530.

Offer Made and Overlooked. — Where the prevailing party offers to remit a part of the judgment in the lower court and the offer is overlooked the appellate court will order a credit for the amount of the remittitur so made below. *Grand Rapids, etc., R. Co. v. Diether*, 10 Ind. App. 206.

Admission in Brief. — Although an admission in the brief of the plaintiff's counsel that a small overcharge in the judgment was caused by his error in writing, the judgment is not strictly a remittitur, yet it will authorize an amendment of the judgment by the appellate court. *Baudoin v. Tete*, 10 La. Ann. 69.

Indorsement on Execution. — Where a judgment was rendered in the trial court for a small amount over the sum claimed in the petition, and the plaintiff after discovering the error endeavored to release such excess by an indorsement to that effect on the execution, it was held that it was not such a cause of error as justified any correction by the appellate court. *Foster v. Van Norman*, 1 Tex. 636. See also *Rogers v. Brooks*, 31 Ark. 194.

2. *German Mut. Farmer F. Ins. Co. v. Decker*, 74 Wis. 556; *Duffy v. Hickey*, 68 Wis. 380; *Killops v. Stephens*, 73 Wis. 111.

Informal Remittitur. — The fact that a remittitur was informally made in the court below will not warrant a reversal of the judgment on appeal. *Phillips v. Evans*, 64 Mo. 17. See also *O'Shea v. Kirker*, 4 Bosw. (N. Y.) 120.

Amendment of Entry. — Under the statutes of *Texas* the prevailing party may remit a part of his recovery, and where the remittitur does not appear to be made in open court, the court may at the same term and before any writ of error is sued out, correct the error in that particular according to the fact. *Pacific Express Co. v. Malin*, 132 U. S. 531.

3. *German Mut. Farmer F. Ins. Co. v. Decker*, 74 Wis. 556; *Duffy v. Hickey*, 68 Wis. 380; *Killops v. Stephens*, 73 Wis. 111.

Notice of Application. — As the prevailing party may voluntarily remit a portion of his recovery without any order of court, no notice of an application to the court to be permitted to remit need be given to the opposite party. *German Mut. Farmer F. Ins. Co. v. Decker*, 74 Wis. 556.

In *Texas* under a statute providing that where a judgment is reversible only because it is excessive, the court shall indicate to the party in whose favor judgment was rendered the excess and the time within which a remittitur may be filed, and that if it is so filed the judgment shall be reformed and affirmed, it has been held that the prevailing party need not file a motion to remit nor need he give the losing party notice of the remittitur. *Galveston, etc., R. Co. v. Duellm*, (Tex. Civ. App. 1893) 24 S. W. Rep. 334.

4. *German Mut. Farmer F. Ins. Co. v. Decker*, 74 Wis. 556.

5. *Bealle v. Schoal*, 1 A. K. Marsh. (Ky.) 475; *Clarke v. Robinson*, 15 R. I.

During the Term. — In other jurisdictions it has been held that a remittitur may be made at any time during the term or while the proceedings are *in fieri*.¹

On Motion for New Trial. — It has also been held that a remittitur may be entered on motion for a new trial.²

Before Disposition of Cause on Appeal. — According to another view a remittitur may be made in the appellate court at any time before the final disposition of the cause by the court.³

IV. OPTIONAL GRANT OF REMITTITUR — 1. New Trial or Remittitur. — It is a very common practice, and one sanctioned by

231. See also *The Steamboat Clarion v. Moran*, 18 Ill. 501.

Before Verdict. — Where the evidence, being all in, tends to show a demand for more than the jurisdictional sum, the excess should be then remitted in order to save the jurisdiction of the cause; a remittitur after verdict or finding comes too late. *Reading v. Mead*, 16 Ill. App. 360.

1. *Davenport v. Bradley*, 4 Conn. 309; *Rowan v. People*, 18 Ill. 159; *Russell v. Hubbard*, 59 Ill. 335; *Wray v. Lister*, 2 Stra. 1110; *Cheveley v. Morris*, 2 W. Bl. 1300. But see *Cohen v. Smith*, 33 Ill. App. 344.

After Appeal or Writ of Error. — A remittitur has been allowed in the trial court after an appeal has been taken or writ of error brought. *Hunter v. Sherman*, 3 Ill. 539; *Lambert v. Blackman*, 1 Blackf. (Ind.) 59; *Averill Coal, etc., Co. v. Verner*, 22 Ohio St. 372; *Doty v. Rigour*, 9 Ohio St. 526; *Fury v. Stone*, 2 Dall. (Pa.) 184. But see *The Ashland*, 19 Fed. Rep. 336.

Judgment by Default. — Where there is a judgment by default, a remittitur is seasonable though made after assessment by the clerk and judgment for the amount assessed. *Linder v. Monroe*, 33 Ill. 388.

2. *Locke v. Duncan*, 47 Ill. App. 110.

In Texas it has been held that the error of an excessive verdict is not cured by a remittitur pending a motion for a new trial entered upon intimation by the court that the verdict is excessive. *Missouri, etc., R. Co. v. Perry*, 8 Tex. Civ. App. 78.

Nor can the supreme court pending an application for a writ of error accept a remittitur. *Fidelity, etc., Co. v. Allibone*, 90 Tex. 660.

After Motion for New Trial Overruled.

— In *Hahn v. Sweazea*, 29 Mo. 199, it was held that a remission of damages may be made by a plaintiff after a

motion for a new trial has been overruled.

3. *Fulton v. Hunt*, 3 Ark. 280; *Ex p. Hardy*, 26 Ark. 94; *Welsh v. Johnson*, 76 Ill. 295; *Bailey v. Heintz*, 71 Ill. App. 189; *McCormick Harvesting Mach. Co. v. McKee*, 51 Mich. 426; *Dolittle v. McCullough*, 7 Ohio St. 299; *Theavenought v. Hardeman*, 4 Verg. (Tenn.) 565; *Chadwick v. Meredith*, 40 Tex. 380; *Galveston, etc., R. Co. v. Wesch*, 85 Tex. 593; *Edmunson v. Yates*, 25 Tex. 373; *Bushee v. Wright*, 1 Pin. (Wis.) 104. But see *Gulf, etc., R. Co. v. Key*, (Tex. App. 1891) 16 S. W. Rep. 543; *Howe v. Merrell*, 36 Tex. 319; *Chrisman v. Davenport*, 21 Tex. 483.

On Rehearing. — There is, however, authority for the entry of a remittitur on a rehearing. *Arnau v. Florida First Nat. Bank*, 36 Fla. 395; *Hyde v. Minneapolis Lumber Co.*, 53 Iowa 243; *Gere v. Council Bluffs Ins. Co.*, 67 Iowa 272; *Sharpe v. Johnston*, 76 Mo. 660.

After Affirmance of Order Granting New Trial. — A plaintiff who on motion for a new trial refuses to remit a part of the verdict in his favor will not be permitted, after an order granting a new trial has been affirmed on appeal, to make a remittitur and have judgment directed in his favor for the amount of the verdict less the amount remitted. *Kohler v. Fairhaven, etc., R. Co.*, 8 Wash. 455.

After Satisfaction of Execution. — In *Miller v. Glass*, 11 Ill. App. 560, it was held that where a judgment had been rendered for a greater sum than that for which damages were claimed in the writ, the error could not be cured by entering a remittitur in the appellate court after execution had been issued on such judgment and had been satisfied by payment before suing out the writ of error.

a long line of authorities, for the trial court, when of opinion that a verdict is excessive, to give the prevailing party the option to accept judgment for an amount which the court believes to be just or to submit to a new trial.¹

1. *Alabama*. — *Smith v. Paul*, 8 Port. (Ala.) 503; *Richardson v. Birmingham Cotton Mfg. Co.*, 116 Ala. 381.

Arizona. — *Southern Pac. Co. v. Tomlinson*, (Ariz. 1893) 33 Pac. Rep. 710.

California. — *Gregg v. San Francisco, etc.*, R. Co., 59 Cal. 312; *Clanton v. Coward*, 67 Cal. 373; *Gardner v. Tatum*, 81 Cal. 370; *George v. Law*, 1 Cal. 363; *Benedict v. Cozzens*, 4 Cal. 381; *Chapin v. Bourne*, 8 Cal. 294; *Clark v. Huber*, 20 Cal. 196; *Carpentier v. Gardiner*, 29 Cal. 160; *Russell v. Dennison*, 50 Cal. 243; *Tobin v. Omnibus Cable Co.*, (Cal. 1893) 34 Pac. Rep. 124.

District of Columbia. — *Sinclair v. Washington, etc.*, R. Co., 4 MacArthur (D. C.) 13.

Florida. — *Harrell v. Durrance*, 9 Fla. 490.

Georgia. — *Loyd v. Hicks*, 31 Ga. 140; *Harris v. Central of Georgia R. Co.*, 103 Ga. 495; *Carlisle v. Callahan*, 78 Ga. 320; *Central R. Co. v. Crosby*, 74 Ga. 739; *Whaley v. Broadwater*, 78 Ga. 336; *Mayer v. Tufts*, 76 Ga. 96.

Illinois. — *Libby v. Scherman*, 146 Ill. 540; *Illinois Cent. R. Co. v. Robinson*, 58 Ill. App. 181; *West Chicago St. R. Co. v. Wheeler*, 73 Ill. App. 368; *Thomas v. Fischer*, 71 Ill. 576; *Albin v. Kinney*, 96 Ill. 214; *Union Rolling Mill Co. v. Gillen*, 100 Ill. 52; *Chicago, etc., R. Co. v. Cummings*, 20 Ill. App. 333; *McCausland v. Wonderly*, 56 Ill. 410; *Illinois Cent. R. Co. v. Ebert*, 74 Ill. 399; *Haymarket Theater Co. v. Rosenberg*, 77 Ill. App. 183.

Iowa. — *Duffy v. Dubuque*, 63 Iowa 176; *Brockman v. Berryhill*, 16 Iowa 183; *Noel v. Dubuque, etc.*, R. Co., 44 Iowa 293; *Callanan v. Shaw*, 24 Iowa 441; *Baxter v. Cedar Rapids*, 103 Iowa 599; *Montelius v. Wood*, 56 Iowa 254; *Kitterman v. Chicago, etc.*, R. Co., 69 Iowa 440; *Collins v. Council Bluffs*, 35 Iowa 432; *Van Winter v. Henry County*, 61 Iowa 691.

Kansas. — *Union Pac. R. Co. v. Mitchell*, 56 Kan. 324; *Haldeman v. Johnson*, (Kan. App. 1898) 54 Pac. Rep. 507.

Kentucky. — *Johnson v. Johnson*, (Ky. 1898) 47 S. W. Rep. 883.

Maine. — *Howard v. Grover*, 28 Me. 97; *Jewell v. Gage*, 42 Me. 247; *Snow v. Weeks*, (Me. 1887) 8 Atl. Rep. 462.

Massachusetts. — *Doyle v. Dixon*, 97 Mass. 208; *King v. Howard*, 1 Cush. (Mass.) 137; *Lambert v. Craig*, 12 Pick. (Mass.) 199.

Minnesota. — *Stickney v. Bronson*, 5 Minn. 215; *Brown v. Doyle*, 69 Minn. 543; *Kopp v. Northern Pac. R. Co.*, 41 Minn. 310; *Van Doren v. Wright*, 54 Minn. 455.

Mississippi. — *Young v. Englehard*, 1 How. (Miss.) 19.

Missouri. — *Ellis v. Mackie Constr. Co.*, 60 Mo. App. 67; *McAllister v. Mullanphy*, 3 Mo. 38; *Hoyt v. Reed*, 16 Mo. 294; *Berthold v. Gruner*, 12 Mo. App. 575; *Ray v. Thompson*, 26 Mo. App. 431; *Loyd v. Hannibal, etc.*, R. Co., 53 Mo. 509; *Holmes v. Atchison, etc.*, R. Co., 48 Mo. App. 79; *Walser v. Thies*, 56 Mo. 89.

Montana. — *Cunningham v. Quirk*, 10 Mont. 462.

New Hampshire. — *Belknap v. Boston, etc.*, R. Co., 49 N. H. 358.

New York. — *Jansen v. Ball*, 6 Cow. (N. Y.) 629; *M'Connell v. Hampton*, 12 Johns. (N. Y.) 234; *Dublin v. Murphy*, 3 Sandf. (N. Y.) 19; *Clapp v. Hudson River R. Co.*, 19 Barb. (N. Y.) 461.

Ohio. — *Durrell v. Boyd*, 9 Ohio St. 72; *Bagley v. Bates*, *Wright (Ohio)* 705; *Clary v. Protection Ins. Co.*, *Wright (Ohio)* 227; *Douglas v. Day*, 28 Ohio St. 175; *Lear v. McMillen*, 17 Ohio St. 464.

Pennsylvania. — *Myers v. Litts*, 3 Lack. Leg. N. (Pa.) 363; *McBride v. Daniels*, 92 Pa. St. 332; *Crew v. McCafferty*, 124 Pa. St. 200.

Rhode Island. — *Forbes v. Howard*, 4 R. I. 364.

South Carolina. — *Guerrey v. Kerton*, 2 Rich. L. (S. Car.) 507; *Atkinson v. Fraser*, 5 Rich. L. (S. Car.) 519.

Utah. — *Reddon v. Union Pac. R. Co.*, 5 Utah 344.

Washington. — *Winter v. Shoudy*, 9 Wash. 52; *McDonough v. Great Northern R. Co.*, 15 Wash. 244.

West Virginia. — *Williams v. Baltimore, etc.*, R. Co., 9 W. Va. 33.

Wisconsin. — *Murray v. Buell*, 74 Wis.

Discretion of Court. — But the exaction, as a condition of refusing a new trial, that the prevailing party shall remit a portion of the amount awarded by the verdict, is a matter within the discretion of the court.¹

2. Reversal or Remittitur. — It is also a very common practice for an appellate court, when it deems the damages recovered to be excessive, and this is the only error, to require a remittitur of the amount considered excessive as a condition to the affirmance of the judgment.²

14; *Corcoran v. Harra*, 55 Wis. 120. *United States.* — *Blunt v. Little*, 3 Mason (U. S.) 102.

As to necessity of giving option of new trial see *supra*, II. 4. *Necessity of Giving Option of New Trial.*

1. *Chapin v. Bourne*, 8 Cal. 294; *Davis v. Southern Pac. Co.*, 98 Cal. 13; *Anderson v. Jenkins*, 99 Ga. 299; *Mayer v. Tufts*, 76 Ga. 96; *Cleveland, etc., R. Co. v. Beckett*, 11 Ind. App. 547; *Browning v. Merritt*, 61 Ind. 425; *Godfrey v. Moser*, 66 N. Y. 250; *Gumb v. Twenty-third St. R. Co.*, 58 N. Y. Super. Ct. 1, 559; *Kennedy v. Oregon Short Line R. Co.*, (Utah 1898) 54 Pac. Rep. 988; *Winter v. Shoudy*, 9 Wash. 52; *Northern Pac. R. Co. v. Herbert*, 116 U. S. 642; *Arkansas Valley Land, etc., Co. v. Mann*, 130 U. S. 69; *Thompson v. Butler*, 95 U. S. 694.

2. *Arkansas.* — *Fowler v. Johnson*, 11 Ark. 280; *Hirsch v. Patterson*, 23 Ark. 112; *Ex p. Hardy*, 26 Ark. 94; *Hamlett v. Tallman*, 30 Ark. 505; *Dodds v. Roane*, 36 Ark. 511; *Ferguson v. Far-gason*, 38 Ark. 238; *South Western Tel., etc., Co. v. Benson*, 63 Ark. 283; *Reasoner v. Brown*, 19 Ark. 234.

California. — *Doll v. Feller*, 16 Cal. 432; *Colton v. Onderdonk*, 69 Cal. 155; *Granger Business Assoc. v. Clark*, 84 Cal. 201; *Mascarel v. Raffour*, 51 Cal. 242; *Behlow v. Shorb*, 91 Cal. 141; *Carpentier v. Gardiner*, 29 Cal. 160; *Chapin v. Bourne*, 8 Cal. 294; *Clark v. Huber*, 20 Cal. 196; *Harrison v. Pea-body*, 34 Cal. 178; *Russell v. Dennison*, 50 Cal. 243; *Atherton v. Fowler*, 46 Cal. 323; *Dreyfous v. Adams*, 48 Cal. 131; *Clanton v. Coward*, 67 Cal. 373; *Durfee v. Garvey*, 78 Cal. 546; *Love-land v. Gardner*, 79 Cal. 317; *Gardner v. Tatum*, 81 Cal. 370; *De Costa v. Massachusetts Flat Water, etc., Co.*, 17 Cal. 613; *Muller v. Boggs*, 25 Cal. 175; *Eames v. Haver*, 111 Cal. 401; *Tarbell v. Central Pac. R. Co.*, 34 Cal. 616; *Kinsey v. Wallace*, 36 Cal. 462; *Phelps v. Cogswell*, 70 Cal. 201; *Sloane v.*

Southern California R. Co., 111 Cal. 668.

Connecticut. — *Smith v. Hall*, 69 Conn. 651.

Florida. — *Gunning v. Heron*, 25 Fla. 846.

Georgia. — *Boram v. Thweatt*, 45 Ga. 94; *Richmond, etc., R. Co. v. Benson*, 86 Ga. 203.

Illinois. — *Daube v. Nessler*, 50 Ill. App. 166; *McNail v. Welch*, 21 Ill. App. 378; *North Chicago St. R. Co. v. Cotton*, 140 Ill. 486.

Indiana. — *H. G. Olds Wagon Works v. Coombs*, 124 Ind. 52; *Pancoast v. Travelers' Ins. Co.*, 79 Ind. 172; *Trent-man v. Wiley*, 85 Ind. 33; *Grand Rapids, etc., R. Co. v. Diether*, 10 Ind. App. 206; *Simpson v. Shafer*, 20 Ind. 306.

Iowa. — *Thompson v. Purnell*, 10 Iowa 205; *Anderson v. Kerr*, 10 Iowa 233; *Van Valtenburg v. Alberry*, 10 Iowa 264; *Austin v. Burgett*, 10 Iowa 302; *Payne v. Billingham*, 10 Iowa 360; *Thrift v. Redman*, 13 Iowa 25; *Knapp v. Miller*, 13 Iowa 596; *Pelley v. Walker*, 79 Iowa 142; *Union Mercantile Co. v. Chandler*, 90 Iowa 650; *Hyde v. Minneapolis Lumber Co.*, 53 Iowa 243; *Gere v. Council Bluffs Ins. Co.*, 67 Iowa 272; *Brentner v. Chicago, etc., R. Co.*, 68 Iowa 530; *Ketchum v. Larkin*, 88 Iowa 215; *Cooper v. Mills County*, 69 Iowa 350; *Keyser v. Kansas City, etc., R. Co.*, 56 Iowa 440; *Noel v. Dubuque, etc., R. Co.*, 44 Iowa 293; *Lombard v. Chicago, etc., R. Co.*, 47 Iowa 494; *McKinley v. Chicago, etc., R. Co.*, 44 Iowa 314; *Howe v. Sutherland*, 39 Iowa 484; *Sherman v. Western Stage Co.*, 24 Iowa 517.

Kansas. — *Educational Assoc. v. Hitchcock*, 4 Kan. 36; *Kansas City, etc., R. Co. v. Kier*, 41 Kan. 671; *State v. Durein*, 46 Kan. 695; *Fort Scott, etc., R. Co. v. Tubbs*, 47 Kan. 630; *Frankhouser v. Cannon*, 50 Kan. 621; *George R. Barse Live Stock, etc., Co. v. Guthrie*, 50 Kan. 476; *Dennis v. Benfer*, 54 Kan. 527.

3. Time of Exercise of Option. — The party recovering an excessive judgment will be given a reasonable time within which to

Maine. — *Snow v. Weeks*, (Me. 1887) 8 Atl. Rep. 462; *Howard v. Grover*, 28 Me. 97.

Minnesota. — *Becker v. Bohmert*, 63 Minn. 403.

Mississippi. — *Chicago, etc., R. Co. v. Jarrett*, 59 Miss. 470.

Missouri. — *Waldhier v. Hannibal, etc., R. Co.*, 87 Mo. 37; *Smith v. Wabash, etc., R. Co.*, 92 Mo. 374; *Burdick v. Missouri Pac. R. Co.*, 123 Mo. 221, 45 Am. St. Rep. 528; *Furnish v. Missouri Pac. R. Co.*, 102 Mo. 456; *State v. Hope*, 121 Mo. 34; *Miller v. Hardin*, 64 Mo. 545; *Clark v. Bullock*, 65 Mo. 535; *Hahm v. Cotton*, 136 Mo. 216; *Franklin v. Haynes*, 119 Mo. 566; *West v. Creve Coeur Lake Ice Co.*, 19 Mo. App. 547; *Hartman v. Louisville, etc., R. Co.*, 48 Mo. App. 619; *Warder v. Henry*, 117 Mo. 530; *Pierce v. Lowder*, 54 Mo. App. 25; *Opplinger v. Sutton*, 50 Mo. App. 348; *Rodney v. St. Louis Southwestern R. Co.*, 127 Mo. 676; *Hollender v. Koetter*, 20 Mo. App. 79; *Henry v. Bassett*, 22 Mo. App. 667; *Nicholds v. Crystal Plate Glass Co.*, 126 Mo. 55; *State v. McHale*, 16 Mo. App. 478; *Auchincloss v. Frank*, 17 Mo. App. 41.

Montana. — *Kennon v. Gilmer*, 9 Mont. 108.

Nebraska. — *Sioux City, etc., R. Co. v. Finlayson*, 16 Neb. 578; *Boston Tea Co. v. Brubaker*, 26 Neb. 409; *Meharry v. Halligan*, 29 Neb. 565; *Omaha, etc., R. Co. v. Brady*, 39 Neb. 27; *Friend v. Ingersoll*, 39 Neb. 717; *St. John v. Swanback*, 39 Neb. 841; *Omaha, etc., R. Co. v. Ryburn*, 40 Neb. 87; *Fremont, etc., R. Co. v. Leslie*, 41 Neb. 159; *Gordon v. Little*, 41 Neb. 250; *Culbertson Irrigating, etc., Co. v. Wildman*, 45 Neb. 663; *Chicago, etc., R. Co. v. Archer*, 46 Neb. 907; *Regier v. Shreck*, 47 Neb. 667; *Fremont, etc., R. Co. v. Leslie*, 41 Neb. 159; *Carter v. Munson*, 27 Neb. 172; *Omaha, etc., R. Co. v. Brady*, 39 Neb. 27; *Wonderlick v. Walker*, 41 Neb. 806; *Haas v. Bank of Commerce*, 41 Neb. 754; *Gifford v. Faubion*, 27 Neb. 41; *Grand Island, etc., R. Co. v. Swinbank*, 51 Neb. 521.

Nevada. — *Hastings v. Johnson*, 2 Nev. 190.

New Hampshire. — *Odlin v. Gove*, 41 N. H. 465; *Wendell v. Moulton*, 26 N. H. 41; *Sanborn v. Emerson*, 12 N. H.

58; *Pierce v. Wood*, 23 N. H. 519; *Willard v. Stevens*, 24 N. H. 271.

New York. — *Sackett v. Thomas*, 4 N. Y. App. Div. 447; *Fischer v. Blank*, 138 N. Y. 671, 53 N. Y. St. Rep. 293; *Vail v. Reynolds*, 118 N. Y. 297; *Sears v. Conover*, 3 Keyes (N. Y.) 113; *Hayden v. Florence Sewing Mach. Co.*, 54 N. Y. 221; *Jenks v. Van Brunt*, (Supm. Ct. Gen. T.) 6 Civ. Pro. (N. Y.) 158; *Boyd v. Foot*, 5 Bosw. (N. Y.) 110; *McAuley v. Mildrum*, (C. Pl. Gen. T.) 9 Abb. Pr. (N. Y.) 198; *Ayrault v. Pacific Bank*, (N. Y. Super. Ct. Gen. T.) 1 Abb. Pr. N. S. (N. Y.) 381; *Bunten v. Orient Mut. Ins. Co.*, 8 Bosw. (N. Y.) 448; *Corning v. Corning*, 6 N. Y. 97; *Gansevoort Freezing, etc., Co. v. Wesels Co.*, (N. Y. Super. Ct. Gen. T.) 29 N. Y. Supp. 590; *Schenck v. Marx*, (Supm. Ct. Gen. T.) 5 N. Y. Supp. 309; *Clapp v. Hudson River R. Co.*, 19 Barb. (N. Y.) 461; *Potter v. Thompson*, 22 Barb. (N. Y.) 87; *Sears v. Conover*, 34 Barb. (N. Y.) 330; *La Motte v. Archer*, 4 E. D. Smith (N. Y.) 46; *Griffiths v. Hardenbergh*, 41 N. Y. 464; *Boehm v. Sheddinsky*, (C. Pl. Gen. T.) 15 N. Y. Supp. 974; *De Lavalette v. Wendt*, 11 Hun (N. Y.) 432; *Hanson v. Aikman*, 2 Silv. Sup. (N. Y.) 528, 6 N. Y. Supp. 366; *Holmes v. Jones*, 121 N. Y. 461; *Bishop v. Autographic Register Co.*, 19 N. Y. App. Div. 268; *Coppins v. New York Cent., etc., R. Co.*, 48 Hun (N. Y.) 292; *Silberstein v. Houston, etc., R. Co.*, (Supm. Ct. Gen. T.) 4 N. Y. Supp. 843; *Andrews v. Brewster*, 124 N. Y. 433; *Simms v. Calcagnino*, (N. Y. City Ct. Gen. T.) 21 Misc. (N. Y.) 787; *Kolsch v. Jewell*, 21 N. Y. App. Div. 581; *Doran v. Brooklyn, etc., Ferry Co.*, (Brooklyn City Ct. Gen. T.) 19 N. Y. Supp. 172.

Ohio. — *Marietta Iron Works v. Lottimer*, 25 Ohio St. 621; *Lear v. McMillen*, 17 Ohio St. 464.

Oregon. — *Cochran v. Baker*, (Oregon 1898) 52 Pac. Rep. 520.

Tennessee. — *Louisville, etc., R. Co. v. Wallace*, 91 Tenn. 35.

Texas. — *International, etc., R. Co. v. Overton*, (Tex. Civ. App. 1896) 34 S. W. Rep. 165; *Sabine R. Co. v. Johnson*, (Tex. 1888) 7 S. W. Rep. 378; *Missouri Pac. R. Co. v. Johnson*, 72 Tex. 95; *Gulf, etc., R. Co. v. Key*, (Tex. App. 1891) 16 S. W. Rep. 543; *Jackel v. Reiman*, 78 Tex. 588; *Mayer v. Duke*,

exercise the option given him of remitting a part of his recovery or of submitting to a new trial.¹

V. ERRORS CURABLE BY REMITTITUR — 1. **In General.** — The rule may be generally stated that an excessive recovery of damages is curable by a remittitur of the excess.²

72 Tex. 445; Galveston, etc., R. Co. v. Neel, (Tex. Civ. App. 1894) 26 S. W. Rep. 788; Galveston, etc., R. Co. v. Duelm, (Tex. Civ. App. 1893) 23 S. W. Rep. 596; Gulf, etc., R. Co. v. Trawick, 80 Tex. 270; Zapp v. Michaelis, 58 Tex. 270; Gregory v. Coleman, 3 Tex. Civ. App. 166; Chadwick v. Meredith, 40 Tex. 380; Vance v. Lindsey, 60 Tex. 286; Taylor v. Hall, 20 Tex. 211; Edmonson v. Garnett, 33 Tex. 250; Missouri Pac. R. Co. v. Shuford, 72 Tex. 165.

Washington. — King County v. Ferry, 5 Wash. 536, 34 Am. St. Rep. 880.

Wisconsin. — Kavanaugh v. Janesville, 24 Wis. 618; Bigelow v. Doolittle, 36 Wis. 115; McHugh v. Chicago, etc., R. Co., 41 Wis. 75; Baker v. Madison, 62 Wis. 137; Smith v. Schulenberg, 34 Wis. 41; Wright v. Roberts, 22 Wis. 161; Zitske v. Goldberg, 38 Wis. 216; Strong v. Hooe, 41 Wis. 659; Diedrich v. Northwestern Union R. Co., 47 Wis. 662; Pavey v. American Ins. Co., 56 Wis. 221; West v. Milwaukee, etc., R. Co., 56 Wis. 318.

United States. — Kennon v. Gilmer, 131 U. S. 22; Loewer v. Harris, 57 Fed. Rep. 368; Washington, etc., R. Co. v. Harmon, 147 U. S. 571; Hansen v. Boyd, 161 U. S. 397; Koenigsberger v. Richmond Silver Min. Co., 158 U. S. 41; Hopkins v. Orr, 124 U. S. 510.

1. Cooper v. Mills County, 69 Iowa 350; Campbell v. Loeb, 72 Minn. 76; Carter v. Munson, 27 Neb. 172; Omaha, etc., R. Co. v. Brady, 39 Neb. 27; Washington, etc., R. Co. v. Harmon, 147 U. S. 571.

Thirty Days is very often designated as the time within which the prevailing party should exercise his option of remitting or of submitting to a new trial. Brentner v. Chicago, etc., R. Co., 68 Iowa 530; Curran v. Percival, 21 Neb. 434; Orleans v. Perry, 24 Neb. 831; Averill Coal, etc., Co. v. Verner, 22 Ohio St. 372.

Waiver of Limitation. — Where, upon motion, an order for a new trial is made unless a remittitur is entered within a certain time, the court may waive the limitation and enter judg-

ment upon a remittitur made after the time but within the term. Miles v. Weston, 60 Ill. 361.

Amendment of Order. — In Crew v. McCafferty, 124 Pa. St. 200, a rule for a new trial was discharged on condition that the plaintiff file a remittitur within ten days and in copying the order on the docket the clerk omitted the words "within ten days." On the thirtieth day thereafter the plaintiff filed the remittitur and caused judgment to be entered for the amount limited and subsequently upon a rule to strike off the judgment the court directed the original order to be corrected so as to read "within thirty days." It was held that the latter order was an alteration, not an amendment, and its effect was to deprive the defendant of a new trial, the right to which had become absolute, and beyond the power of the court to interfere with it, and was therefore error.

2. *Alabama.* — Lenoir v. Broadhead, 50 Ala. 58; Smith v. Paul, 8 Port. (Ala.) 503.

Arkansas. — Hamlett v. Tallman, 30 Ark. 505; Ferguson v. Fargason, 38 Ark. 238; Hirsch v. Patterson, 23 Ark. 112; Reasoner v. Brown, 19 Ark. 234; Dodds v. Roane, 36 Ark. 511; St. Louis, etc., R. Co. v. Hagan, 42 Ark. 122; St. Louis, etc., R. Co. v. Trimble, 54 Ark. 354; Southwestern Tel., etc., Co. v. Benson, 63 Ark. 283.

California. — Muller v. Boggs, 25 Cal. 175; De Costa v. Massachusetts Flat Water, etc., Co., 17 Cal. 613; Chapin v. Bourne, 8 Cal. 294; Patterson v. Ely, 19 Cal. 28; Pierce v. Payne, 14 Cal. 419; Behlow v. Shorb, 91 Cal. 141.

Colorado. — Teller v. Hartman, 16 Colo. 447.

Delaware. — Benson v. Wilmington, 9 Houst. (Del.) 359.

Florida. — Florida R., etc., Co. v. Webster, 25 Fla. 394.

Illinois. — Illinois Cent. R. Co. v. Gilbert, 51 Ill. App. 404; North Chicago St. R. Co. v. Shreve, 70 Ill. App. 666; Evanston v. Fitzgerald, 37 Ill. App. 86; Chicago, etc., R. Co. v. Hogan, 56 Ill. App. 577; Henning v.

Misjoinder of Counts or Causes of Action. — It has been held that where a declaration contains counts setting up different causes of action and damages are assessed severally on the separate counts, a mis-

Probst, 66 Ill. App. 159; Gammon v. Havelock, 40 Ill. App. 268; Marshall v. Freeman, 52 Ill. App. 42.

Indiana. — Phillips v. Nicholas, 3 Blackf. (Ind.) 133; Devore v. McDermitt, 47 Ind. 234; Line v. State, 131 Ind. 468; Bauer v. Oldendorf, 12 Ind. App. 397; Harvey v. Baldwin, 124 Ind. 59.

Iowa. — Newbury v. Getchell, etc., Lumber, etc., Co., 100 Iowa 441; Knapp v. Miller, 13 Iowa 596; Callanan v. Shaw, 24 Iowa 441; Howe v. Sutherland, 39 Iowa 484; Montelius v. Wood, 56 Iowa 254; Buetzier v. Jones, 85 Iowa 721.

Kansas. — Broquet v. Tripp, 36 Kan. 701; Florence, etc., R. Co. v. Pember, 45 Kan. 625; Wichita, etc., R. Co. v. Gibbs, 47 Kan. 274.

Kentucky. — Dayton v. Gardner, (Ky. 1897) 40 S. W. Rep. 779.

Louisiana. — Amet v. Boyer, 42 La. Ann. 831; Haselmeyer v. McLellan, 24 La. Ann. 629.

Maine. — Butler v. Millett, 47 Me. 492.

Massachusetts. — King v. Howard, 1 Cush. (Mass.) 137.

Michigan. — Hines v. Darling, 99 Mich. 47; Tuttle v. White, 49 Mich. 407; Tubbs v. Dwelling-House Ins. Co., 84 Mich. 646.

Mississippi. — Buck v. Little, 24 Miss. 463; Dean v. Tucker, 58 Miss. 487.

Missouri. — Ray v. Thompson, 26 Mo. App. 431; Hartman v. Louisville, etc., R. Co., 48 Mo. App. 619; McCullough v. Phoenix Ins. Co., 113 Mo. 606; Holmes v. Atchison, etc., R. Co., 48 Mo. App. 79; Sherman v. Commercial Printing Co., 29 Mo. App. 31; Pierce v. Lowder, 54 Mo. App. 25; Hatton v. Randall, 48 Mo. App. 203; Crawford v. Doppler, 120 Mo. 362; State v. Sanford, 127 Mo. 368; Cape Girardeau v. Fisher, 61 Mo. App. 509; State v. Hope, 121 Mo. 34; Western Boatmen's Benev. Assoc. v. Kribben, 48 Mo. 37; Smith v. Wabash, etc., R. Co., 92 Mo. 359; Ibers v. O'Donnell, 25 Mo. App. 120; Brooking v. Shinn, 25 Mo. App. 277; Buse v. Russell, 86 Mo. 209; White v. N. O. Nelson Mfg. Co., 53 Mo. App. 337; Hume Bank v. Hartsock, 56 Mo. App. 291; Stone v. Barrett, 34 Mo. App. 15; Sharpe v. John-

ston, 76 Mo. 660; Muldrow v. Missouri, etc., R. Co., 62 Mo. App. 431; Opplinger v. Sutton, 50 Mo. App. 348; West v. Creve Cœur Lake Ice Co., 19 Mo. App. 547.

Montana. — Cook v. Greenough, 14 Mont. 352.

Nebraska. — Regier v. Shreck, 47 Neb. 667; Lenzen v. Miller, 51 Neb. 855; St. John v. Swanback, 39 Neb. 841; Gifford v. Faubion, 27 Neb. 41; Fremont, etc., R. Co. v. Leslie, 41 Neb. 159; Mullen v. Morris, 43 Neb. 596; Friend v. Ingersoll, 39 Neb. 717; Omaha, etc., R. Co. v. Ryburn, 40 Neb. 87; Van Etten v. Selden, 36 Neb. 209.

New Hampshire. — Jacobs v. Shorey, 48 N. H. 100, 97 Am. Dec. 586.

New York. — Schenck v. Marx, (Supm. Ct. Gen. T.) 5 N. Y. Supp. 309; Bunten v. Orient Mut. Ins. Co., 8 Bosw. (N. Y.) 448; Lawrence v. Church, (Ct. App.) 41 N. Y. St. Rep. 513, 129 N. Y. 635; Wolf v. Hvass, (N. Y. Super. Ct. Gen. T.) 11 Misc. (N. Y.) 561; Devlin v. New York, (C. Pl. Gen. T.) 4 Misc. (N. Y.) 106; Andrews v. Brewster, 124 N. Y. 433.

Ohio. — Cleveland, etc., R. Co. v. Himrod Furnace Co., 37 Ohio St. 434; Sibila v. Bahney, 34 Ohio St. 399; Hanes v. Tiffany, 25 Ohio St. 554.

Pennsylvania. — Graham v. Keys, 29 Pa. St. 189; Pontius v. Com., 4 W. & S. (Pa.) 52.

South Carolina. — Guerry v. Kerton, 2 Rich. L. (S. Car.) 507.

Tennessee. — McKinley v. Beasley, 5 Sneed (Tenn.) 170.

Texas. — Butt v. Schrimpf, 31 Tex. 601; Ft. Worth, etc., R. Co. v. Viney, (Tex. Civ. App. 1895) 30 S. W. Rep. 252; Houston, etc., R. Co. v. Pereira, (Tex. Civ. App. 1898) 45 S. W. Rep. 767; Cotter v. Parks, 80 Tex. 539; King v. Bremond, 25 Tex. 637; Goldstein v. Cook, (Tex. Civ. App. 1893) 22 S. W. Rep. 762; Galveston, etc., R. Co. v. Duellin, 86 Tex. 450; Western Union Tel. Co. v. Jobe, 6 Tex. Civ. App. 403; Walker v. Simkins, 2 Tex. App. Civ. Cas., § 71; Galveston, etc., R. Co. v. Neel, (Tex. Civ. App. 1894) 26 S. W. Rep. 788; Galveston, etc., R. Co. v. Duellin, (Tex. Civ. App. 1893) 23 S. W. Rep. 596; Nunnally v. Taliaferro, 82 Tex. 286; International, etc., R. Co. v. Wilkes, 68 Tex. 617; Sabine,

joinder of counts or causes of action may be cured by remitting the damages on the bad counts and taking judgment only on those that can legally stand together.¹

2. Improper Admission or Exclusion of Evidence. — Error in the improper admission or exclusion of evidence may often be cured by a remittitur.²

3. Verdict in Excess of Ad Damnum. — By the great weight of authority, a verdict assessing damages in excess of the *ad damnum* laid in the writ, or the amount claimed in the declaration or complaint, may be cured by a remittitur of the excess.³

etc., *R. Co. v. Hadnot*, 67 Tex. 503; *Beard v. Miller*, (Tex. App. 1890) 16 S. W. Rep. 655; *Missouri*, etc., *R. Co. v. Warren*, 90 Tex. 566; *Western Union Tel. Co. v. Zane*, 6 Tex. Civ. App. 585; *Clapp v. Walters*, 2 Tex. 130; *Taylor v. Hall*, 20 Tex. 211; *Clapp v. Walters*, 2 Tex. 130; *Illies v. Diercks*, 16 Tex. 251.

United States. — *Loewer v. Harris*, 57 Fed. Rep. 368.

England. — *Leeson v. Smith*, 4 N. & M. 304, 30 E. C. L. 372.

Error in Instruction. — Error in instructing the jury in an action for death by wrongful act that they could find the plaintiffs' damages at a sum not exceeding \$5,000 is cured by a remittitur of \$2,500. *Illinois Cent. R. Co. v. Gilbert*, 51 Ill. App. 404. But where a cause is submitted to a jury under absolute instructions, if the finding is for the plaintiff to make the verdict for \$400, and they do so, it is erroneous on appeal to affirm the judgment on reducing the recovery to \$175 (the statutory maximum limit), as the jury, if allowed their discretion, might have found for a less sum. *Burling v. Gunther*, (C. Pl. Gen. T.) 63 How. Pr. (N. Y.) 68.

1. *Haskell v. Bowen*, 44 Vt. 585.

2. *Fordyce v. Hardin*, 54 Ark. 554; *Owen v. Crum*, 20 Mo. App. 121; *Wilson v. Adams*, 15 Tex. 323; *Texas Trunk R. Co. v. Johnson*, (Tex. Civ. App. 1893) 25 S. W. Rep. 740.

Exclusion of Deposition. — In *Anderson v. Tarpley*, 6 Smed. & M. (Miss.) 507, which was an action on an open account, the defendant offered a deposition showing part payment of the account sued on but it was excluded. It was held that if the plaintiff would enter a remittitur of the amount shown by the deposition to have been paid the supreme court would render judgment for the balance.

Inability to Determine Effect of Exclusion. — In *Olcott v. Hanson*, 12 Mich. 452, which was an action on a note, the defendant pleaded a set-off and payment and offered evidence of a payment of five dollars which was excluded on the ground that the item was not mentioned in the bill of particulars of set-off. The plaintiff having recovered judgment was allowed by the trial court to remit five dollars of the amount with a view to curing the error. It was held that the error was not cured, as by rejecting this evidence the court in effect denied the defendant the right to prove any item of payment without notice and the supreme court could not therefore say what other payments may have been excluded by this ruling.

Failure to Submit Question to Jury. — In an action to recover the enhanced damages given by statute for the wrongful cutting of logs, an error of the court in treating a statement in the defendants' affidavit for confession of judgment that the cutting was by mistake as an admission of the pleadings and taking the question from the jury is cured by the plaintiff's remitting from the judgment the excess above the lowest estimate given by the defendants' witnesses and notifying the defendants' attorneys thereof before appeal. *Underwood v. Paine Lumber Co.*, 79 Wis. 592. See also *Hines v. Darling*, 99 Mich. 47.

3. *California.* — *Clanton v. Coward*, 67 Cal. 373; *Pierce v. Payne*, 14 Cal. 419.

Colorado. — *Duncan v. Whedbee*, 4 Colo. 143; *Litchfield v. Daniels*, 1 Colo. 268; *Winne v. Colorado Spring Co.*, 3 Colo. 155; *Central City v. Wilcoxon*, 3 Colo. 566; *Consolidated Gregory Co. v. Raber*, 1 Colo. 513.

Georgia. — *Hunnicut v. Perot*, 100 Ga. 312; *Raney v. McRae*, 14 Ga. 589;

Judgment in Excess of Penalty in Bond.—Where the judgment in an action on a bond is in excess of the penalty designated in the

Griffin *v.* Witherspoon, 8 Ga. 113; Hendry *v.* Hurst, 22 Ga. 312.

Illinois.—Linder *v.* Monroe, 33 Ill. 389; Louisville, etc., R. Co. *v.* Harlan, 31 Ill. App. 544; Winslow *v.* People, 117 Ill. 152; People *v.* Steele, 7 Ill. App. 20; Dowling *v.* Stewart, 4 Ill. 193; Fournier *v.* Faggott, 4 Ill. 347; Chenot *v.* Lefevre, 8 Ill. 637; Pickering *v.* Pulsifer, 9 Ill. 79; Wood *v.* Kingston Coal Co., 48 Ill. 356; Gillet *v.* Stone, 2 Ill. 539; Stephens *v.* Sweeney, 7 Ill. 375; Pixley *v.* Boynton, 79 Ill. 351; Thomlinson *v.* Earnshaw, 14 Ill. App. 593; Hunter *v.* Sherman, 3 Ill. 539; Bristow *v.* Catlett, 92 Ill. 17.

Indiana.—Johnson *v.* Hawkins, 2 Blackf. (Ind.) 459; Dobenspeck *v.* Armel, 11 Ind. 31; Lambert *v.* Blackman, 1 Blackf. (Ind.) 59; Harris *v.* Osenback, 13 Ind. 445; Phillips *v.* Nicholas, 3 Blackf. (Ind.) 133; Alsop *v.* Wiley, 17 Ind. 452.

Iowa.—David *v.* Conard, 1 Greene (Iowa) 336; Morrill *v.* Miller, 3 Greene (Iowa) 104; Bridge *v.* Livingston, 11 Iowa 57; Cox *v.* Burlington, etc., R. Co., 77 Iowa 478; Roberts *v.* Smith, 1 Morr. (Iowa) 417; Garber *v.* Morrison, 5 Iowa 476.

Kansas.—Frankhouser *v.* Cannon, 50 Kan. 621.

Kentucky.—Newport News, etc., R. Co. *v.* Thomas, 15 Ky. L. Rep. 876; Bealle *v.* Schoal, 1 A. K. Marsh. (Ky.) 475.

Louisiana.—Jones *v.* Pereira, 13 La. Ann. 102; Benagam *v.* Plassan, 15 La. Ann. 703; Leverich *v.* Adams, 15 La. Ann. 310.

Maine.—Starbird *v.* Eaton, 42 Me. 569.

Maryland.—Harris *v.* Jaffray, 3 Har. & J. (Md.) 543; Lewis *v.* Cooke, 1 Har. & M. (Md.) 159; Attrill *v.* Patterson, 58 Md. 226.

Massachusetts.—King *v.* Howard, 1 Cush. (Mass.) 137; Hemmenway *v.* Hickes, 4 Pick. (Mass.) 407.

Michigan.—McCormick Harvesting Mach. Co. *v.* McKee, 51 Mich. 426; Hubbell *v.* Palmer, 76 Mich. 441.

Minnesota.—Campbell *v.* Loeb, 72 Minn. 76; Elfelt *v.* Smith, 1 Minn. 125.

Mississippi.—Hurd *v.* Germany, 7 How. (Miss.) 675; Young *v.* Englehard, 1 How. (Miss.) 19.

Missouri.—Zerbe *v.* Missouri, etc., R. Co., 70 Mo. App. 644; Peck *v.*

Childers, 73 Mo. 484; Higgs *v.* Hunt, 75 Mo. 106; Burkholder *v.* Rudrow, 19 Mo. App. 60; Johnson *v.* Robertson, 1 Mo. 615; Brooking *v.* Shinn, 25 Mo. App. 277; Opplinger *v.* Sutton, 50 Mo. App. 348; Hoyt *v.* Reed, 16 Mo. 294; Atwood *v.* Gillespie, 4 Mo. 423.

Nevada.—Hastings *v.* Johnson, 2 Nev. 190.

New Hampshire.—Pierce *v.* Wood, 23 N. H. 519; Buzzell O Snell, 25 N. H. 474; Taylor *v.* Jones, 42 N. H. 25; Sanborn *v.* Emerson, 12 N. H. 57.

New Jersey.—Herbert *v.* Hardenbergh, 10 N. J. L. 222.

New York.—Collins *v.* Albany, etc., R. Co., 12 Barb. (N. Y.) 492; Putnam *v.* Shelop, 12 Johns. (N. Y.) 435; Corning *v.* Corning, 6 N. Y. 97; Weed *v.* Lee, 50 Barb. (N. Y.) 354; Gansevoort Freezing, etc., Co. *v.* Wessels Co., (N. Y. Super. Ct. Gen. T.) 9 Misc. (N. Y.) 703; Dox *v.* Dey, 3 Wend. (N. Y.) 356; Curtiss *v.* Lawrence, 17 Johns. (N. Y.) 110; Barber *v.* Rose, 5 Hill (N. Y.) 76; Fish *v.* Dodge, 4 Den. (N. Y.) 311.

North Carolina.—Williamson *v.* Canaday, 3 Ired. L. (N. Car.) 349; Harper *v.* Davis, 9 Ired. L. (N. Car.) 44.

Pennsylvania.—Fury *v.* Stone, 2 Dall. (Pa.) 184, 1 Yeates (Pa.) 186; Lantz *v.* Frey, 19 Pa. St. 366; Spackman *v.* Byers, 6 S. & R. (Pa.) 385.

Rhode Island.—Francis *v.* Baker, 11 R. I. 103.

South Carolina.—Croxtton *v.* Addison, Harp. L. (S. Car.) 72; Ashmore *v.* Charles, 14 Rich. L. (S. Car.) 63.

Tennessee.—Campbell *v.* Hancock, 7 Humph. (Tenn.) 75; Fowlkes *v.* Webber, 8 Humph. (Tenn.) 530; McKinley *v.* Beasley, 5 Sneed (Tenn.) 170; Goodman *v.* Floyd, 2 Humph. (Tenn.) 59; Crabb *v.* Nashville Bank, 6 Yerg. (Tenn.) 332.

Texas.—Gregory *v.* Coleman, 3 Tex. Civ. App. 166; Moore *v.* Republic, 1 Tex. 563; Gay *v.* Raines, 21 Tex. 460; King *v.* Bremond, 25 Tex. 637; McDonald *v.* Grey, 29 Tex. 80; Thome *v.* Zushlag, 25 Tex. Supp. 225; York *v.* Gregg, 9 Tex. 85.

Virginia.—Hook *v.* Turnbull, 6 Call (Va.) 85; Tennant *v.* Gray, 5 Munf. (Va.) 494; Lewis *v.* Arnold, 13 Gratt. (Va.) 454.

Wisconsin.—Smith *v.* Phelps, 7 Wis. 211; Lester *v.* French, 6 Wis. 580.

bond, the appellate court may permit the plaintiff to enter a remittitur of the excess.¹

4. Judgment in Excess of Verdict. — An error in a judgment, in that it exceeds the amount of the verdict on which it is entered, may be cured by a remittitur of the excess.²

5. Improper or Excessive Recovery of Interest. — A judgment erroneous because of an improper or excessive allowance of interest or of usury may be cured by a remittitur.³

Wyoming. — *Ivenson v. Caldwell*, 3 Wyo. 465.

United States. — *Kentucky Bank v. Ashley*, 2 Pet. (U. S.) 327.

In *Arkansas* it would seem that error in finding damages beyond the amount claimed in the complaint is not cured by an offer to remit the excess. *Tyner v. Hays*, 37 Ark. 599.

Judgment in Excess of Bill of Particulars. — A judgment for a greater amount than that contained in the bill of particulars may be cured by a remittitur of the excess. *Roberts v. Smith*, 1 Morr. (Iowa) 417.

Scire Facias Against Bail. — Where the trial court gives judgment for the plaintiff in a scire facias against bail for too large an amount, the appellate court will reverse the judgment and enter it for the proper sum. *Bowyer v. Hewitt*, 2 Gratt. (Va.) 193.

1. *Line v. State*, 131 Ind. 468.

2. *Morrill v. Miller*, 3 Greene (Iowa) 104; *Miller v. Hardin*, 64 Mo. 545; *Hoffman v. Bowen*, 17 Tex. 506.

An **Erroneous Entry** of judgment may be cured by the plaintiff's remitting the excess. *Smith v. Paul*, 8 Port. (Ala.) 503; *Lear v. McMillen*, 17 Ohio St. 464.

Judgment in Excess of Amount Due. — Where judgment is taken for more than is at the time legally due, the error may be corrected by remitting the excess. *Doty v. Rigour*, 9 Ohio St. 519; *Mock v. Walker*, 42 Ala. 668.

Judgment on Cause of Action Not Set Up. — Error in permitting a party to recover on a cause of action not contained in his declaration or complaint may be cured by a remittitur of the amount so recovered. *Fisk Pavement, etc., Co. v. Evans*, 37 N. Y. Super. Ct. 482; *Ward v. Haws*, 5 Minn. 440.

3. *Arkansas.* — *McFarland v. State Bank*, 4 Ark. 44; *Hay v. State Bank*, 5 Ark. 250.

California. — *Crosby v. McDermitt*, 7 Cal. 146; *Behlow v. Shorb*, 91 Cal. 141.

District of Columbia. — *Costello v.*

District of Columbia, 21 D. C. 508; *Connor v. Meany*, 8 App. Cas. (D. C.) 1, 24 Wash. L. Rep. 235.

Georgia. — *King v. Black Diamond Coal Co.*, 99 Ga. 103.

Illinois. — *Tomlinson v. Earnshaw*, 112 Ill. 311, affirming 14 Ill. App. 593; *Cooper v. Johnson*, 27 Ill. App. 504; *Hart v. Morgan*, 49 Ill. App. 516; *Willets v. Wheeler*, 33 Ill. App. 629; *Firemen's Fund Ins. Co. v. Western Refrigerating Co.*, 162 Ill. 322; *Convey v. Sheldon*, 1 Ill. App. 555.

Indiana. — *Browning v. Merritt*, 61 Ind. 425; *Simpson v. Shafer*, 20 Ind. 306.

Iowa. — *Thrift v. Redman*, 13 Iowa 25; *Thompson v. Purnell*, 10 Iowa 205; *Brentner v. Chicago, etc., R. Co.*, 68 Iowa 530.

Kansas. — *Educational Assoc. v. Hitchcock*, 4 Kan. 36.

Michigan. — *Bresnahan v. Nugent*, 97 Mich. 359.

Minnesota. — *Sanborn v. Webster*, 2 Minn. 323.

Missouri. — *Kimes v. St. Louis, etc., R. Co.*, 85 Mo. 611; *Whetstone v. Shaw*, 70 Mo. 575; *Slattery v. Bates*, 8 Mo. App. 595; *Flannery v. St. Louis, etc., R. Co.*, 44 Mo. App. 396; *State v. Hope*, 121 Mo. 34.

New York. — *Lawrence v. Church*, 129 N. Y. 635, 41 N. Y. St. Rep. 513; *McLaughlin v. Washington County Mut. Ins. Co.*, 23 Wend. (N. Y.) 525; *Klipstein v. New York El. R. Co.*, (N. Y. Super. Ct. Gen. T.) 29 N. Y. Supp. 1145.

North Carolina. — *Porter v. Grimsley*, 98 N. Car. 550.

Ohio. — *Averill Coal, etc., Co. v. Verner*, 22 Ohio St. 372.

Oregon. — *Duzan v. Meserve*, 24 Oregon 523.

Pennsylvania. — *Emerson v. Schoonmaker*, 135 Pa. St. 437; *Graham v. Keys*, 29 Pa. St. 189.

Tennessee. — *Louisville, etc., R. Co. v. Wallace*, 91 Tenn. 35.

Texas. — *Chapman v. Bolton*, (Tex.

Future Interest. — It has been held that where the verdict manifestly includes both principal and interest and does not specify separately the amount of each, a new trial will be required unless the prevailing party will renounce all future interest upon the judgment.¹

6. Improper or Excessive Recovery of Costs or Attorney's Fees. — An erroneous or excessive allowance of costs or attorney's fees may be cured by a remittitur.²

7. Improper Recovery of Exemplary Damages. — A verdict or judgment erroneous because of the allowance of exemplary damages may sometimes be cured by a remittitur of such damages.³

8. Excessive Recovery of Land. — It has also been held that an excessive recovery of land may be cured by a remittitur of the excess where the amount of the excess is clearly ascertainable.⁴

Civ. App. 1894) 25 S. W. Rep. 1001; Galveston, etc., R. Co. v. Carter, (Tex. App. 1892) 18 S. W. Rep. 196; Alamo F. Ins. Co. v. Schmitt, 10 Tex. Civ. App. 550; Halbert v. Paddleford, (Tex. Civ. App. 1896) 33 S. W. Rep. 1092, *modifying* on rehearing (Tex. Civ. App. 1896) 33 S. W. Rep. 592; Meuly v. Corkill, 75 Tex. 599; San Antonio, etc., R. Co. v. Kniffen, 4 Tex. Civ. App. 484; Kinkler v. Junica, 84 Tex. 116; Ft. Worth, etc. R. Co. v. Osborne, (Tex. Civ. App. 1894) 26 S. W. Rep. 274.

Vermont. — Miltimore v. Bottom, 66 Vt. 168.

Wisconsin. — German Mut. Farmer F. Ins. Co. v. Decker, 74 Wis. 556; Nudd v. Wells, 11 Wis. 415.

United States. — Washington, etc., R. Co. v. Harmon, 147 U. S. 571; Gulf, etc., R. Co. v. Johnson, 54 Fed. Rep. 474.

In Maine it has been held in a case brought up by exceptions from a lower court, the higher court cannot authorize a remittitur of excess of interest allowed by the jury under the instructions of the court below. *Greenleaf v. Hill*, 30 Me. 165.

1. Hubbard v. McRae, 95 Ga. 705. See also Buice v. McCrary, 94 Ga. 418.

2. Richmond, etc. R. Co. v. Benson, 86 Ga. 203; Dearlove v. Edwards, 166 Ill. 619; School Trustees v. Hihler, 85 Ill. 409; Dowty v. Holtz, 85 Ill. 525; Sells v. Sandwich Mfg. Co., 21 Ill. App. 56; Glos v. McKeown, 141 Ill. 288; Stone v. Billings, 167 Ill. 170; Shannon v. Pickell, (Supm. Ct. Gen. T.) 40 N. Y. St. Rep. 559.

3. Bixby v. Dunlap, 56 N. H. 456; Freiberg v. Elliott, (Tex. 1888) 8 S. W.

Rep. 322; San Antonio, etc., R. Co. v. Morgan, (Tex. Civ. App. 1898) 45 S. W. Rep. 169; Texas-Mexican R. Co. v. Blucher, (Tex. Civ. App. 1897) 42 S. W. Rep. 1022; Stone v. Chicago, etc., R. Co., 88 Wis. 98. But see St. Louis, etc., R. Co. v. Hall, 53 Ark. 7.

4. Sanders v. Simmons, (Miss. 1893) 12 So. Rep. 850; Fine v. St. Louis Public Schools, 39 Mo. 59; McQuiddy v. Ware, 67 Mo. 74; Keen v. Schnedler, 92 Mo. 516; Gibson v. Chouteau, 50 Mo. 85; Fowler v. Nixon, 7 Heisk. (Tenn.) 719.

Writ of Entry. — Where on a writ of entry there is a disclaimer as to part and the general issue as to the residue and the jury return a verdict for the whole in favor of the demandant, he may have judgment for the parcel intended to be found if the materials for a sufficient description exist upon entering a remittitur as to the residue. *Odlin v. Gove*, 41 N. H. 465.

Rents and Profits. — And where, in ejectment, the judgment includes damages for rents and profits, where there is no evidence as to them, the error may be corrected by a remittitur in the appellate court. *Franklin v. Haynes*, 119 Mo. 566.

Betterments. — Where betterments are erroneously awarded, the error may be cured by remitting them. *Wendell v. Moulton*, 26 N. H. 41.

Adding Parties to Represent Excess. — In *McQuiddy v. Ware*, 67 Mo. 74, the plaintiffs, as heirs of one who died seized of certain land, recovered in an action of ejectment a larger interest in such land than they were entitled to. Upon appeal they asked leave of the appellate court to add, as parties plain-

VI. ERRORS NOT CURABLE BY REMITTITUR — 1. Verdict Result of Passion or Prejudice. — Where the damages are so excessive as to be accounted for only on the ground of passion or prejudice on the part of the jury, a remittitur will not cure the error, as such passion or prejudice will be deemed to have influenced the finding of the jury on the issues of fact.¹ But the fact that a verdict is large, and the trial court requires a remittitur of a part thereof, does not, of itself, show that the verdict was given under the influence of passion or prejudice.²

tiff, the names of other heirs representing the excess of interest recovered. It was held that this amendment could not be allowed; that the remedy in such case, where there was no other error in the record, was for the plaintiffs to enter a remittitur.

Statute Permitting New Trial as of Right. — In *Illinois* it has been held that under the statute permitting a defendant in ejectment to have a second trial, a remittitur cannot be entered for an excessive recovery in ejectment. *Lowe v. Foulke*, 103 Ill. 58; *Stream v. Lloyd*, 128 Ill. 493. See also *East St. Louis v. Hackett*, 85 Ill. 382.

1. *Stafford v. Pawtucket Hair-Cloth Co.*, 2 Cliff. (U. S.) 82, wherein it was said: "Where the circumstances clearly indicate that the jury were influenced by prejudice or by a reckless disregard of the instructions of the court, that remedy cannot be allowed. Where such motives or influences appear to have operated, the verdict must be rejected, because the effect is to cast suspicion upon the conduct of the jury and their entire finding."

See also the following cases:

Illinois. — *Chicago, etc., R. Co. v. Cummings*, 20 Ill. App. 333; *West Chicago St. R. Co. v. Johnson*, 69 Ill. App. 151; *Chicago, etc., R. Co. v. Binkopski*, 72 Ill. App. 22; *West Chicago St. R. Co. v. Krueger*, 68 Ill. App. 450; *Loewenthal v. Streng*, 90 Ill. 74.

Kansas. — *Steinbuechel v. Wright*, 43 Kan. 307; *Bell v. Morse*, 48 Kan. 601; *Atchison, etc., R. Co. v. Dwelle*, 44 Kan. 394; *Atchison, etc., R. Co. v. Plaskett*, 47 Kan. 107; *Union Pac. R. Co. v. Hand*, 7 Kan. 380; *Atchison, etc., R. Co. v. Cone*, 37 Kan. 567; *Haldeman v. Johnson*, (Kan. App. 1898) 54 Pac. Rep. 507.

Minnesota. — *Kopp v. Northern Pac. R. Co.*, 41 Minn. 310.

Missouri. — *Koeltz v. Bleckman*, 46 Mo. 320; *Doty v. Steinberg*, 25 Mo. App. 328; *Chitty v. St. Louis, etc., R. Co.*, (Mo. 1899) 49 S. W. Rep. 868.

Nebraska. — *Wainwright v. Satterfield*, 52 Neb. 403; *Regier v. Shreck*, 47 Neb. 667; *Fremont, etc., R. Co. v. French*, 48 Neb. 638.

New York. — *Cassin v. Delany*, 38 N. Y. 178.

Ohio. — *Douglas v. Day*, 28 Ohio St. 175; *Pendleton St. R. Co. v. Rahmann*, 22 Ohio St. 446.

South Dakota. — *Murray v. Leonard*, (S. Dak. 1898) 75 N. W. Rep. 272.

Tennessee. — *Massadillo v. Nashville, etc., R. Co.*, 89 Tenn. 661.

Texas. — *Gulf, etc., R. Co. v. Coon*, 69 Tex. 730; *Nunnally v. Taliaferro*, 82 Tex. 286; *Thomas v. Womack*, 13 Tex. 580.

Wisconsin. — *Schultz v. Chicago, etc., R. Co.*, 48 Wis. 375.

Quotient Verdict. — Where a quotient verdict is rendered, the trial court is not authorized to accept a remittitur of all but the lowest amount which any juror was disposed to give, and render judgment for that amount. *Darland v. Wade*, 48 Iowa 547.

Error Affecting Right of Recovery. — Errors of law occurring on the trial going to the right of recovery cannot be cured by entering a remittitur in the appellate court. *Ramming v. Caldwell*, 43 Ill. App. 175.

Judgment Retorno Habendo in Replevin. — In replevin, where it appears by the officer's return that he had restored the property replevied, it is error to render a judgment *retorno habendo*, and a remittitur of the damages will not cure the error as it is no release of the judgment for a return. *Harrod v. Hill*, 2 Dana (Ky.) 165.

Judgment by Default. — Upon default after publication in attachment proceedings, a judgment for too large an amount cannot be cured by a remittitur, for the reason that the record cannot show that the merits as to the residue are with the party in whose behalf the same was entered. *Cohen v. Smith*, 33 Ill. App. 344.

2. *Conrad Seipp Brewing Co. v.*

2. **Failure of Pleading to Show Jurisdiction.** — A defect in a pleading in a federal court in that it failed to show the diverse citizenship necessary to give the court jurisdiction cannot be cured by making such averment of diverse citizenship in a remittitur of a portion of the judgment.¹

3. **Judgment of Justice in Excess of Jurisdiction.** — A judgment of a justice of the peace in excess of his jurisdiction cannot, it would seem, be cured on appeal by a remittitur of the excess.²

VII. COURT IN WHICH REMITTITUR SHOULD BE ENTERED — Trial Court. — The practice varies as to the court in which a remittitur should be entered after the cause has been transferred to an appellate court. Some jurisdictions require the entry to be made in the trial court.³

Doody, 25 Ill. App. 305; Stumer v. Pitchman, 22 Ill. App. 399; Baxter v. Cedar Rapids, 103 Iowa 599; Grant v. Wolf, 34 Minn. 32. See also Omaha Ins. Co. v. Thompson, 50 Neb. 580.

Error in Assessing Actual Damages. — An error by the jury in assessing actual damages, where the damages are computed on the value of goods damaged or destroyed, is not evidence of passion or prejudice on the part of the jury. Erie, etc., Dispatch v. Stanley, 22 Ill. App. 459.

1. *Denny v. Pironi*, 141 U. S. 121, wherein the court said: "The remittitur formed no proper part of the judgment record, and the recital of citizenship formed no proper part of the remittitur. Undoubtedly proceedings subsequent to the judgment are admissible to show what action has been taken upon such judgment, as for instance that it has been vacated * * * or that a part of it has been remitted, but such proceedings cannot be introduced to validate a judgment void for the want of jurisdiction. Not only is the remittitur in this case open to this objection, but it appears upon its face not to have been filed in good faith, but for the sole purpose of introducing the averment of citizenship; in other words, this averment is the object, and the remittitur the incident. Remittiturs are used where the judgment has been accidentally entered for a larger amount than was due, or occasionally to forestall an appeal, but never to give jurisdiction where it is not otherwise shown."

2. *Hanna v. Morrow*, 43 Ark. 107; *Pritchard v. Bartholomew*, 45 Ind. 219; *Stair v. Bishop*, 121 Ind. 273; *Batchelor v. Bess*, 22 Mo. 402; *Ijames v. McClamroch*, 92 N. Car. 362; *Dixon v.*

Caruthers, 9 Verg. (Tenn.) 30; *Crow v. Cunningham*, 5 Coldw. (Tenn.) 255. See generally articles AMOUNT IN CONTROVERSY, vol. 1, p. 702; JUSTICES OF THE PEACE, vol. 12, p. 755.

Remittitur of Demand in Excess of Jurisdiction. — In *Plunket v. Evans*, 2 S. Dak. 434, it was held that a plaintiff claiming a sum in excess of the jurisdiction of the justice cannot at the trial before the justice remit the excess and take judgment for a sum within the justice's jurisdiction.

Judgment on Appeal in Excess of Justice's Jurisdiction. — In *Crow v. Cunningham*, 5 Coldw. (Tenn.) 255, which was an appeal from a justice of the peace, the circuit court awarded judgment on a set-off in favor of the defendant to a larger amount than the justice had jurisdiction over. It was held that the supreme court on appeal could not allow a remittitur to be entered there for the excess. To the same effect is *People v. Skinner*, 13 Ill. 287. But see *Lester v. French*, 6 Wis. 580; *Dunbar v. Bittle*, 7 Wis. 143.

3. *Campbell v. Loeb*, 72 Minn. 76; *Washington, etc., R. Co. v. Harmon*, 147 U. S. 571; *Phillips, etc., Constr. Co. v. Seymour*, 91 U. S. 646; *Werninger v. Wilson*, 2 W. Va. 1; *Spackman v. Byers*, 6 S. & R. (Pa.) 385; *Pontius v. Com.*, 4 W. & S. (Pa.) 52. See generally the statutes and rules of court of the several states.

Remittitur in Appellate Court. — In *Hollinger v. Smith*, 4 Ala. 367, it was said: "The defendant in error has offered to remit his damages for the purpose of avoiding another trial, but we think this cannot be done, as our jurisdiction over the case ceases with its reversal, and we are not invested with the discretionary power to allow

Appellate Court. — In other jurisdictions the remittitur may be filed in the appellate court.¹

VIII. IMPOSITION OF TERMS — 1. On Prevailing Party. — Where a remittitur is not entered until the cause is carried to an appellate court, the party remitting is usually taxed with the costs of the appeal or writ of error.²

of such amendment. When the judgment is reversed there is nothing for such a release to operate upon because the judgment is declared null. The release cannot be entered before the reversal for the reason that no such power is vested in this court, and by such a course the parties in a great number of cases would avoid the consequences of erroneous proceedings to the prejudice of those against whom they were committed."

In Illinois, by the early practice, the remittitur was entered in the trial court. *Dowling v. Stewart*, 4 Ill. 193; *Pickering v. Pulsifer*, 9 Ill. 79; *Chenot v. Lefevre*, 8 Ill. 643; *Wood v. Kingston Coal Co.*, 48 Ill. 356; *Aldrich v. Aldrich*, 37 Ill. 32; *Beese v. Becker*, 51 Ill. 82; *Fournier v. Faggott*, 4 Ill. 347.

And it was only in extraordinary cases that it was permitted in the court of appeal. *Boyle v. Carter*, 24 Ill. 49; *Telfer v. Hoskins*, 32 Ill. 165.

The statute (Cothran's Stat. 1885, p. 1112), now permits the entry of a remittitur in the court of appeal. *School Trustees v. Hihler*, 85 Ill. 409; *Snell v. Warner*, 91 Ill. 472; *Hart v. Morgan*, 49 Ill. App. 516; *Mosely v. Schoonhoven*, 12 Ill. App. 113; *Thomlinson v. Earnshaw*, 14 Ill. App. 593; *Winslow v. People*, 117 Ill. 152; *Glos v. McKeown*, 141 Ill. 288; *North Chicago St. R. Co. v. Wrixon*, 150 Ill. 532; *Daube v. Nessler*, 50 Ill. App. 166. See also *Schneider v. Seely*, 40 Ill. 257; *Cheney v. City Nat. Bank*, 77 Ill. 562; *Rowan v. People*, 18 Ill. 159; *North Chicago St. R. Co. v. Cotton*, 41 Ill. App. 311.

In Wisconsin the earlier practice permitted the entry of a remittitur in the appellate court. *Kavanaugh v. Janesville*, 24 Wis. 618; *Bigelow v. Doolittle*, 36 Wis. 115; *McHugh v. Chicago, etc.*, R. Co., 41 Wis. 75.

Later practice requires the entry to be made in the trial court. *Evans v. Foster*, 80 Wis. 509; *Page v. Sumpter*, 53 Wis. 652; *Wylie v. Karner*, 54 Wis. 591; *West v. Milwaukee, etc.*, R. Co., 56 Wis. 318.

1. Arkansas. — *Fulton v. Hunt*, 3 Ark. 280; *Robertson v. Allen*, 36 Ark. 553.

California. — *Eames v. Haver*, 111 Cal. 401.

Iowa. — *Waggoner v. Turner*, 69 Iowa 127.

Missouri. — *Smith v. Wabash, etc.*, R. Co., 92 Mo. 359; *Johnston v. Morrow*, 60 Mo. 339.

Michigan. — *McCormick Harvesting Mach. Co. v. McKee*, 51 Mich. 426.

Nebraska. — *Carter v. Munson*, 27 Neb. 172.

Ohio. — *Collins v. John, Wright (Ohio)* 628.

Tennessee. — *Fowlkes v. Webber*, 8 Humph. (Tenn.) 530; *Campbell v. Hancock*, 7 Humph. (Tenn.) 75; *Crabb v. Nashville Bank*, 6 Yerg. (Tenn.) 332; *McKinley v. Beasley*, 5 Sneed (Tenn.) 170; *Fowler v. Nixon*, 7 Heisk. (Tenn.) 719.

Texas. — *Baird v. Trice*, 51 Tex. 555.

United States. — *Loewer v. Harris*, 57 Fed. Rep. 368; *Kentucky Bank v. Ashley*, 2 Pet. (U. S.) 327.

Insufficient Remittitur Below. — Where, on a motion for a new trial, the court rules that certain instructions were erroneous as to one cause of action and the plaintiff attempts to avoid a new trial by entering a remittitur, but does not remit enough, the appellate court will permit him to remit the balance of the amount improperly recovered. *Warder v. Henry*, 117 Mo. 530.

2. California. — *Doll v. Feller*, 16 Cal. 432; *Eames v. Haver*, 111 Cal. 401.

Indiana. — *Teagarden v. Hetfield*, 11 Ind. 522; *Pate v. Roberts*, 55 Ind. 277; *H. G. Olds Wagon Works v. Coombs*, 124 Ind. 62; *Lambert v. Blackman*, 1 Blackf. (Ind.) 59.

Iowa. — *Keyser v. Kansas City, etc.*, R. Co., 56 Iowa 440; *Gere v. Council Bluffs Ins. Co.*, 67 Iowa 272; *Payne v. Billingham*, 10 Iowa 360.

Missouri. — *Peck v. Childers*, 73 Mo. 484; *Higgs v. Hunt*, 75 Mo. 106; *Burkeholder v. Rudrow*, 19 Mo. App. 60; *Miller v. Hardin*, 64 Mo. 545; *Clark v. Bullock*, 65 Mo. 535.

Costs of Intermediate Appellate Court. — It has been held that costs of an intermediate appellate court may be taxed against the prevailing party where the remittitur is not entered until the case is carried to a higher court.¹

2. On Losing Party. — As a rule no terms should be imposed on the losing party on the allowance of a remittitur.²

Mistake of Clerk. — Where, however, the only error assigned on appeal is that the judgment is in excess of the verdict, and it appears that the error was a mistake of the clerk, the costs of the appeal or writ of error will be taxed against the appellant or plaintiff in error.³

North Carolina. — *Williamson v. Canaday*, 3 Ired. L. (N. Car.) 349; *Harper v. Davis*, 9 Ired. L. (N. Car.) 44; *Connelly v. McNeil*, 2 Jones L. (N. Car.) 51.

Ohio. — *Doty v. Rigour*, 9 Ohio St. 519.

Texas. — *Bracken v. Neill*, 15 Tex. 109; *Gulf, etc., R. Co. v. Key*, (Tex. App. 1891) 16 S. W. Rep. 543; *Pearce v. Tootle*, 75 Tex. 148; *McNairy v. Castleberry*, 6 Tex. 286; *Westall v. Marshall*, 16 Tex. 182; *Chrisman v. Davenport*, 21 Tex. 483; *Arnold v. Williams*, 21 Tex. 413; *Howe v. Merrell*, 36 Tex. 319; *McDonald v. Grey*, 29 Tex. 80; *Reed v. Herring*, 37 Tex. 160; *Cornelius v. Thompson*, 27 Tex. 31.

Wisconsin. — *Wright v. Roberts*, 22 Wis. 161; *Kavanaugh v. Janesville*, 24 Wis. 618.

United States. — *Fury v. Stone*, 2 Dall. (Pa.) 184; *Washington, etc., R. Co. v. Harmon*, 147 U. S. 571.

In *Arkansas* the rule is that where a remittitur will cure the only error complained of, it will be allowed to be entered upon the terms of paying costs, and of an abandonment of record of all right to proceed on the recognition. *Fowler v. Johnson*, 11 Ark. 280; *Fulton v. Hunt*, 3 Ark. 280; *Rector v. Gaines*, 19 Ark. 70; *Hunter v. Gaines*, 19 Ark. 92; *Hamlett v. Tallman*, 30 Ark. 505; *Dodds v. Roane*, 36 Ark. 511; *Robertson v. Allen*, 36 Ark. 553; *Hirsch v. Patterson*, 23 Ark. 112; *Texas, etc., R. Co. v. Kirby*, 44 Ark. 103; *Hay v. State Bank*, 5 Ark. 251; *Ex p. Hardy*, 26 Ark. 94.

In *Illinois* where the only error in the record is obviated by a remittitur, the judgment will be affirmed and costs in the court above to the date of the entry of the remittitur, and the costs of entering the same will be taxed against the appellee. *Lowman v. Aubery*, 72 Ill. 619; *Nixon v. Halley*, 78 Ill. 611;

Bristow v. Catlett, 92 Ill. 17; *Welsh v. Johnson*, 76 Ill. 295; *Dowty v. Holtz*, 85 Ill. 525; *Pixley v. Boynton*, 79 Ill. 351; *Snell v. Warner*, 91 Ill. 472; *Cooper v. Johnson*, 27 Ill. App. 504; *Kankakee, etc., R. Co. v. Horan*, 30 Ill. App. 552; *School Trustees v. Hihler*, 85 Ill. 409.

1. *Firemen's Fund Ins. Co. v. Western Refrigerating Co.*, 162 Ill. 322.

2. *Schultz v. Chicago, etc., R. Co.*, 48 Wis. 375. In this case the trial court declined to sign judgment for the sum assessed by the jury until the plaintiff stipulated to discharge the judgment if the defendant should, within sixty days after the judgment should be signed, pay the plaintiff a certain sum together with the costs. The court said: "We are aware of no law or rule of practice which authorizes a court to impose the terms here imposed as a condition precedent to signing judgment. The court may grant or refuse a new trial, or, in a proper case, may grant a new trial *nisi*; but should do one thing or the other. It should not, as was done in this case, require the prevailing party to remit a portion of the damage awarded, and then deprive the other party of the benefit of the reduction unless he submits to onerous terms." See also *Gardner v. Tatum*, 81 Cal. 370.

Costs of Motion. — Where the prevailing party makes a motion in the trial court for a modification of the judgment by a remittitur of a part thereof, the court should not impose on the losing party who had theretofore appealed, a condition that he pay the costs of the motion should he fail to dismiss his appeal. *German Mut. Farmer F. Ins. Co. v. Decker*, 74 Wis. 556.

3. *Hoffman v. Bowen*, 17 Tex. 506, wherein it was said: "On reference to the verdict and judgment it is found

Refusal of Offer of Remittitur. — And where, before costs are made on appeal, the successful party offers to remit all the judgment above a certain amount, and the offer is refused, and on final hearing judgment is rendered for the amount as reduced by the remittitur, the costs of the appeal should be taxed to the losing party.¹

IX. JUDGMENT ON ENTRY OF REMITTITUR — 1. In Trial Court. — On the filing of a remittitur to cure an excessive recovery, judgment should be entered for the amount of the recovery as reduced by the remittitur.²

2. In Appellate Court. — The judgment rendered in an appellate court on the remission in such court of excessive damages depends on the practice in such court as to the rendition of judgments on appeal.³

X. CONCLUSIVENESS OF REMITTITUR. — A party consenting to a

that there is a mistake in the calculation of interest by the clerk. * * * The appellee offers to remit this excess, and asks an affirmation of the judgment. There is nothing to be considered of, but the costs, and under the circumstances of this case we are of the opinion that the appellant is not entitled to costs. It is clear that it is the mistake of the clerk that has furnished the appellant with his sole ground of error; nor has he assigned any other; and it does not appear to us to have been more the duty of the plaintiff below to have inspected the clerk's calculation of interest, than it was for the defendant. Had it been noticed at the time, it would have been corrected without any additional costs; or had the appellant, before perfecting his appeal, given notice to the appellee, it could and no doubt would have been corrected in the clerk's office by the appellee. It appears, however, that it must have been known to appellant, at the time the judgment was rendered, because he claims an appeal from the judgment and assigns the mistake of the clerk as grounds for reversing the judgment. On the appellees entering the remittitur the judgment will be affirmed with costs." See also *Bayliss v. Hennessey*, 54 Iowa 11; *Sanxey v. Iowa City Glass Co.*, 68 Iowa 542.

1. *Montelius v. Wood*, 56 Iowa 254.

2. *Farr v. Johnson*, 25 Ill. 522. In this case the jury returned a verdict for the plaintiff and assessed his damages at \$4,750.10, whereupon the plaintiff entered a remittitur of \$2,375.05. The defendant entered his motion for a new trial, which the trial court overruled and rendered judgment on the

verdict in favor of the plaintiff for \$4,750.10, "subject to the aforesaid remittitur." The supreme court said: "Judgment was improperly rendered for the sum found by the jury and not for the sum which remained after deducting the amount remitted. The order should have recited the finding of the jury, the amount remitted and then proceeded to render judgment for the remainder." See also *Walker v. Fuller*, 29 Ark. 448; *Haynes v. Trenton*, 108 Mo. 123; *Schilling v. Speck*, 26 Mo. 489.

Informality. — In *McCausland v. Wonderly*, 56 Ill. 410, the jury found a verdict for the plaintiff for \$1,250. On a motion for a new trial the court held the verdict too large and the plaintiff expressed his readiness to enter a remittitur of \$600. Judgment was thereupon rendered for \$1,250, less \$600 to be remitted. It was held that such a judgment was informal and that a judgment for \$650 should have been rendered.

3. See article JUDGMENTS, vol. 11, p. 1055, and the following cases: *Dean v. Tucker*, 58 Miss. 487; *Meyer v. Blakemore*, 54 Miss. 584; *Atwood v. Gillespie*, 4 Mo. 423; *Tilford v. Ramsey*, 43 Mo. 410; *Johnston v. Morrow*, 60 Mo. 339; *Miller v. Hardin*, 64 Mo. 545; *Clark v. Bullock*, 65 Mo. 535; *Nicholds v. Crystal Plate Glass Co.*, 126 Mo. 55; *Bolger v. Metropolitan El. R. Co.*, (N. Y. Super. Ct. Gen. T.) 20 N. Y. Supp. 430; *Carter v. Beckwith*, 128 N. Y. 312; *Carter v. Roland*, 53 Tex. 540; *Ft. Worth, etc., R. Co. v. White*, (Tex. App. 1889) 14 S. W. Rep. 1068; *Edmundson v. Yates*, 25 Tex. 373; *Baird v. Trice*, 51 Tex. 555.

remittitur to avoid a new trial is, for all the purposes of the remittitur, bound by his election.¹ He cannot, for instance, assign error on the action of the court requiring the remittitur.² Where, however, the prevailing party remits a portion of the judgment to prevent the granting of a new trial by the lower court, and a new trial is granted on appeal, the remittitur is not binding when the case is again tried in the lower court.³

1. *Iron R. Co. v. Mowery*, 36 Ohio St. 418, wherein it was said: "The court gave him his choice to accept a reversal of the judgment and a new trial upon the merits, or to remit the sum which, in the judgment of the court, was in excess of the amount that ought to have been recovered. The plaintiff elected to receive the amount of the judgment less the excess. By this election he was bound. He obtained a judgment * * * which he would not have received had he not assented to the action of the court. That he assented reluctantly does not alter the case. By giving consent he became bound by the action of the court." See also *George v. Law*, 1 Cal. 363; *James River, etc., Co. v. Adams*, 17 Gratt. (Va.) 435.

Setting Aside Remittitur.—A party who has entered a remittitur in the court below to avoid the granting of a new trial cannot have it set aside on appeal. *Floyd v. Efron*, 66 Tex. 221.

Remittitur as Retraxisit.—Where a judgment in ejectment was entered in the supreme court in favor of the plaintiff, upon condition that he enter a remittitur for certain interfering surveys specifically described, such a remittitur is not a retraxisit, and is not a bar to another suit. *Gibson v. Chouteau*, 7 Mo. App. 1.

2. *Alabama, etc., R. Co. v. Davis*, 69 Miss. 444. In this case the trial court made an order granting a new trial unless the plaintiff enter a remittitur

for part of the damages recovered. The plaintiff entered such remittitur, and a motion for a new trial was overruled. The plaintiff appealed, assigning for error the court's action in regard to the remittitur. It was said: "The consent to a remittitur was not compulsorily obtained. The appellee might have declined to yield to what she thought the arbitrary course of the court, and, if the court had persisted and had actually set aside the verdict and awarded a new trial, by taking appropriate steps the appellee might have had this court rectify the arbitrary action complained of, if indeed it had been ascertained to be wrongful. The appellee prudently chose not to take the hazard of that heroic course, and must be held to have voluntarily consented to the remittitur." See also *Vinal v. Core*, 18 W. Va. 1; *Koenigsberger v. Richmond Silver Min. Co.*, 158 U. S. 41; *McCausland v. Wonderly*, 56 Ill. 410.

3. *What Cheer v. Hines*, 86 Iowa 231.

Remittitur as Release.—Where one who has recovered judgment in a justice's court for a greater sum than the justice has jurisdiction, remits the excess to save a reversal, but the case is nevertheless appealed and reversed, it cannot be claimed in a subsequent trial that the plaintiff has released so much of the demand in suit as has been remitted. *School Dist. No. 1 v. Cook*, 47 Mich. 112.

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I. FROM STATE TO FEDERAL COURTS — 1. Constitutionality of Removal Acts. — The various Acts of Congress now in force for the removal of causes from state to federal courts have been pronounced constitutional in numerous cases,¹ on the ground that jurisdiction by removal is a method of exercising the original jurisdiction conferred on the federal courts by the Constitution.²

2. Right of Removal Entirely Statutory — a. IN GENERAL. — The fact that the federal Circuit Court may have original jurisdiction of a case is not sufficient to justify a removal. The right of removal is wholly statutory and cannot be exercised unless by virtue of some provision in an Act of Congress.³

b. ENUMERATION OF VARIOUS REMOVAL ACTS. — The removal acts which have been of material interest were as follows:

Judiciary Act of 1789. — The twelfth section of the Judiciary Act of 1789 provided for the removal of suits against an alien, or by a citizen of a state in which the suit was brought against a citizen of another state, and also for the removal of suits between citizens of the same state claiming lands under grants from different states.⁴ It has been entirely superseded by subsequent acts.

The Force Act. — In 1833 Congress passed the Force Act, so called, providing for the removal to the federal courts of suits or prosecutions against federal revenue officers.⁵ It was incorporated in section 643 of the United States Revised Statutes, together with provisions which extended the right of removal to suits or prosecutions against certain federal election officers. The provisions last mentioned have been repealed,⁶ but the provisions in respect to federal revenue officers are still in force.⁷

Suits for Acts Done During the Rebellion. — There was a provision in an Act of Congress passed in 1863 for the removal of suits or prosecutions against civil or military officers for authorized acts done during the rebellion.⁸ It is of no further interest and may have been impliedly repealed.

1. *Gaines v. Fuentes*, 92 U. S. 10; *Chicago, etc., R. Co. v. Whitton*, 13 Wall. (U. S.) 270; *Virginia v. Rives*, 100 U. S. 313; *Tennessee v. Davis*, 100 U. S. 257; *Ames v. Kansas*, 111 U. S. 449; *Fisk v. Henarie*, 32 Fed. Rep. 417; *Friedman v. Israel*, 26 Fed. Rep. 801; *Girardey v. Moore*, 3 Woods (U. S.) 397; *Haire v. Rome R. Co.*, 57 Fed. Rep. 321; *Meadow Valley Min. Co. v. Dodds*, 7 Nev. 143; *Laird v. Connecticut, etc., R. Co.*, 55 N. H. 375.

2. *Bushnell v. Kennedy*, 9 Wall. (U. S.) 387; *Chicago, etc., R. Co. v. Whitton*, 13 Wall. (U. S.) 270; *Arapahoe County v. Kansas Pac. R. Co.*, 4 Dill. (U. S.) 277; *Dennistoun v. Draper*, 5 Blatchf. (U. S.) 340.

It was formerly considered to be a species of appellate jurisdiction. *Martin v. Hunter*, 1 Wheat. (U. S.) 304;

State v. Fairfield C. Pl., 15 Ohio St. 388. See also *Kulp v. Ricketts*, 5 Phila. (Pa.) 308, 20 Leg. Int. (Pa.) 268.

3. *Johnson v. Wells*, 91 Fed. Rep. 4; *Phoenix Ins. Co. v. Pechner*, 95 U. S. 185; *In re Cilley*, 58 Fed. Rep. 978; *Mantley v. Olney*, 32 Fed. Rep. 708; *Shedd v. Fuller*, 36 Fed. Rep. 609; *Cary v. Curtis*, 3 How. (U. S.) 236; *Dennistoun v. New York, etc., R. Co.*, 1 Hilt. (N. Y.) 66.

4. Act of Sept. 24, 1789, 1 U. S. Stat. at L. 73, c. 20, § 12.

5. Act of March 2, 1833, 4 U. S. Stat. at L. 633.

6. 28 U. S. Stat. at L. 36, c. 25.

7. By virtue of the express provision of the Act of 1887-1888, 24 U. S. Stat. at L. 555, 25 U. S. Stat. at L. 436. See *infra*, I. 10. *Suits and Prosecutions Against Federal Revenue Officers.*

8. Act of March 3, 1863, 12 U. S.

Denial of Civil Rights. — Certain Acts of Congress were passed during the period between 1863 and 1870 providing for the removal of suits or prosecutions against persons who were denied any right secured by any law providing for the equal civil rights of citizens. These acts were merged in sections 641 and 642 of the United States Revised Statutes and are still in force.¹

Separable Controversy Act. — In 1866 Congress passed what is commonly called the separable controversy act, which provided for removal in certain cases by less than all of several defendants.² That act was substantially embodied in section 639 of the United States Revised Statutes, and later with some modification in an act passed in 1875³ which has been superseded in respect of that provision by the Act of 1887-1888, now in force.⁴

Prejudice or Local Influence Act. — In 1867 Congress passed an act for the removal of a cause on the ground of prejudice or local influence.⁵ The provision was re-enacted in section 639 of the United States Revised Statutes, which is superseded by the Act of 1887-1888, containing a similar provision.⁶

Suits Against Federal Corporations. — An act passed in 1868 provided for the removal of suits against federal corporations other than banking corporations.⁷ It was re-enacted in section 640 of the United States Revised Statutes, but repealed by the Act of 1887-1888.⁸

Action by Alien Against Federal Civil Officer. — An act passed in 1872 provided for the removal of an action by an alien against a civil officer of the United States, and is perhaps still in force,⁹ except as to the amount in controversy, which may be governed by the Act of 1887-1888.¹⁰

Judiciary Act of 1875. — Many of the foregoing provisions were re-enacted in an act of 1875.¹¹

Act of 1887-1888. — The last-mentioned act was amended and mainly superseded by the Act of 1887.¹² The latter act is still in force in form and substance as it was actually passed by Congress, but by reason of serious errors in grammar, orthography, and arrangement its enrolment was corrected by the Act of 1888.¹³

Stat. at L. 756, § 5. See *infra*, I. 13.
Suits for Acts Done During the Rebellion.

1. By the express provisions of the Act of 1887-1888. See *infra*, I. 11.
Denial of Civil Rights.

2. 14 U. S. Stat. at L. 306, c. 288.

3. 18 U. S. Stat. at L. 471, c. 137, § 3.

4. 24 U. S. Stat. at L. 552; 25 U. S. Stat. at L. 433. See *infra*, I. 16. *b.*
Diverse Citizenship and Separable Controversy.

5. 14 U. S. Stat. at L. 558, c. 196.

6. 24 U. S. Stat. at L. 552; 25 U. S. Stat. at L. 433. See *infra*, I. 17.
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7. 15 U. S. Stat. at L. 226, c. 255.

8. 24 U. S. Stat. at L. 552; 25 U. S. Stat. at L. 433. See *infra*, I. 16. *c.* (1)
(b) Suit By or Against Federal Corporation.

9. 17 U. S. Stat. at L. 44, re-enacted in Rev. Stat. U. S., § 644.

10. 24 U. S. Stat. at L. 552; 25 U. S. Stat. at L. 433.

11. 18 U. S. Stat. at L. 470, c. 137.

12. 24 U. S. Stat. at L. 552.

13. 25 U. S. Stat. at L. 433.

"The act [of 1887] printed on the statute-book conforms to the enrolment, but the enrolled act, when compared with the original papers on file

and throughout this article both of those acts constitute what is herein uniformly referred to as the Act of 1887-1888.

3. Rule of Construction of Removal Acts. — The removal provisions of the Judiciary Act of 1789¹ were strictly construed.² The Act of 1875,³ providing for the removal of causes to the federal court, was intended to enlarge the right of removal and to extend the jurisdiction of the federal courts, especially in respect to controversies between citizens of different states, up to the limit of the federal Constitution,⁴ and the statute was construed in furtherance of that object.⁵ But the Act of 1887-1888, which now governs removals,⁶ was designed to contract the jurisdiction of the federal courts, both original and by removal,⁷ and the tendency is to construe it strictly against the petitioner for removal.⁸

4. Statutory Requirements to Be Strictly Complied With. — It is a

in the secretary's office, contains twenty-five mistakes in spelling, in punctuation, in changing and omitting words, and in the structure of the bill — that is, by changing paragraphs. Cong. Rec., March 14, 1888, pp. 2102, 2103." *Per* Lacombe, J., in *Swayne v. Boylston Ins. Co.*, 35 Fed. Rep. 2.

1. 1 U. S. Stat. at L. 79, § 12.

2. *Bryan v. Ponder*, 23 Ga. 482.

"If the defendant is not strictly entitled to have his cause removed, we are bound to maintain our jurisdiction." *Redmond v. Russell*, 12 Johns. (N.Y.) 153.

3. Act of March 3, 1875, 18 U. S. Stat. at L. 470, c. 137.

4. *Pirie v. Tvedt*, 115 U. S. 45; *Thurber v. Miller*, 67 Fed. Rep. 376; *In re Cilley*, 58 Fed. Rep. 978; *Glover v. Shepperd*, 15 Fed. Rep. 835; *Arapahoe County v. Kansas Pac. R. Co.*, 4 Dill. (U. S.) 279; *Girardey v. Moore*, 3 Woods (U. S.) 400; *Garrett v. Bonner*, 30 La. Ann. 1306. See also *Ames v. Kansas*, 111 U. S. 471.

5. *Glover v. Shepperd*, 15 Fed. Rep. 835. Compare *Alabama v. Wolfe*, 18 Fed. Rep. 838; *Levy v. Laclede Bank*, 18 Fed. Rep. 193.

6. 24 U. S. Stat. at L. 552, c. 373; 25 U. S. Stat. at L. 433, c. 866.

7. *Wabash Western R. Co. v. Brow*, 164 U. S. 277; *Hanrick v. Hanrick*, 153 U. S. 197; *Fisk v. Henarie*, 142 U. S. 467; *In re Pennsylvania Co.*, 137 U. S. 454; *Smith v. Lyon*, 133 U. S. 320; *Martin v. Baltimore, etc., R. Co.*, 151 U. S. 687; *Mexican Nat. R. Co. v. Davidson*, 157 U. S. 208; *Tennessee v. Union, etc., Bank*, 152 U. S. 462; *Hartford, etc., R. Co. v. Montague*, 94 Fed. Rep. 228; *Waco Hardware Co. v.*

Michigan Stove Co., 91 Fed. Rep. 290; *Fox v. Southern R. Co.*, 80 Fed. Rep. 946; *Thurber v. Miller*, 67 Fed. Rep. 378; *Daugherty v. Western Union Tel. Co.*, 61 Fed. Rep. 139; *Brigham v. C. C. Thompson Lumber Co.*, 55 Fed. Rep. 883; *In re Cilley*, 58 Fed. Rep. 980; *Campelle v. Balbach*, 46 Fed. Rep. 81; *Tennessee Coal, etc., Co. v. Waller*, 37 Fed. Rep. 546; *Security Co. v. Pratt*, 65 Conn. 179; *Chappell v. Chappell*, 86 Md. 543.

8. *Dwyer v. Peshall*, 32 Fed. Rep. 498; *Hayes v. Todd*, 34 Fla. 238; *State v. Sullivan*, 110 N. Car. 518. See also the preceding note.

Not with Unreasonable Strictness. — "Yet, notwithstanding this manifestly restrictive policy, the new act should be judicially treated, so far as it goes, as other voluntary legislative grants of jurisdiction are, and nothing should be implied, as some of the cases considering the act seem to suggest, from those restrictions themselves, which is inconsistent with the rule of a liberal construction in furtherance of the accomplishment of the designated purpose of the congressional grant, whatever that purpose be." *Gavin v. Vance*, 33 Fed. Rep. 86.

"The general result of the Act of 1887-1888 has been to greatly diminish the jurisdiction of the Circuit Court, and it may be assumed that such was the general purpose of Congress in its enactment; but we cannot assume such a purpose, and then, in the endeavor to carry it out, ignore the obvious meaning of the language of the act itself." *Per* Barr, J., in *Jackson, etc., Co. v. Pearson*, 60 Fed. Rep. 127.

general rule that in order to procure the removal of a cause the petitioner for removal must strictly comply with the statutory requirements in respect to the procedure, at least as to all jurisdictional matters.¹

5. Right of Removal Not Impaired by State Legislation.—The statutes of a state cannot prevent the removal to a federal court of a suit which is within the judicial powers of the United States if the defendant brings himself within the terms of the federal statutes which authorize the removal.² The state legislature cannot, by merely investing certain courts with exclusive jurisdiction over certain subjects,³ nor by declaring particular contro-

1. *Delbanco v. Singletary*, 40 Fed. Rep. 178; *Wilcox, etc., Sewing Mach. Co. v. Follett*, 2 Flipp. (U. S.) 265; *Clippinger v. Missouri Valley L. Ins. Co.*, 1 Flipp. (U.S.) 459; *Fisk v. Fisk*, 4 Mart. N. S. (La.) 678; *Mahone v. Manchester, etc., R. Corp.*, 111 Mass. 72, where the court said that "the requirements of the Act of Congress must be strictly and fully complied with;" *Amory v. Amory*, 36 N. Y. Super. Ct. 520, holding that there must be "strict, literal, and perfect compliance with every provision required by the act;" *Bates v. Baltimore, etc., R. Co.*, 39 Ohio St. 157. See also *Crane v. Reeder*, 28 Mich. 532.

2. *American Finance Co. v. Bostwick*, 151 Mass. 27; *Fidelity Trust Co. v. Gill Car Co.*, 25 Fed. Rep. 738; *Hulbert v. Russo*, 64 Fed. Rep. 8, holding that a state statute which should provide in substance that a defendant could not remove a cause while he was in default for nonpayment of motion costs imposed by the state court would be void.

Legislation Affecting Foreign Corporations.—If the intent of a statute is to impose as a condition upon foreign corporations before they are allowed to do business in a state such action on their part as will deprive them of, or prevent them from seeking, the jurisdiction of the federal court, it is inoperative and void. *Hollingsworth v. Southern R. Co.*, 86 Fed. Rep. 353, where the court said: "No state legislature can lawfully impose such a condition in express terms upon any corporation seeking to do business in a state, nor would the acceptance of any such condition bind such corporation, nor can any state legislature by indirect action accomplish that which it cannot do directly." See also *Home Ins. Co. v. Morse*, 20 Wall. (U. S.) 445; *Barron*

v. Burnside, 121 U. S. 186 [*explaining* *Doyle v. Continental Ins. Co.*, 94 U. S. 535]; *Southern Pac. Co. v. Denton*, 146 U. S. 202; *Moore v. Chicago, etc., R. Co.*, 21 Fed. Rep. 819; *Allen v. Texas, etc., R. Co.*, 25 Fed. Rep. 513; *Chicago, etc., R. Co. v. Becker*, 32 Fed. Rep. 849; *Hartford F. Ins. Co. v. Doyle*, 6 Biss. (U. S.) 461; *Com. v. Jellico Coal Co.*, 97 Ky. 246; *Com. v. East Tennessee Coal Co.*, 97 Ky. 238; *Erie R. Co. v. Stringer*, 32 Ohio St. 468; *Baltimore, etc., R. Co. v. Cary*, 28 Ohio St. 208; *Railway Pass. Assur. Co. v. Pierce*, 27 Ohio St. 155 [*overruling* *New York, L. Ins. Co. v. Best*, 23 Ohio St. 105, which *affirmed* *Best v. New York L. Ins. Co.*, 2 Cinc. Super. Ct. 329]; *Texas Land, etc., Co. v. Worsham*, 76 Tex. 556; *Rece v. Newport News, etc., Co.*, 32 W. Va. 164.

Earlier Cases to the Contrary, such as *People v. Judge*, 21 Mich. 577, and *Home Ins. Co. v. Davis*, 29 Mich. 238, are now of no authority.

3. *Marshall v. Holmes*, 141 U. S. 598; *Barrow v. Hunton*, 99 U. S. 80. See also *Johnson v. Waters*, 111 U. S. 640; *Arrowsmith v. Gleason*, 129 U. S. 86; *Payne v. Hook*, 7 Wall. (U. S.) 425.

Thus a legislative enactment conferring upon a probate court exclusive jurisdiction of all proceedings or suits involving the settlement and distribution of the estates of deceased persons does not exclude the jurisdiction of the federal courts where the other conditions exist. *Clark v. Bever*, 139 U. S. 102; *Hess v. Reynolds*, 113 U. S. 73.

A state statute providing that a bill to set aside a judgment can be brought only in the courts of the county where the judgment was rendered will not prevent a federal court from acquiring jurisdiction of such a suit. *Davenport v. Moore*, 74 Fed. Rep. 951.

versies to be special proceedings and not civil suits at law or in equity,¹ nor by "hedging about the commencement of suits by a statutory procedure which could not be employed in the federal courts,"² deprive the latter of jurisdiction of a cause in its nature removable.

6. Waiver of Right of Removal. — It is competent for a party to waive his right of removal to a federal court,³ either by stipulation or agreement or by conduct which evinces a plain purpose to do so.⁴ If a defendant has done nothing in the state court whereby he has secured some benefit which should estop him from repudiating his former action, he will not, as a general rule, be held to have waived his right of removal.⁵ Conversely, if he has

1. *In re Jarnecke Ditch*, 69 Fed. Rep. 163.

2. *In re Stutsman County*, 88 Fed. Rep. 337, holding that a proceeding under the *North Dakota* statute for the collection of delinquent taxes was removable although of such a character that owing to its procedure it could not be commenced in the federal courts. To the same effect are *Colorado Midland R. Co. v. Jones*, 29 Fed. Rep. 193; *In re Jarnecke Ditch*, 69 Fed. Rep. 163; *Warren v. Wisconsin Valley R. Co.*, 6 Biss. (U. S.) 425. See also *Franz v. Wahl*, 81 Fed. Rep. 9; *Little Rock Junction R. Co. v. Burke*, 66 Fed. Rep. 83; *Elliott v. Shuler*, 50 Fed. Rep. 454. Compare *Hartford, etc., R. Co. v. Montague*, 94 Fed. Rep. 227.

3. *Bell v. Bell*, 3 W. Va. 183; *Wadleigh v. Standard L., etc., Ins. Co.*, 76 Wis. 439. See also *New York, etc., Land Co. v. Martin*, (Tex. Civ. App. 1894) 25 S. W. Rep. 475; *Hill v. Henderson*, 13 Smed. & M. (Miss.) 688.

4. *Smithson v. Chicago, etc., R. Co.*, (Minn. 1898) 73 N. W. Rep. 853.

By Procuring a Change of Venue after the denial of his petition for removal, it was held that the defendant waived his right of removal on that petition. *Wausau First Nat. Bank v. Conway*, 67 Wis. 210, approved in *Northern Pac. R. Co. v. McMullen*, 86 Wis. 509, where the court said that the defendant by his own act made it impossible to remove the case on the first application.

Trying One of Several Causes. — Where there are several actions for the same cause between the same parties in a state court, and the parties proceed to trial in one, the other cannot afterwards be removed to the federal court. *Evans v. Smith*, 21 Fed. Rep. 1, on the ground that "inasmuch as a judgment in one would bar the other, the causes

must be taken to be so identified that whatever was done in one of them will conclude the parties on the same point in the other."

Taking Appeal with Supersedeas. — In *Chicago, etc., R. Co. v. Minnesota, etc., R. Co.*, 29 Fed. Rep. 337, a case of removal under the Act of 1875, it was held that by appearing to a motion for a temporary injunction and by taking an appeal and supersedeas to the Supreme Court of the state from an order granting the injunction, the defendant waived his right of removal.

Prosecuting Certiorari. — In *Hudson River R., etc., Co. v. Day*, 54 Fed. Rep. 545, the defendant landowner in condemnation proceedings appealed from the award of commissioners to the state Circuit Court, where he filed a petition for removal, and at the same time moved for and obtained a writ of certiorari from the state Supreme Court to review all the proceedings up to that time. The writ was duly served, its mandate obeyed, and the allegations of the respective parties heard and taken into consideration by the Supreme Court, but no judgment had been rendered therein, when a motion to remand was made and granted in the federal court, on the ground that the right of removal had been waived. The court cited *Amy v. Manning*, 144 Mass. 153 [affirmed *Manning v. Amy*, 140 U. S. 137], as "very much in point."

5. *Hulbert v. Russo*, 64 Fed. Rep. 8.

"To operate as a waiver the act of the party must be irreconcilably repugnant to the assertion of his legal right." *Whiteley Malleable Castings Co. v. Sterlingworth R. Supply Co.*, 83 Fed. Rep. 583.

Waiver of Personal Service. — A stipulation by a nonresident in a suit begun

received a consideration for the relinquishment of his right, he ought not to be allowed to exercise it.¹

7. From What Court a Suit May Be Removed. — The removal act provides for removal of a suit "brought in any state court."²

Justice of the Peace. — It has been held that a cause cannot be removed from the court of a justice of the peace.³

by attachment, submitting himself to the jurisdiction of the state court and agreeing to be bound by its judgment as if he had been personally served, does not estop him from removing the cause. *Southern Pac. Co. v. Stewart*, 88 Ga. 13.

Special Appearance and Motion to Dismiss. — Where a defendant made a special appearance and moved to dismiss the case for want of service of process and took a bill of exceptions to the order of the court overruling his motion, it was held that he had not waived his right of removal. *Baumgardner v. Bone Fertilizer Co.*, 58 Fed. Rep. 1.

Agreement for Continuance. — An agreement between counsel before the beginning of the term that the cause shall be continued for the term is not a waiver of the right of removal. *Southern Pac. R. Co. v. Harrison*, 73 Tex. 107.

Giving Bond to Release an Attachment is not a waiver of the right. *Purdy v. Muller*, 81 Fed. Rep. 513; *Whiteley Malleable Castings Co. v. Sterlingworth R. Supply Co.*, 83 Fed. Rep. 853. *Compare Bell v. Bell*, 3 W. Va. 183.

Consenting to a Reference was held to be a waiver in *Hanover Nat. Bank v. Smith*, 13 Blatchf. (U. S.) 224. *Contra*, *Ketchum v. Black River Lumber Co.*, 4 Fed. Rep. 142.

Proceedings After Filing Petition for Removal. — Filing an answer in the state court after filing a petition and bond for removal does not constitute a submission to the jurisdiction of the state court. *Brisenden v. Chamberlain*, 53 Fed. Rep. 307.

If the petition and bond were duly filed, the defendant does not waive his removal by consenting to an order that the case shall stand under the rules to plead and try at the next term of the court. *Waite v. Phoenix Ins. Co.*, 62 Fed. Rep. 770.

Whether a party who has filed a petition for removal in time, and, without calling it to the attention of the judge, thereupon files the record in the fed-

eral court, may be considered as having waived the right of removal by subsequently moving in the state court to dismiss the suit, was left undecided in *Scout v. Keck*, 73 Fed. Rep. 907.

A party does not waive the right of removal by remaining in the state court and contesting the case on the merits, if the state court, upon due application, wrongfully refuses to order a removal of the cause and forces him to trial. *Richards v. Rock Rapids*, 31 Fed. Rep. 506. See for numerous other cases on the same point *infra*, I. 37. *d. Petitioner for Removal Participating in Further Proceedings.* And under such circumstances a failure to enter a copy of the record at the next term of the federal court does not prejudice the defendant's right. *Baltimore, etc., R. Co. v. Koontz*, 104 U. S. 14. *Compare Springer v. Howes*, 69 Fed. Rep. 851.

1. Relief from Default. — Where a defendant was in default for want of an answer, and stipulated in writing with the plaintiff that in consideration of being relieved from his default and allowed to answer the issues made should be tried in the state court and the defendant would abide by the judgment, it was held that he was debarred from claiming a right of removal after answering and going to trial in pursuance of the agreement. *Smithson v. Chicago, etc., R. Co.*, (Minn. 1898) 73 N. W. Rep. 853.

2. Act of 1887-1888; 24 U. S. Stat. at L. 552, c. 373; 25 U. S. Stat. at L. 433, c. 866.

3. *Rathbone Oil Tract Co. v. Rauch*, 5 W. Va. 79, holding that where the case stood for trial *de novo* in the state Circuit Court on appeal from the justice it might be removed from that court. See *New York I. & P. Co. v. Milburn Gin, etc., Co.*, 35 Fed. Rep. 225.

Contra. — In *Wood v. Matthews*, 2 Blatchf. (U. S.) 370, 23 Vt. 735, a civil action in a justice's court against a United States revenue officer was removed under the Act of 1833, 4 U. S.

Commissioners. — Proceedings before a special tribunal, such as commissioners of appraisement¹ or a board of county commissioners,² have been held not removable.

Probate Court. — But a controversy in a probate court may be removed³ unless it fails to satisfy the definition of a suit.⁴

Court to Which Cause Has Been Transferred. — The state court mentioned in the statute means the court in which the suit is pending at the time when the petition for removal is filed,⁵ and consequently the suit is removable from a state court to which the cause has been transferred for trial under the state statute.⁶ But it cannot be removed from a court to which it has been transferred on a motion for change of venue, if the time for removal had expired when the transfer was made.⁷

Appellate Court. — A suit cannot be removed from a court to which it has been taken by appeal or error after final judgment

Stat. at L. 633, § 3, Rev. Stat. U. S., § 643, and jurisdiction was entertained without objection. That act provides for removal of suits, etc., "commenced in a court of any state." To the same effect see *Georgia v. Port*, 3 Fed. Rep. 117, 4 Woods (U. S.) 513, a criminal prosecution against a revenue officer.

1. See *infra*, I. 9. *i. Eminent Domain Proceedings.*

2. **A Board of County Commissioners** in auditing and allowing or rejecting claims presented to it cannot be deemed a court. *Fuller v. Colfax County*, 14 Fed. Rep. 177, where the court pointed out that the concomitants of a court, such as a judge, clerk, sheriff, or marshal, were absent; that the board had no right to issue process to compel attendance of parties or witnesses, and no power to enter a formal judgment, or to execute one if rendered.

3. *Craigie v. McArthur*, 4 Dill. (U. S.) 474.

4. See *infra*, I. 9. *a. Suits.*

5. *American Finance Co. v. Bostwick*, 151 Mass. 19.

Order in Another Judicial District. — In *Erisman v. Pidcock*, (Supm. Ct. Spec. T.) 62 How. Pr. (N. Y.) 327, an action in the Supreme Court, the county designated in the complaint for the trial of the action was the county of Erie, but it was held that an order for its removal made in the county of New York was not irregular, since it was only motions necessarily made upon notice that the law required to be made within the judicial district in which the action was pending for trial or in an adjoining county. But the

order which was made directed that it should be entered in Erie county.

In *Bristol v. Chapman*, (Supm. Ct. Gen. T.) 34 How. Pr. (N. Y.) 140, it was held that the order for removal could be made only by the court in which the action was to be tried, but the decision was based upon the supposition that notice of the application was necessary, which is now regarded as incorrect.

6. *American Finance Co. v. Bostwick*, 151 Mass. 19. In that case the action was originally brought in the Superior Court, and at the request of the defendant, under Pub. Stat. Mass., c. 152, § 8, and upon his making an affidavit as provided by that statute, it was transferred to the Supreme Judicial Court, there to proceed "as if originally brought in that court." Within the time prescribed by the Removal Act of 1887-1888, the defendant filed his petition for removal in the Supreme Judicial Court, and it was held that the suit was removable. Speaking of the state statute for the transfer of causes the court said that "the object plainly is to give to the defendant the right to elect in which one of the two courts the cause should proceed, which is similar to the right which the plaintiff had when he began the suit."

Hess v. Reynolds, 113 U. S. 73, was a case removed on the ground of prejudice or local influence from a state court to which it had been transferred, on account of the disqualification of the judge, and the removal was sustained.

7. *Wausau First Nat. Bank v. Conway*, 67 Wis. 210.

in the court of original jurisdiction.¹

8. To What Court Removal Is Made.—The Act of 1887–1888 provides for removal of a suit “into the Circuit Court of the United States for the proper district.”² That phrase first occurs in the Act of 1875.³ In the earlier statutes the Circuit Court to which the suit was removable was the Circuit Court of the United States for the district where the suit was pending.⁴ The meaning of these different provisions is the same;⁵ that is, the cause should be removed to and the record entered in the federal Circuit Court for the district in which the suit is pending.⁶

9. Removable Suits or Controversies—*a. SUITS*—The Removal Act provides only for the removal of “suits.”⁷

Definition and General Characteristics.—The term “suit” is understood to apply to any proceeding in a court of justice by which an individual pursues that remedy in a court of justice which the law affords him.⁸ It must be a proceeding in which a judgment

1. *Lowe v. Williams*, 94 U. S. 650 [affirming *Williams v. Lowe*, 4 Neb. 400]; *Du Vivier v. Hopkins*, 116 Mass. 129; *Craigie McArthur*, 4 Dill. (U. S.) 474, holding that a case on appeal from a probate court was not removable; *In re Frazer*, 9 Fed. Cas. No. 5,068; *Miller v. Finn*, 1 Neb. 267; *Beery v. Irick*, 22 Gratt. (Va.) 484. See also *Waggener v. Cheek*, 2 Dill. (U. S.) 560; *Stevenson v. Williams*, 19 Wall. (U. S.) 572; *Bryant v. Scott*, 67 N. Car. 391. But compare *Douglas v. Caldwell*, 65 N. Car. 250, where a cause pending in the Supreme Court was removed on the ground of local prejudice under Act of 1867, and the court said: “We cannot consider the mere fact that the case is pending in an appellate court sufficient to take it out of the Act of Congress.”

2. 24 U. S. Stat. at L. 552, c. 373; 25 U. S. Stat. at L. 433, c. 866. Section 3 of the same act, relating to the procedure for removal, describes the court as “the Circuit Court to be held in the district where such suit is pending.”

3. Act March 3, 1875, 18 U. S. Stat. at L. 470, c. 137.

4. Rev. Stat. U. S., § 639; Act March 2, 1867, 14 U. S. Stat. at L. 558, c. 196; Act July 27, 1866, 14 U. S. Stat. at L. 306, c. 288; Judiciary Act of 1789, 1 U. S. Stat. at L. 79, c. 20, § 12.

5. *American Finance Co. v. Bostwick*, 151 Mass. 25, holding that a suit in *Massachusetts* is properly removed on a petition praying for its removal to the Circuit Court of the United States for the district of Massachusetts, as the district includes the same terri-

tory as the commonwealth of Massachusetts.

6. *Cobb v. Globe Mut. L. Ins. Co.*, 3 Hughes (U. S.) 452; *Knowlton v. Congress, etc.*, Spring Co., 13 Blatchf. (U. S.) 170; *Ex p. State Ins. Co.*, 18 Wall. (U. S.) 417. See also *Suydam v. Smith*, 1 Den. (N. Y.) 263; *Norton v. Hayes*, 4 Den. (N. Y.) 248.

Removal After Change of Venue.—Where the cause before removal has been transferred from the court of one county to that of another it should be removed to the federal Circuit Court of the district where it is pending at the time of removal. *Hess v. Reynolds*, 113 U. S. 73.

7. Act of 1887–1888, 24 U. S. Stat. at L. 552, c. 373; 25 U. S. Stat. at L. 433, c. 866.

8. *Per* Chief Justice Marshall in *Weston v. Charleston*, 2 Pet. (U. S.) 464, where it was further said that “the modes of proceeding may be various, but if a right is litigated between parties in a court of justice, the proceeding by which the decision of the court is sought is a suit.” Quoted in *Ex p. Milligan*, 4 Wall. (U. S.) 112; *Upshur County v. Rich*, 135 U. S. 474; *Holmes v. Jennison*, 14 Pet. (U. S.) 566; *In re Jarnecke Ditch*, 69 Fed. Rep. 161; *Richardson v. Green*, 61 Fed. Rep. 423; *Lackawanna Coal, etc., Co. v. Bates*, 56 Fed. Rep. 740; *In re Chicago*, 64 Fed. Rep. 898; *McCullough v. Large*, 20 Fed. Rep. 311; *White v. Philadelphia*, 8 Phila. (Pa.) 243, where the court said: “There is some ground for the assumption that in the Act of Congress referred to the word

or decree can be rendered or some action taken affecting the rights of parties.¹ It is no objection to removal that the suit after removal cannot be maintained in the precise form in which it was begun.²

The Decision of the Highest Court of a State upon the question whether a particular proceeding is a suit at law or in equity does not conclude the federal court when called upon to decide the same question.³

Administrative Proceedings. — A proceeding not in a court of justice, but carried on by executive officers in the exercise of their proper functions, is purely administrative, and cannot be called a suit;⁴ but on appeal docketed in a court where the case is to be heard *de novo* it becomes a suit.⁵

Petition of Intervention. — The contention arising out of a petition of intervention which seeks relief against defendants therein named may constitute a suit.⁶ But the mere filing of a petition

'suit' is used in a more restricted sense," and "refers to a proceeding in which the defendant is brought into court upon process." "In law language it [a suit] is the prosecution of some demand in a court of justice." *Cohens v. Virginia*, 6 Wheat. (U. S.) 407.

"A judgment which conclusively determines a right or obligation, so that the same matter cannot be further litigated except by writ of error or appeal, is an exercise of judicial power; and a proceeding in a court of common law or equity which culminates in such a judgment is a 'suit' within the meaning of the federal judiciary acts." *In re Stutsman County*, 88 Fed. Rep. 341.

1. *In re Iowa*, etc., Constr. Co., 6 Fed. Rep. 801, 2 McCrary (U. S.) 178.

In *Clafflin v. Robbins*, 1 Flipp. (U. S.) 603, it was held that a proceeding by petition under the *Ohio* statute against an assignee for the benefit of creditors to procure an allowance of the petitioner's claim was a suit and removable.

2. Thus a statutory action in common-law form against an executor to recover a legacy may be removed, though it will be necessary to assign it to the equity side of the federal court. *Wilson v. Smith*, 66 Fed. Rep. 81.

3. *Upshur County v. Rich*, 135 U. S. 477; *In re Jarnecke Ditch*, 69 Fed. Rep. 161. Compare *In re Stutsman County* 88 Fed. Rep. 340, where the state court had decided that the proceeding was a suit; *Lackawanna Coal, etc., Co. v. Bates*, 56 Fed. Rep. 738.

4. *Upshur County v. Rich*, 135 U. S. 467.

Presentation of Claim Against County. — In *Delaware County v. Diebold Safe, etc., Co.*, 133 U. S. 473, it was held that where a claim against a county is heard before county commissioners, though the proceedings are in some respects assimilated to proceedings before a court, yet they are not in the nature of a trial *inter partes*, and are merely the allowance or disallowance by county officers of a claim against the county, upon their own knowledge, or upon any proof that may be presented to them, but that an appeal from their decision, tried and determined by the Circuit Court of the county, is a suit removable to the federal court. See also *Fuller v. Colfax County*, 14 Fed. Rep. 177, a similar case, where the court said: "Two parties to a suit seem to be almost indispensable: one who seeks redress, and the other who commits a wrong or withholds what is justly due another. The parties must stand in such relation to each other that the machinery of the court will operate on them when their powers and their aid are invoked. No such a condition of things existed so long as this claim remained before the county board." See further *infra*, I. 9. i. *Eminent Domain Proceedings*, and I. 9. j. *Proceedings Relating to Taxation*.

5. See the cases cited in the preceding note.

6. *In re Iowa*, etc., Constr. Co., 10 Fed. Rep. 401.

of intervention without the issuing of notice or process of any kind is not a suit.¹

Proceeding Coram Non Judge. — If the subject-matter of a proceeding is one over which the state court has no jurisdiction, it cannot constitute a suit.²

But an Attachment Suit against a nonresident without personal service of process is removable.³

State Court in Possession of Res. — If the proceeding is a suit within the meaning of the removal act the fact that the state court has possession of the subject-matter of the controversy cannot prevent the removal.⁴

1. *In re Iowa, etc.*, Constr. Co., 6 Fed. Rep. 799, 2 McCrary (U. S.) 178, where the court said: "Upon general principles I should say without hesitation that process is essential to the institution of a suit. In the very nature of the case it must be necessary to bring the party defendant into court before any step can be taken to change the forum, or for any other purpose affecting his rights." See also, to the point that process is an essential ingredient of a suit, *White v. Philadelphia*, 8 Phila. (Pa.) 243.

2. *Trester v. Missouri Pac. R. Co.*, 23 Neb. 242, where a railway corporation sought to take land by eminent domain in a state other than that wherein it was chartered, the state constitution forbidding it, and an order of removal was reversed on appeal with instructions to dismiss the condemnation proceeding; *Fidelity Trust Co. v. Gill Car Co.*, 25 Fed. Rep. 739, where the court said: "If a citizen of Pennsylvania holding a promissory note made by a citizen of Ohio on which he desired to bring suit should go into a state court of exclusive criminal jurisdiction, file his complaint, sue out his writ of summons, have it served in the usual way, and then remove the controversy into this court, could it be pretended that we should retain the jurisdiction on the grounds urged here? * * * There would be no 'suit' in court any more than if the proceeding had been commenced in a moot court, such as are organized in law schools to teach practice. * * * Wherever there is a total absence of jurisdiction over the subject-matter in the state court, so that it had no power to entertain the suit in which the controversy was sought to be litigated in its then existing or any other form, there can be no jurisdiction in the fed-

eral court to entertain it on removal, although in some other form it would have plenary jurisdiction over the case made between the parties. * * * The case of *Kelly v. Virginia Protection Ins. Co.*, 3 Hughes (U. S.) 449, does not establish a contrary doctrine, however broad its expressions may be. There the question was one of mere locality of jurisdiction, or, to speak perhaps without entire accuracy, of venue only. The federal court had jurisdiction of the particular territory in which the suit was brought, while the corporation court from which it was removed did not have jurisdiction of the place where the defendant was located, and the plea was that the state court did not have jurisdiction because neither the plaintiff nor defendant resided in the city, nor did the cause of action arise there. Perhaps this was an entire absence of jurisdiction over the subject-matter and would invoke the ruling I make; but I doubt if the court intended in that case to go as far as counsel would press it here." See also *Edwards v. Connecticut Mut. L. Ins. Co.*, 20 Fed. Rep. 453; *Simpkins v. Lake Shore, etc., R. Co.*, 19 Fed. Rep. 802.

3. *Barney v. Globe Bank*, 5 Blatchf. (U. S.) 107; *Bliven v. New England Screw Co.*, 3 Blatchf. (U. S.) 111; *Sayles v. North-western Ins. Co.*, 2 Curt. (U. S.) 212; *Martin v. Thompson*, 3 McCord L. (S. Car.) 167.

4. *Kern v. Huidekoper*, 103 U. S. 485, a removal of an action of replevin, where the court said: "The contention of the plaintiff in error seems to be that an action of replevin where the sheriff of a state court is the defendant is not removable, because the sheriff, an officer of the state court, being in possession of the property, the subject-matter of the controversy, the federal

A Part of a Suit cannot be removed; to be removable the case as an entirety must be brought into the federal court.¹

After Dismissal. — A suit cannot be removed after it has been regularly dismissed by the plaintiff.²

b. CONTROVERSIES. — Besides the general provision for the removal of "suits" the removal act also provides specifically for the removal of certain suits in which there shall be "a controversy," etc.³ It is well settled that in order to constitute a controversy it is not essential that any pleadings shall have been filed by the defendant.⁴

c. OF A CIVIL NATURE. — The Removal Act of 1887-1888 provides for the removal of "suits of a civil nature," and suits of a penal nature are not removable under the act.⁵

Nature of Suit — How Determined. — It is not the form but the nature of the action which determines whether it is a civil suit within the meaning of the statute.⁶ A suit to recover a penalty for

court is without legal authority or power by writs, process, or orders to wrest its possession from him. There is no support either in the Act of Congress for the removal of causes or in any case adjudged by this court, for this position."

1. Thus in *Chicago, etc., R. Co. v. Minnesota, etc., R. Co.*, 29 Fed. Rep. 337, the defendant, before filing his petition for removal, appealed from an order granting a temporary injunction, and it was held that since the jurisdiction of the appellate court, which had attached to that part of the suit, would not be terminated by a removal of the rest of the suit remaining in the trial court where the petition for removal was filed, the suit was not removable.

In *Bowman v. Bowman*, 30 Fed. Rep. 849, a suit for divorce, the defendant denied the plaintiff's allegation of marriage, and it was held that such issue could not be removed to the federal court for trial, it being conceded that the main suit was not removable. The court said: "The statute allowing the removal of cases from the state to the federal courts by its provisions clearly contemplates that when removed the case must be removed into this court for all purposes, and for a final judgment or decree, no matter which way the issues may be found."

2. *New England Mortg. Security Co. v. Aughe*, 12 Neb. 504.

"Of course a suit terminated has ceased to be a suit." *Hewitt v. Phelps*, 105 U. S. 395.

3. See the provisions in the Act of 1887-1888 for removal on the ground

of a separable controversy and for prejudice or local influence. 24 U. S. Stat. at L. 532, c. 373; 25 U. S. Stat. at L. 433, c. 866.

4. *Creagh v. Equitable L. Assur. Soc.*, 83 Fed. Rep. 849; *Ketchum v. Black River Lumber Co.*, 4 Fed. Rep. 142; *Bailey v. American Cent. Ins. Co.*, 8 Fed. Rep. 686. The following cases to the contrary are now of no authority: *Flynn v. Des Moines, etc., R. Co.*, 63 Iowa 490; *Stanbrough v. Griffin*, 52 Iowa 112; *Bosler v. Booge*, 54 Iowa 251.

5. Act of 1887-1888, 24 U. S. Stat. at L. 552, c. 373; 25 U. S. Stat. at L. 433, c. 866.

"Beyond doubt (except in cases removed from a state court in obedience to an express Act of Congress in order to protect rights under the Constitution and laws of the United States), a Circuit Court of the United States cannot entertain jurisdiction of a suit in behalf of the state, or of the people thereof, to recover a penalty imposed by way of punishment for a violation of a statute of the state." *Huntington v. Attrill*, 146 U. S. 672.

As to removal of criminal proceedings see *infra*, I. 10. *Suits and Prosecutions Against Federal Revenue Officers*; I. 11. *Denial of Civil Rights*.

6. *Indiana v. Alleghany Oil Co.*, 85 Fed. Rep. 873; *Texas v. Day Land, etc., Co.*, 41 Fed. Rep. 230; *Ames v. Kansas*, 111 U. S. 460; *Iowa v. Chicago, etc., R. Co.*, 37 Fed. Rep. 497, where Judge Brewer in an exhaustive opinion goes over the whole subject; *Dey v. Chicago, etc., R. Co.*, 45 Fed.

violation of a statute, of a criminal nature, even when the remedy provided by the statute is a civil action, is not a suit of a civil nature.¹ But where the object of an action is indemnity for a civil injury, it is not a penal action, though the statute punishes the act committed by the defendant as a crime.² If the action is penal in its nature the fact that the state statute declares it to be a civil action does not make it removable.³

A Proceeding for a Purely Criminal Contempt of Court would not be removable.⁴

Rep. 84. See also *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265.

1. *Texas v. Day Land, etc., Co.*, 41 Fed. Rep. 228, 49 Fed. Rep. 593; *Ferguson v. Ross*, 38 Fed. Rep. 161; *Iowa v. Chicago, etc., R. Co.*, 37 Fed. Rep. 503, where the court concluded that "an action to enforce a penalty, whatever may be its form, is one of a criminal nature. As such, within the removal act, it is not a removable case."

An action by a state to recover a penalty for violation of a statute making it unlawful to permit the flow of gas or oil from a well into the open air is not removable. *Indiana v. Alleghany Oil Co.*, 85 Fed. Rep. 870.

An Action of Debt on a Recognizance for Good Behavior is not removable. *Republica v. Cobbet*, 3 Dall. (Pa.) 467.

Enforcement of Anti-trust Law.—An information in equity by the attorney-general of a state to enforce against the defendant a prohibition from doing business in the state, the cause of action alleged consisting of conduct which within the meaning of the state statute was an offense or misdemeanor, was held not to be removable. *Moloney v. American Tobacco Co.*, 72 Fed. Rep. 801, where the court said that "the circumstance that an injunction is the instrument, and apparently the only instrument, of the state's displeasure does not change the essential nature of the conduct complained of, or of the legal sanction to which said conduct must be referred." See also, for an application of the same principle, *Dey v. Chicago, etc., R. Co.*, 45 Fed. Rep. 82.

Bill to Enjoin Operation of Brewery.—In *Iowa v. Chicago, etc., R. Co.*, 37 Fed. Rep. 502, Judge Brewer stated that it had been said that in the cases of *Mugler v. Kansas* and *Kansas v. Ziebold*, 123 U. S. 623, the Supreme Court impliedly recognized the right

to remove a bill in equity filed to enjoin the operation of a brewery, which, though in form civil in its nature, was clearly an action to enforce the penal laws of the state; but that "in reply to this it may be said that in *Schmidt v. Cobb*, 119 U. S. 286, an order remanding a similar case was affirmed in the Supreme Court by a divided vote; that the cases of *Mugler* and *Ziebold* were considered and decided together; that the *Mugler* case was on appeal from the Supreme Court of Kansas; and that in the *Ziebold* case counsel preferred to discuss and have determined the absolute rights of the parties, rather than any question of form or removal. So that the question of removal seems not to have been considered by the court."

2. *Bunford v. Strother*, 10 Fed. Rep. 406, 3 McCrary (U. S.) 253, a statutory proceeding by a creditor to enforce the liability of stockholders and directors of a corporation for fraudulent acts. *Robertson v. Kettell*, 64 N. H. 430, was an action of debt by a stockholder in a corporation to recover a penalty provided by statute when a corporate officer or agent should refuse to furnish to a stockholder or creditor a copy of any record, account, or paper in his keeping which the stockholder or creditor was entitled to inspect, and the court was apparently inclined to the opinion that it was a suit of a civil nature and removable.

3. *Indiana v. Alleghany Oil Co.*, 85 Fed. Rep. 873.

4. *Williams Mower, etc., Co. v. Raynor*, 7 Biss. (U. S.) 245, holding, however, that where in a suit in the state court a proceeding for contempt which was in the nature of a civil remedy for the benefit of the party injured had resulted in an order adjudging the defendant guilty, the removal of the main suit carried the contempt proceeding with it. See *McLeod v. Duncan*, 5 McLean (U. S.) 342; *Kirk v.*

An Indictment for Causing Death by wrongful act under a statute providing for the infliction of a "fine" to be paid to the widow or heirs of the deceased is a criminal proceeding, especially where the highest state court has so construed the statute.¹

d. AT COMMON LAW OR IN EQUITY. — The phrase "suits of a civil nature at common law," in the statute describing removable suits,² is used in contradistinction to equity, admiralty, and maritime jurisdiction.³ It does not mean and is not confined to suits based on rights which owe their origin to the common law as distinguished from rights created by statute.⁴

e. MANDAMUS PROCEEDINGS. — A proceeding for an original writ of mandamus, commenced in a state court, is not a suit of a civil nature at law or in equity within the meaning of the removal act, and therefore it is not removable from a state to a federal court,⁵ unless it is subordinate and ancillary to a suit rightfully

Milwaukee Dust Collector Mfg. Co., 26 Fed. Rep. 507.

1. *New Hampshire v. Grand Trunk R. Co.*, 3 Fed. Rep. 887. See also *Lyman v. Boston, etc., R. Co.*, 70 Fed. Rep. 409.

2. Act of 1887-1888, 24 U. S. Stat. at L. 552, c. 373; 25 U. S. Stat. at L. 433, c. 866, providing for removal of "suits of a civil nature at common law or in equity."

3. *Parsons v. Bedford*, 3 Pet. (U. S.) 433; *Gaines v. Fuentes*, 92 U. S. 23; *Brisenden v. Chamberlain*, 53 Fed. Rep. 309, where the court said: "The phrase means all those suits in which the rights must be established and the remedies sought by the procedure known and prevailing in the courts of law, as distinguished from the procedure and the remedies prevailing in and administered by the courts of equity — that is, by a court and jury."

4. *Brisenden v. Chamberlain*, 53 Fed. Rep. 307, holding that a statutory action for death by wrongful act is removable, *citing* *Gordon v. Longest*, 16 Pet. (U. S.) 103; *Texas, etc., R. Co. v. Cox*, 145 U. S. 594; *Dennick v. Central R. Co.*, 103 U. S. 11; *Ex p. McNiel*, 13 Wall. (U. S.) 243; and *Van Norden v. Morton*, 99 U. S. 378. See also *Elliott v. Shuler*, 50 Fed. Rep. 454, a proceeding for a probate sale.

5. *Indiana v. Lake Erie, etc., R. Co.*, 85 Fed. Rep. 1, an action begun by the state on the relation of a city in a state court of Indiana to procure a writ of mandamus to compel the change and reconstruction of an overhead crossing theretofore erected by the defendant over and across a high-

way in the city. In holding that the federal court had no jurisdiction, *Baker, J.*, said: "In the absence of authority to the contrary, I should have been of the opinion that such a suit, where the requisite diversity of citizenship existed, was removable from a state court into a Circuit Court of the United States as a civil suit at law for the enforcement of the rights of the city alone. See *Washington Imp. Co. v. Kansas Pac. R. Co.*, 5 Dill. (U. S.) 489; *People v. Colorado Cent. R. Co.*, 42 Fed. Rep. 638; *People v. Rock Island, etc., R. Co.*, 71 Fed. Rep. 753; [*Erwin v. Walsh*, 27 Fed. Rep. 579]. It is settled, however, too firmly to be open to doubt or debate, that the authority of the Circuit Courts of the United States to issue writs of mandamus is confined exclusively to those cases in which they may be necessary as ancillary to, or in aid of, a jurisdiction already acquired. They have no authority in any case to issue a writ of mandamus as an original writ. The construction placed upon the first clause of section 14 of the Judiciary Act of September 24, 1789, continued in force in section 716, Rev. Stat. 1878, denies authority to the Circuit Courts of the United States to issue writs of mandamus except as ancillary to, or in aid of, a pre-existing jurisdiction; and it has been held that the present Acts of Congress defining the jurisdiction of those courts have not enlarged their jurisdiction in respect to writs of mandamus." The court then laid down the proposition stated in the text, to which the following cases were *cited*: *M'Intire v.*

pending in the federal Circuit Court.¹

f. QUO WARRANTO PROCEEDINGS. — An information in the nature of quo warranto is usually deemed a civil suit and removable if the other conditions exist.² Since the state is a party to the proceeding, it is not removable on the ground of diverse citizenship,³ but only when the record presents a federal question.⁴

g. HABEAS CORPUS PROCEEDINGS. — A proceeding for a writ of habeas corpus is a suit,⁵ but the matter in dispute is not regarded as having a money value, and therefore the federal court cannot acquire jurisdiction by removal.⁶

h. PROCEEDINGS FOR INJUNCTION OR PROHIBITION — **Injunction Suits.** — The United States Revised Statutes provide that "the writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."⁷ It follows that a suit for an injunction to stay proceedings in a state court cannot be removed to a federal court prior to the granting of an injunction.⁸ But if a preliminary injunction has already been granted by the state

Wood, 7 Cranch (U. S.) 504; Bath County v. Amy, 13 Wall. (U. S.) 244; Graham v. Norton, 15 Wall. (U. S.) 427; Heine v. Levee Com'rs, 19 Wall. (U. S.) 655; Greene County v. Daniel, 102 U. S. 187; Davenport v. Dodge County, 105 U. S. 237; Louisiana v. Jumel, 107 U. S. 711; Rosenbaum v. Bauer, 120 U. S. 450 [affirming Rosenbaum v. Board of Supervisors, 28 Fed. Rep. 223]; Smith v. Bourbon County, 127 U. S. 105; American Union Tel. Co. v. Bell Telephone Co., 1 Fed. Rep. 698; U. S. v. Pearson, 32 Fed. Rep. 309; State v. Columbus, etc., R. Co., 48 Fed. Rep. 626; *In re* Vintschger, 50 Fed. Rep. 459; Gares v. Northwest Nat. Bldg., etc., Assoc., 55 Fed. Rep. 209; Fuller v. Aylesworth, 75 Fed. Rep. 699; *In re* Forsyth, 78 Fed. Rep. 296. See also Woodruff v. New York, etc., R. Co., 59 Conn. 63; State v. Johnson, 29 La. Ann. 399. Compare Tennessee v. Whitworth, 117 U. S. 129, 139; New Orleans, etc., R. Co. v. Mississippi, 102 U. S. 135.

1. In Washington v. Northern Pac. R. Co., 75 Fed. Rep. 333, an action for mandamus against a railroad company and a receiver thereof appointed by a federal Circuit Court to control the official conduct of the receiver was removed into the federal court, and a motion to remand was denied.

2. Against Corporation. — A suit brought by a state in one of its own courts against a corporation amenable

to its own process to try the right of the corporation to exercise corporate powers within the territorial limits of the state is a suit of a civil nature, and removable to a federal court if it presents a case arising under the laws of the United States. Ames v. Kansas, 111 U. S. 449. For a similar case see Illinois v. Illinois Cent. R. Co., 33 Fed. Rep. 721.

3. See *infra*, I. 16. a. (2) *Where a State Is a Party*.

4. To Determine Title to Office. — A quo warranto proceeding by a relator in the name of the state to determine the defendant's title to the office of president of a state corporation was held not to be removable in Place v. Illinois, 69 Fed. Rep. 481.

In State v. Bowen, 8 S. Car. 382, it was held that quo warranto to determine the title to the office of presidential elector did not present a federal question and was therefore not removable.

5. *Ex p.* Milligan, 4 Wall. (U. S.) 112.

6. Kurtz v. Moffitt, 115 U. S. 487. See also Barry v. Mercein, 5 How. (U. S.) 103; Pratt v. Fitzhugh, 1 Black (U. S.) 271.

7. Rev. Stat. U. S., § 720.

8. Lawrence v. Morgan's R., etc., Co., 121 U. S. 634; Diggs v. Wolcott, 4 Cranch (U. S.) 179; Edwards Mfg. Co. v. Sprague, 76 Me. 53. See also Bondurant v. Watson, 103 U. S. 288; Rogers v. Rogers, 1 Paige (N. Y.) 184.

court, the inhibition of the statute does not apply so as to prevent a removal.¹ And a suit brought to enjoin the enforcement of a fraudulent judgment is not within the category of suits to stay proceedings in a state court.²

A Petition for a Writ of Prohibition is a suit,³ but it is doubtless irremovable for the reason just stated in respect of injunction suits for a like purpose.⁴

2. EMINENT DOMAIN PROCEEDINGS. — An application to state railroad commissioners to obtain their approval of contemplated proceedings to condemn land by eminent domain is devoid of the characteristics of a suit, and is not removable.⁵ So a proceeding to take land by eminent domain begun before commissioners appointed to appraise the land is in the nature of an inquest to ascertain its value, and not a suit at law in the ordinary sense of the term, and is therefore not removable.⁶ But on appeal from the award of the commissioners,⁷ or on a hearing of their report in court, with parties and pleadings,⁸ it takes the form of a suit at law and may be removed to a federal court if the other conditions for removal exist. Where the proceeding was originally instituted in a state court, and conducted like an ordinary lawsuit, it is a removable suit at its inception.⁹

1. *Hunt v. Fisher*, 29 Fed. Rep. 801, where, however, the court expressed its opinion that there was no sound reason for the distinction; *Smith v. Schwed*, 6 Fed. Rep. 455; *Bondurant v. Watson*, 103 U. S. 287.

2. *Marshall v. Holmes*, 141 U. S. 589.

3. *Weston v. Charleston*, 2 Pet. (U. S.) 449.

4. See *In re Bininger*, 7 Blatchf. (U. S.) 159; *Rogers v. Cincinnati*, 5 McLean (U. S.) 337; and article PROHIBITION, vol. 16, p. 1102.

5. *New York, etc., R. Co. v. Cockcroft*, 46 Fed. Rep. 881, where the court, after citing the state statute, said: "This proceeding involves only the consent of the railroad commissioners to the taking of the land. The land cannot be taken in it, nor can the compensation for the land be fixed in it. If they approve, the railroad company can proceed further; if they do not approve, it cannot. No issue is defined for them to try, or guide laid down for them to follow, in determining whether they shall grant or refuse their approval. * * * They render no judgment, but merely declare their own approval or disapproval of further proceedings." See also *White v. Philadelphia*, 8 Phila. (Pa.) 243.

6. *Mississippi, etc., Boom Co. v. Pat-*

terson, 98 U. S. 406; *Pacific R. Removal Cases*, 115 U. S. 19; *In re Jarnecke Ditch*, 69 Fed. Rep. 164. See also *Hartford, etc., R. Co. v. Montague*, 94 Fed. Rep. 227; *Fuller v. Colfax County*, 14 Fed. Rep. 177.

7. *Mississippi, etc., Boom Co. v. Pat-terson*, 98 U. S. 406; *Pacific R. Removal Cases*, 115 U. S. 1; *Warren v. Wisconsin Valley R. Co.*, 6 Biss. (U. S.) 598. See also *Hudson River R., etc., Co. v. Day*, 54 Fed. Rep. 545; *Mt. Washington R. Co. v. Coe*, 50 Fed. Rep. 637; *Clinton v. Missouri Pac. R. Co.*, 122 U. S. 469.

8. *In re Jarnecke Ditch*, 69 Fed. Rep. 161, a drainage proceeding under the *Indiana* statute, contemplating the taking of land for the improvement and assessment of benefits, *distinguishing In re Chicago*, 64 Fed. Rep. 897.

9. *Postal Tel. Cable Co. v. Southern R. Co.*, 88 Fed. Rep. 803; *Sugar Creek, etc., R. Co. v. McKell*, 75 Fed. Rep. 34; *Kansas City, etc., R. Co. v. Interstate Lumber Co.*, 37 Fed. Rep. 3, 36 Fed. Rep. 9; *Banigan v. Worcester*, 30 Fed. Rep. 392; *Colorado Midland R. Co. v. Jones*, 29 Fed. Rep. 193; *Mineral Range R. Co. v. Detroit, etc., Copper Co.*, 25 Fed. Rep. 515; *Northern Pac. Terminal Co. v. Lowenberg*, 18 Fed. Rep. 339; *Chicago v. Hutchinson*, 15 Fed. Rep. 129; *Matter of Barnesville, etc., R. Co.*, 4 Fed. Rep. 10, 2

j. PROCEEDINGS RELATING TO TAXATION. — An original assessment of property for taxation, made by assessors, is not a suit;¹ nor in ordinary cases is an appeal from such assessment a suit.² But an appeal from an assessment, if referred to a court and jury, or merely to a court, to be proceeded in according to judicial methods, may become a suit.³ And where the legality and constitutionality of taxes and assessments are subjected to judicial examination by an action against the collecting officer, by a bill for injunction, by certiorari, or by other modes of proceeding, a suit arises which may come within the cognizance of the federal courts by removal.⁴

k. PROCEEDINGS RELATING TO WILLS AND ADMINISTRATION — *Proceedings Relating to Wills.* — While it is well settled that the federal courts have no probate jurisdiction,⁵ there is a conflict of authority as to the removability of proceedings or suits to establish or set aside wills. It has been held that a contest in the

McCrary (U. S.) 216. See also *Minneapolis, etc., R. Co. v. Nestor*, 50 Fed. Rep. 1. Compare *Hartford, etc., R. Co. v. Montague*, 94 Fed. Rep. 227.

In *Searl v. School Dist. No. 2*, 124 U. S. 197, a petition was filed by a school district in the County Court of Colorado for condemnation of land for school purposes, and it was held that it was removable to the federal court by a landowner who was a citizen of another state, since it was an adversary judicial proceeding from the beginning although the state statute provided for the ascertainment of damages by a commission of three freeholders, unless at the hearing the defendant should demand a jury.

In *Kohl v. U. S.*, 91 U. S. 367, Mr. Justice Strong, delivering the opinion of the court, said: "It is difficult * * * to see why a proceeding to take land in virtue of * * * eminent domain, and determining the compensation to be made for it, is not, within the meaning of the statute, a suit at common law, when initiated in a court."

1. *Upshur County v. Rich*, 135 U. S. 472.

Exercise of Taxing Power. — It has been held that a proceeding which is a mere exercise of the taxing power is administrative, not judicial, and is not removable to a federal court. *In re Chicago*, 64 Fed. Rep. 897, holding that a proceeding solely for the purpose of raising money by the exercise of the taxing power for the construction of a public improvement is not a suit, although such proceedings may be con-

ducted in a court of general jurisdiction. *Distinguished in In re Jarnecke Ditch*, 69 Fed. Rep. 167, which was a similar proceeding, but in the exercise of the power of eminent domain. On the other hand, it has been held that a proceeding in a state court to collect delinquent taxes where the primary object is to have the validity of the tax judicially determined and all defenses cut off, has all the elements of a suit within the meaning of the removal act. *In re Stutsman County*, 88 Fed. Rep. 337, *disapproving In re Chicago*, 64 Fed. Rep. 897, above cited.

2. *Upshur County v. Rich*, 135 U. S. 470, where the court said: "By the laws of all or most of the states taxpayers are allowed to appeal from the assessment of their property by the assessor to some tribunal constituted for that purpose, sometimes called a board of commissioners of appeal; sometimes one thing, and sometimes another. But whatever called, it is not usually a court, nor is the proceeding a suit between parties; it is a matter of administration, and the duties of the tribunal are administrative, and not judicial in the ordinary sense of that term, though often involving the exercise of quasi-judicial functions. Such appeals are not embraced in the removal act."

3. *Upshur County v. Rich*, 135 U. S. 473.

4. *Upshur County v. Rich*, 135 U. S. 473.

5. *Ellis v. Davis*, 109 U. S. 485; *Gaines v. Fuentes*, 92 U. S. 10; *Burnside's Succession*, 34 La. Ann. 730.

original proceeding to probate a will, or on appeal from the probate court, is removable where it is of an adversary nature, with parties before the court, and the decision therein is to be final;¹ and on the other hand that a proceeding to probate a will in the probate court or on appeal therefrom is not removable;² that a statutory action to contest a probated will is removable,³ and again that it is not removable.⁴ It has been held that an action to establish a lost will is removable.⁵ A suit brought against a devisee by strangers to the estate to annul the will as a muniment of title and to limit the operation of the decree admitting it to probate is a removable suit.⁶

Administration Proceedings.—A proceeding to establish a claim in the probate court against a decedent's estate is a suit, and removable.⁷ And so is a contest on a proceeding for distribution in a probate court.⁸

Proceeding for Probate Sale.—A special proceeding by a personal representative to obtain a license to sell the lands of a decedent to procure assets for the payment of debts is removable.⁹

Miscellaneous Proceedings in Probate Court.—Proceedings for the

1. *Franz v. Wahl*, 81 Fed. Rep. 9; *Brodhead v. Shoemaker*, 44 Fed. Rep. 518. See also *Tibbatts v. Berry*, 10 B. Mon. (Ky.) 490. Compare *Fraser v. Jennison*, 106 U. S. 191; *Reed v. Reed*, 31 Fed. Rep. 49.

2. *In re Cilley*, 58 Fed. Rep. 977; *In re Aspinwall*, 83 Fed. Rep. 851. Compare *Patten v. Cilley*, 46 Fed. Rep. 892.

3. *Richardson v. Green*, 61 Fed. Rep. 423. See also *Gaines v. Fuentes*, 92 U. S. 18; *Ellis v. Davis*, 109 U. S. 485; *American Bible Soc. v. Price*, 110 U. S. 61; *In re Aspinwall*, 83 Fed. Rep. 852; *Upshur County v. Rich*, 135 U. S. 476, where the court said: "Although the granting of probate of a will is not ordinarily a suit, yet, if a contestation arises, and is carried on between parties litigating with each other, the proceeding then becomes a suit."

4. *Reed v. Reed*, 31 Fed. Rep. 49, distinguishing *Gaines v. Fuentes*, 92 U. S. 10. See also *Oakley v. Taylor*, 64 Fed. Rep. 245; *Cilley v. Patten*, 62 Fed. Rep. 498.

5. *Southworth v. Adams*, 4 Fed. Rep. 1, 9 Biss. (U. S.) 521, a case decided under the Act of 1875, and one whereof the state court in the particular instance had jurisdiction.

6. *Gaines v. Fuentes*, 92 U. S. 10, where the court said: "Whenever a controversy in a suit between such parties [citizens of different states] arises respecting the validity or con-

struction of a will, or the enforcement of a decree admitting it to probate, there is no more reason why the federal courts should not take jurisdiction of the case than there is that they should not take jurisdiction of any other controversy between the parties." See also *Everhart v. Everhart*, 34 Fed. Rep. 82.

7. *Clark v. Bever*, 139 U. S. 96; *Hess v. Reynolds*, 113 U. S. 73. See also *In re Foley*, 76 Fed. Rep. 395.

Contra.—In *Du Vivier v. Hopkins*, 116 Mass. 125, it was held that a claim filed by a creditor against the insolvent estate of a decedent in the course of settlement in the probate court was not a removable controversy. The court said: "It is at least doubtful whether a claim against an insolvent or bankrupt estate is a 'suit' in any sense, under the judiciary acts of the United States." *Coit v. Robinson*, 19 Wall. (U. S.) 284."

Application by Widow for Year's Support.—In *McElmurray v. Loomis*, 31 Fed. Rep. 395, the court inclined to the opinion that an application by a widow to a probate court to have a year's support awarded to her out of her deceased husband's estate was a mere incident to the administration, and not removable.

8. *Craigie v. McArthur*, 4 Dill. (U. S.) 474.

9. *Elliott v. Shuler*, 50 Fed. Rep. 454.

appointment or removal of executors or administrators,¹ and proceedings in the probate court to determine the question whether the property of a deceased person is separate or community property,² are not removable.

A Bill for the Construction of a Will is removable.³

Bill by Trustee for Instructions. — In one case it was declared doubtful whether the federal court could have jurisdiction by removal of a bill by trustees, appointed under state laws, for instructions in the settlement of a decedent's estate.⁴

I. ANCILLARY PROCEEDINGS — (1) *In General.* — It is the main suit or controversy between the parties that is removable, and not a mere sequence or dependency of a suit,⁵ and where a proceeding in a state court is merely incidental and auxiliary to an original action in that court, it cannot be removed to the federal court.⁶ But the fact that a bill in equity is intended to aid a

1. *Burnside's Succession*, 34 La. Ann. 728.

2. *In re Foley*, 80 Fed. Rep. 949, *distinguishing* *Foley v. Hartley*, 72 Fed. Rep. 571.

3. *Security Co. v. Pratt*, 65 Conn. 161.

4. *Gordon v. Green*, 113 Mass. 261.

5. *Webber v. Humphreys*, 5 Dill. (U. S.) 225.

6. *Chappell v. Chappell*, 86 Md. 544; *Cole v. La Chambre*, 31 La. Ann. 44; *Hospes v. Northwestern Mfg., etc., Co.*, 22 Fed. Rep. 565. See also *Jackson v. Gould*, 74 Me. 578; *West v. Aurora City*, 6 Wall. (U. S.) 139; and *supra*, p. 169, note 1.

"Nothing less than a whole cause can be removed into the Circuit Court of the United States under the Acts of Congress. A part of the cause, or a controversy incidental to the main cause, cannot be so removed." *Per* Gray, C. J., in *Du Vivier v. Hopkins*, 116 Mass. 128.

Trial of Right of Property. — In *Alexandria First Nat. Bank v. Turnbull*, 16 Wall. (U. S.) 190, it appeared that the bank had obtained a judgment in the state court against a debtor, and levied an execution upon certain cotton. *Turnbull & Co.* asserted a claim thereto as owners, and gave bond, as required by the state statutes; and under the provisions of the statute the state court ordered an issue to be tried before a jury to determine the right of property levied on. Thereupon *Turnbull & Co.* filed a petition for the removal of the cause. The Supreme Court held that the proceeding was auxiliary and incidental to the original

suit, and therefore not removable; reaching this conclusion upon the ground that the proceeding was under the state statute and necessarily brought in the court which rendered the original judgment, and was in fact a proceeding to enable the state court to determine whether its process had been misapplied. The case was *followed* in *Flash v. Dillon*, 22 Fed. Rep. 1, a proceeding for trial of the right of property; *King v. Shepherd*, 20 Fed. Rep. 337; *Hochstadter v. Harrison*, 71 Ga. 21, and in *Besser v. Munford*, 63 Ga. 446. See also *Harrison v. Shorter*, 59 Ga. 512; *Bondurant v. Watson*, 103 U. S. 281.

Where Original Suit Is Removed. — "Where, however, a claim is filed to property levied on under attachment, and the attachment is removed, and the claimant is a resident of the same state as the defendants, the claim should be removed with the attachment." *Hochstadter v. Harrison*, 71 Ga. 21.

Controversy Touching Receivership. — Where a court appoints a receiver in a suit, a controversy in that court between the receiver and a claimant of the fund or between claimants is not removable. *Buell v. Cincinnati, etc., Constr. Co.*, 9 Fed. Rep. 351.

Suit Relating to Succession. — In *Filer v. Levy*, 17 Fed. Rep. 609, it was held that a suit for account by the executor of a deceased partner against the surviving partner who had qualified as liquidating partner was not auxiliary to the settlement of the succession and was removable.

Proceeding to Quiet Title. — A special

court of law, or to prevent a party from availing himself of an inequitable suit or defense in a court of law in another pending action, does not deprive the bill of its character as an original suit.¹ Where the relief sought in the new proceeding could have been obtained on mere petition in the original suit,² or by setting up a defense therein,³ it may be considered as ancillary and not removable.

(2) *Garnishment Proceedings*. — A proceeding in garnishment is merely auxiliary to the original action, and if the latter cannot be removed the former cannot be.⁴

(3) *Proceedings Connected with Judgments — In General*. — There can be no removal of a proceeding which is a mode of relief inseparably connected with an original judgment.⁵ But a suit is not necessarily ancillary because it grows out of matters already litigated and adjudicated between one of the defendants and the plaintiff.⁶

In Aid of Judgment. — A suit in equity in aid of a judgment and proceedings at law, to regulate and perfect rights already determined, is ancillary, and not removable.⁷

statutory proceeding in a court to confirm sales of land by a sheriff or other public officer, being in substance a bill in chancery to quiet title, is removable. *Parker v. Overman*, 18 How. (U. S.) 137.

1. Thus, in *Charter Oak F. Ins. Co. v. Star Ins. Co.*, 6 Blatchf. (U. S.) 208, pending an action at law on a policy of reinsurance the plaintiff brought a suit in equity in the same court to reform and correct the policy on the ground of mistake and to enjoin the defendant from setting up certain specified matters in defense to the action at law. It was held that the suit in equity was removable.

2. *Wolcott v. Aspen Min., etc., Co.*, 34 Fed. Rep. 822.

3. *Richmond, etc., R. Co. v. Findley*, 32 Fed. Rep. 641.

4. *Buford v. Strother*, 3 McCrary (U. S.) 253, 10 Fed. Rep. 406; *Pratt v. Albright*, 9 Fed. Rep. 634, 10 Biss. (U. S.) 511; *Poole v. Thatcher*, 19 Fed. Rep. 49, in which cases judgment had been entered up in the state court against the defendants and the garnishee proceedings were supplemental thereto; *King v. Shepherd*, 20 Fed. Rep. 337; *Weeks v. Billings*, 55 N. H. 371, a petition for removal before judgment in the main suit, where the court said: "There is no provision by which the proceeding can be brought to a close, unless the trustee and the defendant are in the same court."

5. Thus a proceeding under the occupying claimant law of Iowa for the value of improvements after judgment in ejectment was held not to be removable. *Chapman v. Barger*, 4 Dill. (U. S.) 557.

6. *Hatch v. Preston*, 1 Biss. (U. S.) 19; *Pettus v. Georgia R., etc., Co.*, 3 Woods (U. S.) 629.

Opposition to Executory Process in Louisiana. — Where a suit was instituted in Louisiana on a petition for executory process, on a title importing a confession of judgment, executory process had been ordered, and the debtor had filed an opposition, denying the plaintiff's right and asking the revocation of the order, it was held that the opposition was removable, since the order of seizure and sale did not constitute a judgment to which the opposition was merely auxiliary. *Lockhart v. Morey*, 31 Fed. Rep. 497. See also *Boatman's Sav. Bank v. Wagenspack*, 4 Woods (U. S.) 130, 12 Fed. Rep. 66.

7. Thus, in *Ladd v. West*, 55 Fed. Rep. 353, the plaintiff recovered judgment against the defendant, an adjoining landowner, for damages in conducting his business in such a manner as to constitute a nuisance. Later he brought another action at law against the same defendant, alleging the same kind of a grievance at a subsequent period, and still later a suit in equity against the former defendant and his partner, setting up the former judg-

For Relief Against Judgment. — If a proceeding to annul a judgment is merely tantamount to the common-law practice of moving to set aside a judgment for irregularity, or to a writ of error, or to a bill of review or an appeal, it is to be deemed a supplementary

ment and the pendency of the later action at law, and praying for a consolidation, perpetual injunction, and the assessment and recovery of damages accruing subsequent to the proceedings at law, by reason of the wanton and reckless manner of doing business. It was held that the suit in equity was a part and parcel and continuance of the original litigation, and not removable. The court said: "I have doubt as to the power of this court, * * * upon a motion to remand merely, to order the pleadings recast for the purpose of separating law and equity matter and compelling the claim for damages to be stated at law, with a view of holding jurisdiction of that part of the controversy for which the remedy is at law, and remanding that part cognizable in an equity proceeding in aid of the judgment and proceedings at law in the state court. Having such doubt, I do not undertake upon this motion to determine definitely whether a claim for damages of this character is, in an equitable sense, incident to the injunction jurisdiction, and therefore cognizable in equity, but remand the whole case as presented by the record in its present shape." See also *Wolcott v. Aspen Min., etc., Co.*, 34 Fed. Rep. 821.

"Where the supplemental proceeding is in its character a mere mode of execution or of relief, inseparably connected with the original judgment or decree, it cannot be removed, notwithstanding the fact that some new controversy or issue between the plaintiff in the original action and a new party may arise out of the proceeding." *Buford v. Strother*, 3 McCrary (U. S.) 253.

Proceeding to Bind Nonresident Defendants. — In *Fairchild v. Durand*, (N. Y. Super. Ct. Spec. T.) 8 Abb. Pr. (N. Y.) 305, an action was brought against several joint contractors, one of whom was a resident of the state, and the others were nonresidents. Summons was served only on the resident, but judgment was taken against all, and the nonresident defendants were thereupon served with summons, under a statutory provision, to show cause

why they should not be bound by the judgment. It was held that this latter proceeding was merely a continuance of the original action and was not removable by the nonresident defendants, as the other defendant was a resident.

Suits to Subject Real Estate. — In *Kalamazoo Wagon Co. v. Snavely*, 34 Fed. Rep. 823, a suit in equity by a judgment creditor to reach and subject to the payment of the judgment real estate claimed by a third party, the latter being the principal defendant and a stranger to the first proceeding, was held to be removable.

In *Bondurant v. Watson*, 103 U. S. 281, affirming *Watson v. Bondurant*, 2 Woods (U. S.) 166, a judgment creditor levied on real estate as the property of his debtor, and was about to sell. *Watson*, whose title came through the judgment debtor, claimed the property and contended that it was not liable to the plaintiff's judgment, and brought suit in the state court to enjoin the judgment creditor from selling, and it was held to be a new, independent, and removable controversy.

A bill to enforce possession of property after a decree in a former suit adjudicating the title to be in the plaintiff is ancillary though purchasers from the original defendant are joined as codefendants in the new suit. *Wolcott v. Aspen Min., etc., Co.*, 34 Fed. Rep. 821.

A Proceeding Against a Stockholder of a Corporation, under a statute providing that after execution against a corporation returned *nulla bona* the judgment creditor may, upon motion and notice in writing to a stockholder to be charged to the extent of unpaid stock, obtain an execution against him, is not an ancillary but an independent suit removable to a federal court. *Lackawanna Coal, etc., Co. v. Bates*, 56 Fed. Rep. 737, disapproving *Webber v. Humphreys*, 5 Dill. (U. S.) 223. See also *Buford v. Strother*, 10 Fed. Rep. 406, 3 McCrary (U. S.) 253, a similar proceeding to charge stockholders for alleged fraudulent acts, *distinguishing* *Webber v. Humphreys*, 5 Dill. (U. S.) 223.

proceeding of which the federal court cannot entertain jurisdiction by removal.¹ But if the proceeding is tantamount to a bill in equity to set aside a judgment or decree for fraud,² or to obtain relief against a judgment on the ground of accident or mistake,³ then it constitutes an original and independent proceeding removable to a federal court.⁴

A Writ of Review is not a removable proceeding.⁵

(4) *Ancillary Suits Against Receivers.* — See *infra*, I. 16.
c. (1) (c) *Suit By or Against Receiver Appointed by Federal Court.*

m. ONLY SUITS WITHIN ORIGINAL JURISDICTION OF FEDERAL COURT — (1) *As to Subject-matter.* — Jurisdiction of civil suits by removal is conferred upon the federal courts only in those cases of which those courts would have original jurisdiction.⁶ It has been held that a proceeding which presents all the elements of a suit within the original jurisdiction of the federal court is removable notwithstanding it may involve matters of procedure which would prevent its commencement in that court.⁷ But the test of original jurisdiction is applied to removal cases with such insistence that the soundness of the foregoing proposition is not entirely free from doubt.⁸

1. *Barrow v. Hunton*, 99 U. S. 80, where a suit was brought in one of the state courts of Louisiana to annul a judgment rendered in a court of that state, upon the ground that it was founded upon a default taken without lawful service of the petition and a citation, and because prior to the judgment the party seeking to have it set aside had been adjudged a bankrupt. The court held that the proceeding was equivalent in common-law practice to a motion to set aside a judgment for irregularity or to a writ of error *coram vobis*, and as the cause of nullity related to form only, the case was held not to be cognizable in the federal court, and was remanded to the state court.

"If, after judgment rendered, a suit is brought to control as to the mode and manner of execution, or even to prevent execution, there is plausibility and authority for holding that such subsequent suit is ancillary to the main suit and therefore not removable." *Lockhart v. Morey*, 31 Fed. Rep. 497.

2. *Marshall v. Holmes*, 141 U. S. 589, a bill in equity to annul a fraudulent judgment; *Barrow v. Hunton*, 99 U. S. 80; *Davenport v. Moore*, 74 Fed. Rep. 948; *Carver v. Jarvis-Conklin Mortg. Trust Co.*, 73 Fed. Rep. 9. See also *Ladd v. West*, 55 Fed. Rep. 354. Compare *Ranlett v. Collier White Lead*

Co., 30 La. Ann. 56; *Ralston v. British, etc.*, *Mortg. Co.*, 37 La. Ann. 193.

3. *Pelzer Mfg. Co. v. Hamburg-Bremen F. Ins. Co.*, 62 Fed. Rep. 1.

4. *Feigned Issue in Pennsylvania.* — Where a creditor seeks by means of a feigned issue authorized by the Pennsylvania statute to set aside a fraudulent judgment against his debtor, the proceeding is equivalent to a bill in equity for that purpose and is removable as a distinct controversy. *Fuller v. Wright*, 23 Fed. Rep. 833.

5. *Jackson v. Gould*, 74 Me. 564.

6. Act of 1887-1888, 24 U. S. Stat. at L. 552, c. 373; 25 U. S. Stat. at L. 433, c. 866.

7. *In re Stutsman County*, 88 Fed. Rep. 337, a statutory proceeding for the collection of delinquent taxes.

8. *Hartford, etc., R. Co. v. Montague*, 94 Fed. Rep. 227; *In re Cilley*, 58 Fed. Rep. 977; *New York, etc., R. Co. v. Cockcroft*, 46 Fed. Rep. 881; *Dey v. Chicago, etc., R. Co.*, 45 Fed. Rep. 82; *Reed v. Reed*, 31 Fed. Rep. 49.

"It is apparent from the language of the act that no suit can now be removed to a federal court which could not originally have been brought there, except when the sole objection to the original jurisdiction was the nonresidence of the defendant." *La Montague v. T. W. Harvey Lumber Co.*, 44 Fed. Rep. 647.

Exercise of State Police Power. — A statutory proceeding in the exercise of the police power of the state has been held not removable.¹

Federal Equity Jurisdiction. — A federal court sitting as a court of equity cannot take original jurisdiction of a creditors' bill to subject property to the payment of a simple contract debt in advance of any proceeding at law, either to establish the validity or amount of the debt or to enforce its collection.² Hence such a suit cannot be removed from a state to a federal court.³

(2) *Residence in Particular Federal District.* — The Act of 1887-1888 provides that an action between citizens of different states originally commenced in a federal Circuit Court "shall be brought only in the district of the residence of either the plaintiff or the defendant." In the next section of the act the jurisdiction of the federal court by removal is limited to suits of which original jurisdiction is given to it by the preceding section. It is now well settled that this limitation applies only to the general grant of jurisdiction at the beginning of the preceding section, and not to the special regulations as to the district in which an action may be brought, and that a cause may be removed though neither party resides in the federal district in which the suit is brought, if the other necessary conditions exist.⁴ By filing the petition

1. *Woodruff v. New York, etc., R. Co.*, 59 Conn. 63, an application by railroad commissioners to compel a railroad company to move its tracks in obedience to an order of the board made under authority of a legislative act for the abolition of a grade crossing, decided on the ground that the federal court cannot take cognizance of questions relating to the exercise of the police power of a state. But compare *People v. Rock Island, etc., R. Co.*, 71 Fed. Rep. 757.

2. *Scott v. Neely*, 140 U. S. 106. See also article CREDITORS' BILLS, vol. 5, p. 465 *et seq.*

3. *Cates v. Allen*, 149 U. S. 451. *Parkersburg First Nat. Bank v. Prager*, 91 Fed. Rep. 689.

4. *Mexican Nat. R. Co. v. Davidson*, 157 U. S. 208; *McCormick Harvesting Mach. Co. v. Walthers*, 134 U. S. 41; *Cates v. Allen*, 149 U. S. 460; *Monroe v. Williamson*, 81 Fed. Rep. 988; *Stalker v. Pullman's Palace-Car Co.*, 81 Fed. Rep. 989; *Duncan v. Associated Press*, 81 Fed. Rep. 417; *Long v. Long*, 73 Fed. Rep. 369; *Hoover, etc., Co. v. Columbia Straw-Paper Co.*, 68 Fed. Rep. 945; *Frisbie v. Chesapeake, etc., R. Co.*, 57 Fed. Rep. 1; *Sherwood v. Newport News, etc., Co.*, 55 Fed. Rep. 1; *Richmond v. Brookings*, 48 Fed. Rep. 241; *Crocker Nat. Bank v.*

Pagenstecher, 44 Fed. Rep. 705; *Uhle v. Burnham*, 42 Fed. Rep. 1; *Purcell v. British Land, etc., Co.*, 42 Fed. Rep. 465; *Burck v. Taylor*, 39 Fed. Rep. 581; *Kansas City, etc., R. Co. v. Interstate Lumber Co.*, 37 Fed. Rep. 3; *Sheffield First Nat. Bank v. Merchants' Bank*, 37 Fed. Rep. 657; *Swayne v. Boylston Ins. Co.*, 35 Fed. Rep. 1; *Short v. Chicago, etc., R. Co.*, 34 Fed. Rep. 225, 33 Fed. Rep. 114; *Tiffany v. Wilce*, 34 Fed. Rep. 230; *St. Louis, etc., R. Co. v. Terre Haute, etc., R. Co.*, 33 Fed. Rep. 385; *Loomis v. New York, etc., Gas Coal Co.*, 33 Fed. Rep. 353; *Pitkin County Min. Co. v. Markell*, 33 Fed. Rep. 387; *Gavin v. Vance*, 33 Fed. Rep. 84; *Fales v. Chicago, etc., R. Co.*, 32 Fed. Rep. 673; *Craven v. Turner*, 82 Me. 383; *Koshland v. National Ins. Co.*, 31 Oregon 205.

Suit Begun by Attachment. — In *American Finance Co. v. Bostwick*, 151 Mass. 19, a citizen of Pennsylvania sued a citizen of New York in the Superior Court of Massachusetts, and attached property of the defendant, but made no personal service upon him. After notice the defendant appeared in the action, and, before the time when he was required to file an answer in the Superior Court, duly removed it to the Supreme Judicial Court, under the local statute, and in that court filed a

and bond for removal the defendant waives the right to challenge the jurisdiction of the federal court on the ground that the action was not commenced in the proper district.¹

Suits By and Against Aliens. — It is doubtful if the provision as to the district in which an original suit shall be brought applies to actions between citizens of a state and foreign states, citizens, or subjects,² but even if it does, the removal of such an action does not depend upon the condition.³

10. Suits and Prosecutions Against Federal Revenue Officers —
a. AUTHORITY FOR REMOVAL. — An Act of Congress provides for removal to the federal court of certain suits and prosecutions in state courts against federal revenue officers or persons acting under their authority.⁴ The constitutionality of the act

petition to remove the cause to the federal court, on the ground of diverse citizenship. It was held that the cause was properly removed.

1. *Creagh v. Equitable L. Assur. Soc.*, 83 Fed. Rep. 850 [citing *Gracie v. Palmer*, 8 Wheat. (U. S.) 699; *Pollard v. Dwight*, 4 Cranch (U. S.) 421; *Barry v. Foyles*, 1 Pet. (U. S.) 311; *Toland v. Sprague*, 12 Pet. (U. S.) 300; *Ex p. Schollenberger*, 96 U. S. 369; *Fitzgerald, etc., Constr. Co. v. Fitzgerald*, 137 U. S. 98; *St. Louis, etc., R. Co. v. McBride*, 141 U. S. 127; *Texas, etc., R. Co. v. Cox*, 145 U. S. 593; *Southern Pac. Co. v. Denton*, 146 U. S. 202; *Texas, etc., R. Co. v. Saunders*, 151 U. S. 105; *Central Trust Co. v. McGeorge*, 151 U. S. 129; *Mexican Nat. R. Co. v. Davidson*, 157 U. S. 208; *Interior Constr., etc., Co. v. Gibney*, 160 U. S. 220].

2. *Sherwood v. Newport News, etc., Co.*, 55 Fed. Rep. 3.

3. *Uhle v. Burnham*, 42 Fed. Rep. 1; *Sherwood v. Newport News, etc., Co.*, 55 Fed. Rep. 1. See also *Purcell v. British Land, etc., Co.*, 42 Fed. Rep. 465; *Cooley v. McArthur*, 35 Fed. Rep. 372.

4. Rev. Stat. U. S., § 643, which provides as follows: "When any civil suit or criminal prosecution is commenced in any court of a state against any officer appointed under or acting by authority of any revenue law of the United States now or hereafter enacted, or against any person acting under or by authority of any such officer, on account of any act done under color of his office or of any such law, or on account of any right, title, or authority claimed by such officer or other person under any such law; or is commenced

against any person holding property or estate by title derived from any such officer, and affects the validity of any such revenue law; * * * the said suit or prosecution may, at any time before the trial or final hearing thereof, be removed for trial into the circuit court next to be holden in the district where the same is pending, upon the petition of such defendant to said circuit court, and in the following manner: Said petition shall set forth the nature of the suit or prosecution, and be verified by affidavit; and, together with a certificate signed by an attorney or counselor at law of some court of record of the state where such suit or prosecution is commenced, or of the United States, stating that, as counsel for the petitioner, he has examined the proceedings against him, and carefully inquired into all the matters set forth in the petition, and that he believes them to be true, shall be presented to the said circuit court, if in session, or if it be not, to the clerk thereof at his office, and shall be filed in said office. The cause shall thereupon be entered on the docket of the circuit court, and shall proceed as a cause originally commenced in that court; but all bail and other security given upon such suit or prosecution shall continue in like force and effect as if the same had proceeded to final judgment and execution in the state court. When the suit is commenced in the state court by summons, subpoena, petition, or another process except *capias*, the clerk of the circuit court shall issue a writ of *certiorari* to the state court, requiring it to send to the circuit court the record and proceedings in the cause. When it is commenced by *capias*, or by any other

has been expressly affirmed.¹

b. WHAT CASES ARE REMOVABLE. — It is said that the statute is highly remedial and should be construed liberally.²

The following cases were held removable: Prosecutions against United States marshals or their deputies or assistants for acts done by them in the service of warrants issued for the arrest of persons accused of violation of the United States revenue laws;³ a summary proceeding by a landlord to recover possession of premises against the lessee and undertenants, one of whom was a collector of internal revenue and another a United States store-keeper;⁴ an attachment rule against an internal-revenue collector for contempt in obstructing the state sheriff in the levying of an execution upon whiskey in a bonded warehouse;⁵ a suit by a carrier against a collector of customs to recover money paid to the defendant by the consignee of goods delivered to him by the

similar form of proceeding by which a personal arrest is ordered, he shall issue a writ of habeas corpus *cum causa*, a duplicate of which shall be delivered to the clerk of the state court, or left at his office, by the marshal of the district, or his deputy, or by some person duly authorized thereto; and thereupon it shall be the duty of the state court to stay all further proceedings in the cause, and the suit or prosecution, upon delivery of such process, or leaving the same as aforesaid, shall be held to be removed to the circuit court, and any further proceedings, trial, or judgment therein in the state court shall be void. And if the defendant in the suit or prosecution be in actual custody or mesne process therein, it shall be the duty of the marshal, by virtue of the writ of habeas corpus *cum causa*, to take the body of the defendant into his custody, to be dealt with in the cause according to law and the order of the circuit court, or, in vacation, of any judge thereof; and if, upon the removal of such suit or prosecution, it is made to appear to the circuit court that no copy of the record and proceedings therein in the state court can be obtained, the circuit court may allow and require the plaintiff to proceed *de novo*, and to file a declaration of his cause of action, and the parties may thereupon proceed as in actions originally brought in said circuit court. On failure of the plaintiff so to proceed, judgment of *non prosequitur* may be rendered against him, with costs for the defendant."

The foregoing section was expressly continued in force by the Act of 1887-1888, 24 U. S. Stat. at L. 552, c. 373; 25

U. S. Stat. at L. 433, c. 866. Similar provisions are to be found in the Act of July 13, 1886, 14 U. S. Stat. at L. 171, c. 184, § 67, and in the Act of March 2, 1833, 4 U. S. Stat. at L. 633, c. 57, § 3, the latter of which acts was called in the political dialect of the time the Force Act.

What Are Revenue Laws. — "Any law which provides for the assessment and collection of a tax to defray the expenses of the government is a revenue law." *Peyton v. Bliss*, Woolw. (U. S.) 173.

The post-office laws are revenue laws within the meaning of the act. *Warner v. Fowler*, 4 Blatchf. (U. S.) 311.

1. *Tennessee v. Davis*, 100 U. S. 257; *Davis v. South Carolina*, 107 U. S. 597; *Findley v. Satterfield*, 3 Woods (U. S.) 504; *State v. Hoskins*, 77 N. Car. 530. Compare *State v. Davis*, 12 S. Car. 528.

2. *State v. Sullivan*, 50 Fed. Rep. 594.

3. *Davis v. South Carolina*, 107 U. S. 597. In that case a deputy collector of internal revenue indicted for homicide alleged by him to have been committed in self-defense while engaged in the discharge of the duties of his office procured a removal of the prosecution.

A prosecution against a deputy marshal for homicide committed in arresting a violator of the internal revenue laws is removable. *Carico v. Wilmore*, 51 Fed. Rep. 196.

4. *Gallatin v. Sherman*, 77 Fed. Rep. 337.

5. *McCullough v. Large*, 20 Fed. Rep. 309.

defendant for the carrier's charges, the defendant failing to notify the carrier as the law required;¹ a suit against a collector of customs for slanderous words uttered by the defendant in connection with a seizure of goods by him for a violation of the revenue laws;² an action against a postmaster for alleged wrongful refusal to deliver a letter;³ an action against an internal-revenue collector to recover back taxes illegally exacted and collected by him;⁴ and a suit brought against a collector of customs by an informer for the proceeds of goods condemned as forfeited for a breach of the revenue laws.⁵ A United States collector of customs served as garnishee in foreign attachment for goods of the defendant held for duties may remove the suit.⁶

The following cases have been held not removable: An action against a United States commissioner to recover money illegally exacted by him as costs and fees in a criminal proceeding before him;⁷ a suit against an assistant treasurer of the United States to recover the value of United States bonds received by him from the plaintiff and retained under instructions from the treasury department on the ground that they were unlawfully put into circulation;⁸ and an indictment for selling liquor in violation of a state statute though the defendant held a license under the internal-revenue law.⁹

c. AMOUNT IN CONTROVERSY. — The jurisdiction of the federal court by removal of the cases considered in the two foregoing paragraphs does not depend upon the amount in controversy.¹⁰

d. FROM WHAT COURT REMOVABLE. — A prosecution is not only removable when commenced in a court of record, but it may be removed from a court held by a justice of the peace where the party is to be tried before him and the offense is not indictable.¹¹

e. TIME FOR APPLICATION FOR REMOVAL. — The statute provides for removal of a suit or prosecution "commenced."¹² Where the alleged crime is one which must be prosecuted by indictment the prosecution is not commenced until indictment found.¹³ The statute further provides for removal "at any time

1. *Cleveland, etc., R. Co. v. McClung*, 119 U. S. 454.

2. *Buttner v. Miller*, 1 Woods (U. S.) 620.

3. *Warner v. Fowler*, 4 Blatchf. (U. S.) 311.

4. *Venable v. Richards*, 105 U. S. 636; *Philadelphia v. Collector*, 5 Wall. (U. S.) 720. See also *Onondaga Salt Co. v. Wilkinson*, 8 Blatchf. (U. S.) 30; *Field v. Schell*, 4 Blatchf. (U. S.) 436; *Coggill v. Lawrence*, 2 Blatchf. (U. S.) 304.

5. *Van Zandt v. Maxwell*, 2 Blatchf. (U. S.) 421.

6. *Fischer v. Daudistal*, 9 Fed. Rep. 145.

7. *Benchley v. Gilbert*, 8 Blatchf. (U. S.) 147.

8. *Vietor v. Cisco*, 5 Blatchf. (U. S.) 128.

9. *Com. v. Casey*, 12 Allen (Mass.) 214; *State v. Elder*, 54 Me. 381.

10. See *infra*, I. 18. b. *In What Cases Jurisdictional*.

11. *Com. v. Bingham*, 88 Fed. Rep. 561, *distinguishing* *Virginia v. Paul*, 148 U. S. 107. See also *Georgia v. Port*, 3 Fed. Rep. 117.

12. See the statute quoted *supra*, p. 181, note 4.

13. *Virginia v. Paul*, 148 U. S. 107; *Georgia v. O'Grady*, 3 Woods (U. S.) 496; *Com. v. Artman*, 3 Grant Cas.

before the trial or final hearing" of the suit or prosecution.¹ A civil case cannot be removed after trial and final judgment and appeal to the court to which the application for removal is made.²

f. HOW REMOVAL IS EFFECTED — Petition. — The statute provides for the filing of a verified petition for removal in the federal Circuit Court and prescribes the contents thereof.³ The petition should aver positively that the suit or prosecution is for acts done in the performance of official duty.⁴

Certiorari and Habeas Corpus. — The removal of the case takes place without any order of the federal court as soon as the state court by the service upon it or upon its clerk of the appropriate process, whether certiorari or habeas corpus *cum causa*, has notice of the filing of the petition in the federal court. But it is only after such formal notice has been given that the jurisdiction is transferred to the federal court.⁵

g. TRIAL IN FEDERAL COURT. — On the trial in the federal court the parties are entitled to the number of challenges of jurors allowed by the law of the United States and not the number allowed by the state law.⁶ Decisions of the Supreme Court of the state interpreting the statute defining the offense will be followed in the federal court.⁷

11. Denial of Civil Rights — a. AUTHORITY FOR REMOVAL. — An Act of Congress provides for removal to the federal Circuit Courts of certain civil suits or criminal prosecutions wherein the defendant is denied the equal civil rights secured by the laws of the United States.⁸ The act has been declared to be

(Pa.) 436, 5 Phila. (Pa.) 304, 20 Leg. Int. (Pa.) 364. *Contra* in some of the earlier cases, holding that it was sufficiently commenced by arrest on a warrant. *North Carolina v. Kirkpatrick*, 42 Fed. Rep. 689; *Georgia v. Bolton*, 11 Fed. Rep. 217; *Georgia v. Port*, 3 Fed. Rep. 117.

1. See the statute quoted *supra*, p. 181, note 4, and *Northwestern Distilling Co. v. Corse*, 4 Biss. (U. S.) 514.

2. *Brice v. Somers*, 1 Flipp (U. S.) 574.

3. See the statute quoted *supra*, p. 181, note 4.

A Precedent of a Petition may be found in *Tennessee v. Davis*, 100 U. S. 259. See also *Com. v. Bingham*, 88 Fed. Rep. 561.

4. *Illinois v. Fletcher*, 22 Fed. Rep. 776. See also *Ex p. Anderson*, 3 Woods (U. S.) 124.

The jurisdiction of the federal court depends upon the verified statements in the petition for removal. *Virginia v. Paul*, 148 U. S. 122.

5. *Virginia v. Paul*, 148 U. S. 115. For the provisions of the act in respect

of certiorari or habeas corpus see *supra*, p. 181, note 4.

Certiorari in Criminal Case. — When a revenue officer criminally prosecuted in the state court has been released on bail and a writ of habeas corpus is not applied for in the removal petition a certiorari may properly be issued. *State v. Sullivan*, 50 Fed. Rep. 593.

Proceedings in the State Court Subsequent to Removal are *coram non iudice* and void. *McCullough v. Large*, 20 Fed. Rep. 309; *Davis v. South Carolina*, 107 U. S. 597. See also *State v. Circuit Judge*, 33 Wis. 127.

6. *Georgia v. O'Grady*, 3 Woods (U. S.) 496.

7. *North Carolina v. Gosnell*, 74 Fed. Rep. 734.

8. Rev. Stat. U. S., §§ 641, 642, which provides as follows:

"§ 641. When any civil suit or criminal prosecution is commenced in any state court, for any cause whatsoever, against any person who is denied or cannot enforce in the judicial tribunals of the state, or in the part of the state where such suit or prosecution is pend-

constitutional by the United States Supreme Court.¹

b. WHAT CASES ARE REMOVABLE. — The denial of civil rights to which the statute refers is primarily if not exclusively a denial of such rights, or an inability to enforce them, resulting from the constitution or laws of the state.² The statute does not embrace a case in which a right is denied by judicial action during a trial, or in the sentence or in the mode of executing the sentence,³ nor authorize the removal of a criminal prosecution on

ing, any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States, or against any officer, civil or military, or other person, for any arrest or imprisonment or other trespasses or wrongs, made or committed by virtue of or under color of authority derived from any law providing for equal rights as aforesaid, or for refusing to do any act on the ground that it would be inconsistent with such law, such suit or prosecution may, upon the petition of such defendant, filed in said state court at any time before the trial or final hearing of the cause, stating the facts and verified by oath, be removed, for trial, into the next circuit court to be held in the district where it is pending. Upon the filing of such petition all further proceedings in the state courts shall cease, and shall not be resumed except as hereinafter provided. But all bail and other security given in such suit or prosecution shall continue in like force and effect as if the same had proceeded to final judgment and execution in the state court. It shall be the duty of the clerk of the state court to furnish such defendant, petitioning for a removal, copies of said process against him, and of all pleading, depositions, testimony, and other proceedings in the case. If such copies are filed by said petitioner in the circuit court on the first day of its session, the cause shall proceed therein in the same manner as if it had been brought there by original process; and if the said clerk refuses or neglects to furnish such copies, the petitioner may thereupon docket the case in the circuit court, and the said court shall then have jurisdiction therein, and may, upon proof of such refusal or neglect of said clerk, and upon reasonable notice to the plaintiff, require the plaintiff to file a declaration, petition, or complaint in the cause; and, in case of his default,

may order a nonsuit, and dismiss the case at the costs of the plaintiff, and such dismissal shall be a bar to any further suit touching the matter in controversy. But if, without such refusal or neglect of said clerk to furnish such copies and proof thereof, the petitioner for removal fails to file copies in the circuit court as herein provided, a certificate under the seal of the circuit court, stating such failure, shall be given, and upon the production thereof in said state court, the cause shall proceed therein as if no petition for a removal had been filed.

“§ 642. When all the acts necessary for the removal of any suit or prosecution, have been performed, and the defendant petitioning for such removal is in actual custody on process issued by said state court, it shall be the duty of the clerk of said circuit court to issue a writ of habeas corpus *cum causa*, and of the marshal, by virtue of said writ, to take the body of the defendant into his custody, to be dealt with in said circuit court according to law and the orders of said court, or, in vacation, of any judge thereof; and the marshal shall file with or deliver to the clerk of said state court a duplicate copy of said writ.”

1. *Strauder v. West Virginia*, 100 U. S. 303. See also *Ex p. Virginia*, 100 U. S. 345.

2. *Murray v. Louisiana*, 163 U. S. 106; *Dubuclet v. Louisiana*, 103 U. S. 550.

Exclusion of Negroes from Juries. — The act applies to a criminal prosecution under a statute which discriminates against negroes in the selection of juries. *Strauder v. West Virginia*, 100 U. S. 303; *Dixon v. State*, 74 Miss. 271, holding, however, that the *Mississippi* statute did not so discriminate.

3. *Murray v. Louisiana*, 163 U. S. 105; *Virginia v. Rives*, 100 U. S. 313. See also *Stommel v. Timbrel*, 84 Iowa 336.

the ground of race or other prejudice against the defendant,¹ or a civil suit merely because the state is plaintiff and has the privilege, not accorded to citizens, of suing and attaching property without bond or affidavit.²

c. HOW REMOVAL IS EFFECTED. — The statute provides for the filing of a verified petition in the state court before the trial or final hearing of the cause³ and for a writ of habeas corpus *cum causa* when the defendant is in custody.⁴ The state court has a right to determine whether the application for removal shows a removable case, subject, however, to the superior right of the federal court to assert its jurisdiction if it shall deem the case removable.⁵

12. Parties Claiming Land under Grants from Different States. — It is provided by the Act of 1887–1888 that suits between citizens of the same state involving the title to land claimed under grants from different states may be removed by either plaintiff or defendant irrespective of residence.⁶

Exclusion of Negroes from Jury. — A criminal prosecution cannot be removed upon an allegation that jury commissioners or other subordinate officers have, without authority derived from the constitution and laws of the state, excluded colored citizens from the jury because of their race. *Neal v. Delaware*, 103 U. S. 370; *Gibson v. Mississippi*, 162 U. S. 565; *Bush v. Kentucky*, 107 U. S. 110; *Virginia v. Rives*, 100 U. S. 313; *Murray v. Louisiana*, 163 U. S. 105; *Cooper v. State*, 64 Md. 40; *Dixon v. State*, 74 Miss. 271. See also *State v. Murray*, 47 La. Ann. 1424.

1. *California v. Chue Fan*, 42 Fed. Rep. 865; *Ex p. Wells*, 3 Woods (U. S.) 128; *Texas v. Gaines*, 2 Woods (U. S.) 342; *Ex p. State*, 71 Ala. 363; *Fitzgerald v. Allman*, 82 N. Car. 492; *O'Kelly v. Richmond*, etc., R. Co., 89 N. Car. 58; *State v. Smalls*, 11 S. Car. 262. See also *Chappell v. Real-Estate Pooling Co.*, (Md. 1899) 42 Atl. Rep. 936; *Thomas v. State*, 58 Ala. 365.

2. *Alabama v. Wolfe*, 18 Fed. Rep. 836.

3. After Verdict and Sentence it is too late to file a petition for removal. *Bush v. Com.*, 80 Ky. 244.

A Precedent of a Verified Petition may be found in *Neal v. Delaware*, 103 U. S. 371.

4. See the provisions of Rev. Stat. U. S., §§ 641, 642, quoted *supra*, p. 184, note 8.

5. *Ex p. Wells*, 3 Woods (U. S.) 128.

6. 24 U. S. Stat. at L. 552, c. 373; 25 U. S. Stat. at L. 433, c. 866. The provision is as follows:

"If in any action commenced in a state court the title of land be concerned, and the parties are citizens of the same state, and the matter in dispute exceed the sum or value of two thousand dollars, exclusive of interest and costs, the sum or value being made to appear, one or more of the plaintiffs or defendants, before the trial, may state to the court, and make affidavit if the court require it, that he or they claim and shall rely upon a right or title to the land under a grant from a state, and produce the original grant, or an exemplification of it, except where the loss of public records shall put it out of his or their power, and shall move that any one or more of the adverse party inform the court whether he or they claim a right or title to the land under a grant from some other state, the party or parties so required shall give such information, or otherwise not be allowed to plead such grant or give it in evidence upon the trial; and if he or they inform that he or they do claim under such grant, any one or more of the party moving for such information may then, on petition and bond, as hereinbefore mentioned in this act, remove the cause for trial to the circuit court of the United States next to be holden in such district; and any one of either party removing the cause shall not be allowed to plead or give evidence of any other title than that by him or them stated as aforesaid as the ground of his or their claim."

No cases appear to have arisen

13. Suits for Acts Done During the Rebellion. — An Act of Congress of March 3, 1863,¹ amended by Act of May 11, 1866,² provided for the removal of civil suits or criminal prosecutions against civil or military officers for acts done during the Rebellion by order of the President, secretary of war, or any military officer.³ These provisions, though not expressly repealed, have expired by lapse of time.

14. Action by Alien Against Federal Civil Officer. — See *supra*, p. 160.

15. Citizenship as an Element of Federal Jurisdiction — *a. IN GENERAL.* — A citizen, within the meaning of the act conferring jurisdiction on the courts of the United States, means a citizen of the United States and of a particular state thereof.⁴

b. RESIDENCE IN TERRITORY OR DISTRICT OF COLUMBIA. — A resident of a territory or of the District of Columbia is not a citizen of a state,⁵ and a suit in which he is a necessary party, either plaintiff or defendant, cannot be removed to a federal court on the sole ground that it is a controversy between citizens of different states.⁶

under the act. A similar but not the same provision was made by the Judiciary Act of 1789, 1 U. S. Stat. at L. 79, § 12. For a case removed under that act, see *Shepherd v. Young*, 1 T. B. Mon. (Ky.) 203.

1. 12 U. S. Stat. at L. 754, c. 80.

2. 14 U. S. Stat. at L. 46, c. 80.

3. For cases arising under the acts, see *Flanders v. Tweed*, 15 Wall. (U. S.) 450; *Nashville v. Cooper*, 6 Wall. (U. S.) 247; *Justices v. Murray*, 9 Wall. (U. S.) 274; *Bigelow v. Forrest*, 9 Wall. (U. S.) 339; *McKee v. Rains*, 10 Wall. (U. S.) 22; *Woodson v. Fleet*, 2 Abb. (U. S.) 15; *Lamar v. Dana*, 10 Blatchf. (U. S.) 34; *Murray v. Patrie*, 5 Blatchf. (U. S.) 343; *Clark v. Dick*, 1 Dill. (U. S.) 8; *McCormick v. Humphrey*, 27 Ind. 144; *Skeen v. Huntington*, 25 Ind. 510; *Edwards v. Ward*, 2 Bush (Ky.) 606; *Eifort v. Bevins*, 1 Bush (Ky.) 460; *Short v. Wilson*, 1 Bush (Ky.) 350; *Mitchell v. Dix*, (N. Y. Super. Ct. Spec. T.) 42 How. Pr. (N. Y.) 475; *Flourance v. Butler*, (N. Y. Super. Ct. Spec. T.) 9 Abb. Pr. N. S. (N. Y.) 63; *Patrie v. Murray*, 43 Barb. (N. Y.) 323; *People v. Murray*, (N. Y. Gen. Sess.) 5 Park Crim. (N. Y.) 577; *Benjamin v. Murray*, (Supm. Ct. Gen. T.) 28 How. Pr. (N. Y.) 193; *Siebrecht v. Butler*, (Supm. Ct. Spec. T.) 2 Abb. Pr. N. S. (N. Y.) 361, note; *Bell v. Dix*, 49 N. Y. 232; *Jones v. Seward*, 41 Barb. (N. Y.) 269; *State v. Fairfield C. Pl.*, 15 Ohio St. 377; *Hodgson v. Mill-*

ward, 3 Grant Cas. (Pa.) 418; *Com. v. Artman*, 3 Grant Cas. (Pa.) 436; *Jones v. Davenport*, 7 Coldw. (Tenn.) 145; *Martin v. Snowden*, 18 Gratt. (Va.) 100.

For similar acts passed during and after the war of 1812 with Great Britain, see *Wetherbee v. Johnson*, 14 Mass. 412; *Galpin v. Critchlow*, 112 Mass. 340, and the statutes there cited.

4. *Picquet v. Swan*, 5 Mason (U. S.) 35. See also the cases cited in the following note; and as to what constitutes citizenship, see Am. and Eng. Encyc. of Law (2d ed.), title *Citizenship*, vol. 6, p. 14, and title *United States Courts*.

5. *Cameron v. Hodges*, 127 U. S. 325; *New Orleans v. Winter*, 1 Wheat. (U. S.) 91; *Hepburn v. Ellzey*, 2 Cranch (U. S.) 445; *Wescott v. Fairfield Tp.*, Pet. (C. C.) 45; *Vasse v. Mifflin*, 4 Wash. (U. S.) 519; *Picquet v. Swan*, 5 Mason (U. S.) 54; *Barney v. Baltimore*, 6 Wall. (U. S.) 287.

6. *Mansfield, etc., R. Co. v. Swan*, 111 U. S. 381; *Snow v. Smith*, 88 Fed. Rep. 658; *Seddon v. Virginia, etc.*, Steel, etc., Co., 36 Fed. Rep. 8; *Glover v. Shepperd*, 15 Fed. Rep. 836; *Strasburger v. Beecher*, 44 Fed. Rep. 213; *Chapman v. Chapman*, 28 Fed. Rep. 2; *Cissel v. McDonald*, 16 Blatchf. (U. S.) 150, 57 How. Pr. (N. Y.) 175; *Dahlonga Co. v. Frank W. Hall Merchandise Co.*, 88 Ga. 839.

"If plaintiff or defendant be a citizen of a territory or of the District of

c. CITIZENSHIP OF CORPORATIONS — In General. — A corporation has the same privilege of removing a cause to the federal court as a natural person;¹ and it is now familiar law that where the jurisdiction depends upon diverse citizenship a corporation is deemed to be a citizen of the state where it was incorporated, or, to speak with technical precision, it is conclusively presumed that the corporators are citizens of the state creating the corporation.² But a corporation, for instance a railroad corporation, created by the laws of one state, may carry on business in another, either by virtue of being created a corporation by the laws of the latter state,³ or by virtue of a license, permission, or authority granted by the laws of the latter state to act in that state under the charter from the former state.⁴ In the first alternative it is deemed a citizen of both states and cannot remove on the ground of diverse citizenship a suit brought against it by a citizen of the state in which it was last incorporated.⁵ In the second alternative it may remove such a suit, because it is a citizen of a different state from that of the plaintiff.⁶

Columbia, jurisdiction will not attach." *Hollingsworth v. Southern R. Co.*, 86 Fed. Rep. 355.

1. *Chicago, etc., R. Co. v. Whitton*, 13 Wall. (U. S.) 270; *Home Ins. Co. v. Morse*, 20 Wall. (U. S.) 445; *Farmers' L. & T. Co. v. Maquillan*, 3 Dill. (U. S.) 379; *Fox v. American Casualty Ins., etc., Co.*, 2 Pa. Dist. 158; *Florence Sewing Mach. Co. v. Grover, etc., Sewing Mach. Co.*, 110 Mass. 70; and the cases cited in the following notes.

2. *Ohio, etc., R. Co. v. Wheeler*, 1 Black (U. S.) 286; *Louisville, etc., R. Co. v. Letson*, 2 How. (U. S.) 497; *National Steamship Co. v. Tugman*, 106 U. S. 118; *Chicago, etc., R. Co. v. Whitton*, 13 Wall. (U. S.) 270; *Nashua, etc., R. Corp. v. Boston, etc., R. Corp.*, 136 U. S. 356; *Mississippi, etc., Boom Co. v. Patterson*, 98 U. S. 403; *Hollingsworth v. Southern R. Co.*, 86 Fed. Rep. 353; *Pacific R. Co. v. Missouri Pac. R. Co.*, 23 Fed. Rep. 565; *Zambrino v. Galveston, etc., R. Co.*, 38 Fed. Rep. 451; *Ysleta v. Canda*, 67 Fed. Rep. 6; *Hatch v. Chicago, etc., R. Co.*, 6 Blatchf. (U. S.) 105; *Williams v. Missouri, etc., R. Co.*, 3 Dill. (U. S.) 267; *Bliven v. New England Screw Co.*, 3 Blatchf. (U. S.) 111; *Atlas Mut. Ins. Co. v. Byrus*, 45 Ind. 133; *Western Union Tel. Co. v. Dickinson*, 40 Ind. 444; *Rosenfield v. Adams Express Co.*, 21 La. Ann. 233; *Adams Express Co. v. Trego*, 35 Md. 47; *Gull River Lumber Co. v. School Dist. No. 39*, 1 N. Dak. 408; *Baltimore, etc., R.*

Co. v. Cary, 28 Ohio St. 208; *Erie R. Co. v. Stringer*, 32 Ohio St. 468; *Koshland v. National Ins. Co.*, 31 Oregon 205.

3. A Municipal Corporation is for jurisdictional purposes a citizen of the state in which it exists. *Ysleta v. Canda*, 67 Fed. Rep. 6; *Cowles v. Mercer County*, 7 Wall. (U. S.) 121.

3. *Indianapolis, etc., R. Co. v. Vance*, 96 U. S. 450; *Memphis, etc., R. Co. v. Alabama*, 107 U. S. 581; *Clark v. Barnard*, 108 U. S. 436; *Railroad Commission Cases*, 116 U. S. 307; *Graham v. Boston, etc., R. Co.*, 118 U. S. 161.

4. *Baltimore, etc., R. Co. v. Harris*, 12 Wall. (U. S.) 65; *Baltimore, etc., R. Co. v. Koontz*, 104 U. S. 5; *Pennsylvania R. Co. v. St. Louis, etc., R. Co.*, 118 U. S. 290; *Goodlett v. Louisville, etc., R. Co.*, 122 U. S. 391; *Marye v. Baltimore, etc., R. Co.*, 127 U. S. 117.

5. *Memphis, etc., R. Co. v. Alabama*, 107 U. S. 581; *Horne v. Boston, etc., R. Co.*, 62 N. H. 454, 18 Fed. Rep. 50; *Allegheny County v. Cleveland, etc., R. Co.*, 51 Pa. St. 228; *Mathis v. Southern R. Co.*, 53 S. Car. 246. *Compare Nashua, etc., R. Corp. v. Boston, etc., R. Corp.*, 136 U. S. 356.

6. *Martin v. Baltimore, etc., R. Co.*, 151 U. S. 673; *Baltimore, etc., R. Co. v. Koontz*, 104 U. S. 5; *Hollingsworth v. Southern R. Co.*, 86 Fed. Rep. 353; *Markwood v. Southern R. Co.*, 65 Fed. Rep. 817; *Chapman v. Alabama, etc., R. Co.*, 59 Fed. Rep. 370; *Conn v. Chi-*

Citizenship of National Bank. — By the express provisions of the Act of 1887-1888, a national bank is to be deemed, for the purpose of jurisdiction, a citizen of the state in which it is located.¹

d. CITIZENSHIP OF REPRESENTATIVE PARTIES — (1) *Executors and Administrators.* — Federal jurisdiction, when it is based on the citizenship of the parties, depends upon the citizenship of the parties to the record, and not of those whom they may represent,² and in a suit by or against an executor or administrator his personal citizenship controls,³ not that of the decedent⁴ or the next of kin.⁵ Nor is it material in what state his letters testamentary or of administration were granted.⁶

(2) *Trustees and Receivers* — **Trustees.** — As a general rule, the citizenship of a trustee suing or being sued in his representative capacity controls, and not that of his *cestui que trust*.⁷

A Receiver is a trustee, and where a removal is sought on the ground of diverse citizenship, his personal citizenship is regarded, and it is immaterial in what state he was appointed.⁸

cago, etc., R. Co., 48 Fed. Rep. 177; Stephens v. St. Louis, etc., R. Co., 47 Fed. Rep. 530; Callahan v. Louisville, etc., R. Co., 11 Fed. Rep. 536; County Ct. v. Baltimore, etc., R. Co., 35 Fed. Rep. 161; Wilkinson v. Delaware, etc., R. Co., 22 Fed. Rep. 353; Copeland v. Memphis, etc., R. Co., 3 Woods (U. S.) 657; Morton v. Mutual L. Ins. Co., 105 Mass. 141; Quimby v. Pennsylvania Ins. Co., 58 N. H. 494; Southern Pac. R. Co. v. Harrison, 73 Tex. 103.

1. 24 U. S. Stat. at L. 552, c. 343; 25 U. S. Stat. at L. 433, c. 866.

2. Brisenden v. Chamberlain, 53 Fed. Rep. 310.

3. Hess v. Reynolds, 113 U. S. 76; Cooke v. Seligman, 7 Fed. Rep. 263; Bondurant v. Watson, 103 U. S. 286; McElmurray v. Loomis, 31 Fed. Rep. 395; American Bible Soc. v. Price, 110 U. S. 61; Continental Ins. Co. v. Rhoads, 119 U. S. 237.

4. Hess v. Reynolds, 113 U. S. 76; Hill v. Henderson, 6 Smed. & M. (Miss.) 356.

5. Miller v. Sunde, 1 N. Dak. 4.

6. Wilson v. Smith, 66 Fed. Rep. 81, holding that an executor who is sued in the state where his letters testamentary were granted, and by a citizen of that state, may remove the suit if he is a citizen and resident of another state; Miller v. Sunde, 1 N. Dak. 1; Geyer v. John Hancock Mut. L. Ins. Co., 50 N. H. 224.

7. Watson v. Asbury Park, etc., St. R. Co., 73 Fed. Rep. 1; Geyer v. John Hancock Mut. L. Ins. Co., 50 N. H. 224; Miller v. Sunde, 1 N. Dak. 4;

Mead v. Walker, 15 Wis. 499; Dunn v. Waggoner, 3 Yerg. (Tenn.) 59. Compare Banigan v. Worcester, 30 Fed. Rep. 392.

"Where an action is brought by a trustee who is such in good faith, and has power to control the claim, the citizenship of the persons beneficially interested, but not parties to the record, is not considered on a question of removal. If the trustee is a citizen of the same state of which the defendant is, federal jurisdiction is excluded." Vimont v. Chicago, etc., R. Co., 64 Iowa 517, citing Susquehanna, etc., R. Co. v. Blatchford, 11 Wall. (U. S.) 176; Knapp v. Western Vermont R. Co., 20 Wall. (U. S.) 123.

Cases Distinguished. — "The cases of Browne v. Strobe, 5 Cranch (U. S.) 303; McNutt v. Bland, 2 How. (U. S.) 10; and Williams v. Ritchey, 3 Dill. (U. S.) 406, were all cases where the party whose citizenship was held not to be decisive was only a formal party plaintiff. Distinguishing the first two of these cases from a case like the one at bar, the United States Supreme Court, in Susquehanna, etc., R., etc., Co. v. Blatchford, 11 Wall. (U. S.) 172, said: 'The nominal plaintiffs in those cases were not trustees, and held nothing for the use or benefit of the real parties in interest. They could not, as is said in McNutt v. Bland, 2 How. (U. S.) 10, prevent the institution or prosecution of the actions, or exercise any control over them.'" Per Corliss, C. J., in Miller v. Sunde, 1 N. Dak. 4.

8. Moore v. Los Angeles Iron, etc.,

(3) *Guardian or Next Friend*. — Where an infant¹ or a married woman² sues or defends by a guardian or next friend, the federal jurisdiction depends upon the citizenship of the party whom the guardian or next friend represents.³

e. **PARTNERSHIP OR JOINT-STOCK COMPANY** — *Partnership*. — Citizenship cannot be predicated of a partnership *eo nomine*. Federal jurisdiction of suits by and against the partnership must depend upon the citizenship of the respective partners.⁴

A *Joint-stock Company* is not a citizen, and federal jurisdiction must depend upon the citizenship of the individual members.⁵

f. **SUIT BY OR AGAINST AN INDIAN**. — A suit by or against an unnaturalized Indian residing with his tribe in the United States is not removable unless it affirmatively appears on the face of the declaration or complaint that a federal question is necessarily involved.⁶

16. Grounds for Removal under Act of 1887-1888 — a. **DIVERSE CITIZENSHIP OF PARTIES** — (1) *The Statutory Provision*. — The Act of 1887-1888 authorizes the removal of suits "in which there shall be a controversy between citizens of different states."⁷

(2) *Where a State Is a Party*. — A state is not a citizen of any state; hence a suit between a state and a citizen or corporation of another state cannot be removed to a federal court solely on the ground of the diverse citizenship of the parties,⁸ if the state

Co., 89 Fed. Rep. 73; *Davies v. Lathrop*, 12 Fed. Rep. 353, 854, 20 Blatchf. (U.S.) 397; *Brisenden v. Chamberlain*, 53 Fed. Rep. 310.

Thus a receiver of a railway company may remove a suit wherein he is a defendant if he is a citizen and resident of another state than that in which the suit is brought, though the railway company is a citizen of the latter state. *Brisenden v. Chamberlain*, 53 Fed. Rep. 307.

1. *Woolridge v. McKenna*, 8 Fed. Rep. 650. *Compare In re McClean*, 26 Fed. Rep. 49.

2. *Ruckman v. Palisade Land Co.*, 1 Fed. Rep. 367.

3. See the two preceding notes.

4. *Adams v. May*, 27 Fed. Rep. 908; *Conn v. Chicago, etc.*, R. Co., 48 Fed. Rep. 177; *Sawyer v. Switzerland Marine Ins. Co.*, 14 Blatchf. (U.S.) 452.

5. *Chapman v. Bafney*, 129 U. S. 677.

6. *Paul v. Chilsoquie*, 70 Fed. Rep. 401.

7. 24 U. S. Stat. at L. 552, c. 373; 25 U. S. Stat. at L. 433, c. 866.

8. *Upshur County v. Rich*, 135 U. S. 470, holding that a suit against a state and a county thereof is not removable; *Postal Tel. Cable Co. v. Alabama*, 155

U. S. 482; *Germania Ins. Co. v. Wisconsin*, 119 U. S. 473; *Stone v. South Carolina*, 117 U. S. 430; *Ames v. Kansas*, 111 U. S. 449; *Hickman v. Missouri, etc.*, R. Co., 97 Fed. Rep. 116; *Indiana v. Alleghany Oil Co.*, 85 Fed. Rep. 870; *Indiana v. Tolleston Club*, 53 Fed. Rep. 18; *State v. Columbus, etc.*, R. Co., 48 Fed. Rep. 628; *Texas v. Day Land, etc.*, Co., 49 Fed. Rep. 593; *Ferguson v. Ross*, 38 Fed. Rep. 161; *Alabama v. Wolfe*, 18 Fed. Rep. 836; *Grinnell v. Johnson*, 28 Fed. Rep. 2; *Connecticut v. Adams*, 6 Ohio Cir. Dec. 46, 2 Ohio Dec. 119. See also *Texas v. Lewis*, 12 Fed. Rep. 1.

An *Information in Chancery* filed by the attorney-general in the name of the state to protect funds created by a charitable trust must be regarded as a suit by the state. *Grinnell v. Johnson*, 28 Fed. Rep. 2.

Suit Concerning Mortgage to State. — Where a note is made payable to the order of a state treasurer, but a mortgage to secure it is made to the state, in any suit concerning the priority of the mortgage or a sale of the land and transfer of the lien to the proceeds of the sale the state is the real party in interest. *Connecticut v. Adams*, 6 Ohio Cir. Dec. 46, 2 Ohio Dec. 119.

is a real party in interest.¹ The court, however, may look through the record and ascertain whether or not, although not named as such, the state is in fact a real party. If the state is a real party in interest, in the absence of a controlling question arising under some federal law or the constitution the suit is not removable from the state to the United States Circuit Court.²

In an Action of Ejectment between private parties the state is not a party in interest though the question whether the land lies in one state or another is in controversy.³

A Proceeding by a Corporation to Take Land by Eminent Domain is not a suit to which a state can be regarded as a party.⁴

1. State a Nominal or Formal Party.—Where the state is merely a formal or nominal party and the action is prosecuted solely for the protection of a private right in which it has no beneficial interest, the mere formal use of the name of the state would not defeat the right of removal if the requisite diversity of citizenship existed between the relator or the person for whose use the suit was brought and the defendant. *Indiana v. Alleghany Oil Co.*, 85 Fed. Rep. 872. See also *Indiana v. Lake Erie*, etc., R. Co., 85 Fed. Rep. 3.

Thus, in an action in Missouri brought in the name of the state to the use of the public schools of a county for the cancellation of a deed by a county commissioner, it was held that the state was a merely nominal party. *Missouri v. Alt*, 73 Fed. Rep. 302.

In *Memphis*, etc., R. Co. v. Alabama, 107 U. S. 585, the court found it "unnecessary to consider whether the action brought by the state of Alabama for the use of one of its counties can be considered as a suit brought by a citizen of the state of Alabama, within the meaning of the Constitution and laws of the United States."

In *Hickman v. Missouri*, etc., R. Co., 97 Fed. Rep. 113, state railroad commissioners to whom complaint had been duly made under the state statute established a reduced rate of charges for a defendant railroad company. Thereafter they brought suit in the state court charging that the defendant company was proceeding in disregard of the act of the commissioners and was exacting a higher rate than that fixed. The prayer was for an injunction or such other process, mandatory or otherwise, as might be necessary in the premises to restrain the defendant from further continuing to violate the findings and order of the plaintiffs.

The defendant duly removed the cause to the federal Circuit Court, and the plaintiffs moved to remand, contending that the state was the real plaintiff and that the cause was therefore not removable. But that contention was overruled, the court saying: "I had supposed * * * that the question as to whether in a suit like this between state railroad commissioners by name and a nonresident citizen of the state, the state is a party, was settled by adjudications of the Supreme Court of the United States. Mr. Justice Lamar, in *Pennoyer v. McConnaughy*, 140 U. S. 1, reviewed the decisions of that court bearing more or less directly upon the question here involved. In that case the bill was lodged against the land commissioners of the state of Oregon *et al.*, to restrain the state officers from doing acts alleged to be a violation of complainant's contractual rights with the state. The jurisdiction of the federal court was challenged, as in this case, on the ground that although the state was not named as a party, yet it was against the land commissioners, who were officers of the state, acting under its authority, and therefore the state was in effect a party to the suit. This contention was answered in the negative, and the jurisdiction of the federal court was maintained." The court also cited and discussed *Reagan v. Trust Co.*, 154 U. S. 362, and debated the question at considerable length.

2. *Hickman v. Missouri*, etc., R. Co., 97 Fed. Rep. 116, citing *Ames v. Kansas*, 111 U. S. 449; *Stone v. South Carolina*, 117 U. S. 431. See also the last note but one.

3. *Fowler v. Lindsey*, 3 Dall. (U. S.) 411.

4. *Warren v. Wisconsin Valley R. Co.*, 6 Biss. (U. S.) 425.

Where the Suit Involves a Federal Question it is no obstacle to removal that the state is a party.¹

(3) *Time of Diverse Citizenship.*—In order to authorize the removal of a suit on the ground of diverse citizenship the requisite diversity of citizenship must exist at the time of the commencement of the suit, and also at the time of the filing of the petition for removal. This rule has obtained under all the removal acts.² Hence, where the suit as originally brought is between citizens of the same state, the defendant cannot acquire a right of removal by changing his domicile.³ And where a suit is com-

1. *Ames v. Karsas*, 111 U. S. 449; *Southern Pac. R. Co. v. California*, 118 U. S. 109; *Texas v. Texas*, etc., R. Co., 3 *Woods* (U. S.) 308; *Illinois v. Illinois Cent. R. Co.*, 33 *Fed. Rep.* 721.

2. *Mattingly v. Northwestern Virginia R. Co.*, 158 U. S. 53; *Kellam v. Keith*, 144 U. S. 568; *La Confiante Compagnie, etc., v. Hall*, 137 U. S. 61; *Jackson v. Allen*, 132 U. S. 27; *Stevens v. Nichols*, 130 U. S. 232; *Akers v. Akers*, 117 U. S. 197; *Mansfield, etc., R. Co. v. Swan*, 111 U. S. 379; *Houston, etc., R. Co. v. Shirley*, 111 U. S. 358; *Gibson v. Bruce*, 108 U. S. 562; *Phoenix Ins. Co. v. Pechner*, 95 U. S. 185; *Bradley v. Ohio River, etc., R. Co.*, 78 *Fed. Rep.* 388; *Foster v. Paragould Southeastern R. Co.*, 74 *Fed. Rep.* 273; *Grand Trunk R. Co. v. Twitchell*, 59 *Fed. Rep.* 729; *Craswell v. Belanger*, 56 *Fed. Rep.* 529; *Burnham v. Leoti First Nat. Bank*, 53 *Fed. Rep.* 165; *Campelle v. Balbach*, 46 *Fed. Rep.* 81; *Nickerson v. Crook*, 45 *Fed. Rep.* 659; *La Montagne v. T. W. Harvey Lumber Co.*, 44 *Fed. Rep.* 647; *Seddon v. Virginia, etc., Steel, etc., Co.*, 36 *Fed. Rep.* 6; *Richmond, etc., R. Co. v. Findley*, 32 *Fed. Rep.* 642; *Johnston v. Donovan*, 30 *Fed. Rep.* 395; *Endy v. Commercial F. Ins. Co.*, 24 *Fed. Rep.* 657; *Carrick v. Landman*, 20 *Fed. Rep.* 211; *Frelinghuysen v. Baldwin*, 19 *Fed. Rep.* 49; *MacNaughton v. South Pac. Coast R. Co.*, 19 *Fed. Rep.* 881; *Ferry v. Merrimack*, 18 *Fed. Rep.* 657; *Brinkerhoff v. Morris Canal, etc. Co.*, 18 *Fed. Rep.* 97; *Glover v. Sheppard*, 15 *Fed. Rep.* 833; *Burdick v. Peterson*, 6 *Fed. Rep.* 840; *Kaeiser v. Illinois Cent. R. Co.*, 6 *Fed. Rep.* 1; *Beede v. Cheeney*, 5 *Fed. Rep.* 388; *Rawle v. Phelps*, 2 *Flipp.* (U. S.) 471; *U. S. Savings Inst. v. Brockschmidt*, 72 *Ill.* 371; *People v. Superior Ct.*, 34 *Ill.* 356; *Weed Sewing Mach. Co. v. Smith*, 71 *Ill.* 205;

Indianapolis, etc., R. Co. v. Risley, 50 *Ind.* 60; *Cincinnati Sav. Bank v. Benton*, 2 *Met. (Ky.)* 240; *Tapley v. Martin*, 116 *Mass.* 275; *Risley v. Indianapolis, etc., R. Co.*, 1 *Hun (N. Y.)* 203; *Holden v. Putnam F. Ins. Co.*, 46 *N. Y.* 1; *Herndon v. Lancashire Ins. Co.*, 107 *N. Car.* 193; *Blackwell v. Lynchburg, etc., R. Co.*, 107 *N. Car.* 217; *Bardley v. Ohio River, etc., R. Co.*, 119 *N. Car.* 744; *Phoenix L. Ins. Co. v. Saettel*, 33 *Ohio St.* 278; *Baltimore, etc., R. Co. v. Pittsburg, etc., R. Co.*, 17 *W. Va.* 860.

There were a few cases decided under the Act of 1875, prior to the settlement of the point by the Supreme Court, which held that diverse citizenship at the time of removal was sufficient. *Jackson v. Mutual L. Ins. Co.*, 3 *Woods* (U. S.) 413; *McLean v. St. Paul, etc., R. Co.*, 16 *Blatchf. (U. S.)* 309; *Curtin v. Decker*, 5 *Fed. Rep.* 385; *Wehl v. Wald*, 17 *Blatchf. (U. S.)* 342; *Chicago, etc., R. Co. v. McComb*, 17 *Blatchf. (U. S.)* 371; *Stafford v. Hightower*, 68 *Ga.* 394; *Jackson v. Mutual L. Ins. Co.*, 60 *Ga.* 423; *Phoenix L. Ins. Co. v. Saettel*, 33 *Ohio St.* 278. See also *McGinnity v. White*, 3 *Dill. (U. S.)* 350.

At Time of Removal.—Most of the foregoing cases laid down the entire proposition as stated in the text, but were cases where the necessity of citizenship at the time of commencement of the suit was the only point in dispute. The following cases required an express ruling that citizenship at the time of removal was also necessary; *Gibson v. Bruce*, 108 U. S. 561 [*affirming* *Bruce v. Gibson*, 9 *Fed. Rep.* 540]; *Mansfield, etc., R. Co. v. Swan*, 111 U. S. 381. See also the next note but one.

3. *Ex p. Jones*, 66 *Ala.* 202; *Tapley v. Martin*, 116 *Mass.* 275; *Holden v. Putnam F. Ins. Co.*, 46 *N. Y.* 6; *Dart v. Walker*, (C. Pl. Gen. T.) 43 *How. Pr. (N. Y.)* 29, 4 *Daly (N. Y.)* 188.

menced in a state court between citizens of different states and the plaintiff then removes into the state of which the defendant is a citizen, the defendant, though a nonresident of the state in which the suit is brought, has no right afterwards to remove the cause.¹

Removal by Intervener. — Where an intervener petitions for removal his citizenship at the time of intervention is deemed to be at the commencement of the suit.²

Change of Citizenship After Removal. — A change of citizenship after the removal of the cause cannot affect the jurisdiction of the federal court properly acquired.³

(4) *Where There Are Several Plaintiffs or Defendants* — (a) **The Rule Stated.** — Under every Act of Congress for the removal of causes on the sole ground of diverse citizenship⁴ it has uniformly been held that where there is a plurality of plaintiffs or of defendants every necessary party upon one side of the controversy must be a citizen of a different state from every necessary party upon the other.⁵ But the citizenship of the parties upon which federal

1. *Laird v. Connecticut, etc., R. Co.*, 55 N. H. 375, where a citizen of New Hampshire sued a citizen of Vermont in a New Hampshire court. While the cause was pending the plaintiff in good faith removed to Vermont, where he took up his permanent abode, and six months afterwards the defendant in due time filed a petition for removal. It was held that the petition could not be granted. See also *Tapley v. Martin*, 116 Mass. 275.

"We think the rule is now well established and must be literally enforced that in order that there may be jurisdiction it must appear that the diverse citizenship existed at the beginning of the suit, and has continued until the removal." *Per* Carpenter, J., in *Grand Trunk R. Co. v. Twitchell*, 59 Fed. Rep. 729.

Substitution of Executor. — Where a suit is begun between citizens of the same state and the defendant dies *pendente lite*, the substitution of his executor with a different citizenship from the plaintiff does not enable the executor to remove the cause. *Brinkerhoff v. Morris Canal, etc., Co.*, 18 Fed. Rep. 97.

2. *Burdick v. Peterson*, 6 Fed. Rep. 840, 2 McCrary (U. S.) 135.

3. *Laird v. Connecticut, etc., R. Co.*, 55 N. H. 379; *Indianapolis, etc., R. Co. v. Risley*, 50 Ind. 64; *Holden v. Putnam F. Ins. Co.*, 46 N. Y. 6.

4. **Removal for Separable Controversy.** — See *infra*, I. 16. b. *Diverse Citizenship and Separable Controversy*.

Removal for Prejudice or Local Influence. — See *infra*, I. 17. *Removal for Prejudice or Local Influence*.

5. *Gage v. Carraher*, 154 U. S. 656; *Wilson v. Oswego Tp.*, 151 U. S. 56; *Merchants' Cotton Press, etc., Co. v. Insurance Co. of North America*, 151 U. S. 368; *Brown v. Trousdale*, 138 U. S. 389; *Thorn Wire Hedge Co. v. Fuller*, 122 U. S. 535; *Peninsular Iron Co. v. Stone*, 121 U. S. 631; *East Tennessee, etc., R. Co. v. Grayson*, 119 U. S. 243; *Peper v. Fordyce*, 119 U. S. 471; *Sloane v. Anderson*, 117 U. S. 279; *Rand v. Walker*, 117 U. S. 340; *Stone v. South Carolina*, 117 U. S. 433; *Coney v. Winchell*, 116 U. S. 227; *Fletcher v. Hamlet*, 116 U. S. 410; *Sully v. Drennan*, 113 U. S. 287; *Hancock v. Holbrook*, 112 U. S. 229; *American Bible Soc. v. Price*, 110 U. S. 61; *Shainwald v. Lewis*, 108 U. S. 158; *Winchester v. Loud*, 108 U. S. 130; *Myers v. Swann*, 107 U. S. 546; *Fraser v. Jennison*, 106 U. S. 194; *Corbin v. Van Brunt*, 105 U. S. 576; *Hyde v. Ruble*, 104 U. S. 407; *Barney v. Latham*, 103 U. S. 209; *Blake v. McKim*, 103 U. S. 336; *Ayers v. Chicago*, 101 U. S. 184; *Removal Cases*, 100 U. S. 457; *Yulee v. Vose*, 99 U. S. 545; *Gardner v. Brown*, 21 Wall. (U. S.) 36; *Knapp v. Western Vermont R. Co.*, 20 Wall. (U. S.) 117; *Susquehanna, etc., R., etc., Co. v. Blatchford*, 11 Wall. (U. S.) 172; *Commercial, etc., Bank v. Slocomb*, 14 Pet. (U. S.) 60; *Strawbridge v. Curtiss*, 3 Cranch (U. S.) 267; *Parkersburg First Nat. Bank v.*

jurisdiction depends is that of the parties to the record, and it is no objection to removal that there may be necessary parties not

Prager, 91 Fed. Rep. 692; Davis v. County Ct., 88 Fed. Rep. 705; Tracy v. Morel, 88 Fed. Rep. 801; Ruohs v. Jarvis-Conklin Mortg. Trust Co., 84 Fed. Rep. 513; Kane v. Indianapolis, 82 Fed. Rep. 772; Mutual Reserve Fund L. Assoc. v. Farmer, 77 Fed. Rep. 931; Shearing v. Trumbull, 75 Fed. Rep. 33; Missouri v. New Madrid County, 73 Fed. Rep. 304; Olds Wagon Works v. Benedict, 67 Fed. Rep. 1; Security Co. v. Pratt, 64 Fed. Rep. 406; Rogers v. Van Nortwick, 45 Fed. Rep. 514; Rike v. Floyd, 42 Fed. Rep. 247; Anderson v. Bowers, 40 Fed. Rep. 708; Southworth v. Reid, 36 Fed. Rep. 451; Seddon v. Virginia, etc., Steel, etc., Co., 36 Fed. Rep. 6; Vinal v. Continental Constr., etc., Co., 35 Fed. Rep. 673; Reineman v. Ball, 33 Fed. Rep. 692; Fisk v. Henarie, 32 Fed. Rep. 422; Reed v. Reed, 31 Fed. Rep. 53; McElmurray v. Loomis, 31 Fed. Rep. 396; Banigan v. Worcester, 30 Fed. Rep. 394; Shaver v. Hardin, 30 Fed. Rep. 801; Chapman v. Chapman, 28 Fed. Rep. 1; Grinnell v. Johnson, 28 Fed. Rep. 2; *In re* McClean, 26 Fed. Rep. 49; Lyddy v. Gano, 26 Fed. Rep. 177; Wilson v. St. Louis, etc., R. Co., 22 Fed. Rep. 3; Walser v. Memphis, etc., R. Co., 19 Fed. Rep. 152; Folsom v. Continental Nat. Bank, 14 Fed. Rep. 497; Connell v. Utica, etc., R. Co., 13 Fed. Rep. 241; Price v. Foreman, 12 Fed. Rep. 801; Maine v. Gilman, 11 Fed. Rep. 214; Evans v. Faxon, 10 Fed. Rep. 312; Hanover F. Ins. Co. v. Keogh, 7 Fed. Rep. 764; Chester v. Chester, 7 Fed. Rep. 1; Smith v. Horton, 7 Fed. Rep. 270; Smith v. McKay, 4 Fed. Rep. 353; Burke v. Flood, 1 Fed. Rep. 541; Sands v. Smith, 1 Abb. (U. S.) 371; Osgood v. Chicago, etc., R. Co., 6 Biss. (U. S.) 333; Mitchell v. Tillotson, 11 Biss. (U. S.) 325; Ryan v. Young, 9 Biss. (U. S.) 67; Chicago, etc., R. Co. v. Lake Shore, etc., R. Co., 10 Biss. (U. S.) 126; Bixby v. Couse, 8 Blatchf. (U. S.) 73; Hatch v. Chicago, etc., R. Co., 6 Blatchf. (U. S.) 113; Chicago, etc., R. Co. v. McComb, 17 Blatchf. (U. S.) 371; Sawyer v. Switzerland Marine Ins. Co., 14 Blatchf. (U. S.) 451; Van Brunt v. Corbin, 14 Blatchf. (U. S.) 496; Petterson v. Chapman, 13 Blatchf. (U. S.) 395; Hubbard v. Northern R. Co., 3 Blatchf. (U. S.) 84, 25 Vt. 715; Field v. Lownsdale, Deady (U. S.) 291; Allin v. Robinson, 1 Dill. (U. S.) 119; Case v. Douglas, 1 Dill. (U. S.) 300; McBratney v. Usher, 1 Dill. (U. S.) 368; Snow v. Smith, 4 Hughes (U. S.) 204, 88 Fed. Rep. 657; Le Mars v. Iowa Falls, etc., R. Co., 4 McCrary (U. S.) 220; Walsh v. Memphis, etc., R. Co., 2 McCrary (U. S.) 156, 6 Fed. Rep. 797; Ruble v. Hyde, 1 McCrary (U. S.) 513, 3 Fed. Rep. 330; Wilson v. Blodgett, 4 McLean (U. S.) 362; Ward v. Arredondo, 1 Paine (U. S.) 410; *Ex p.* Turner, 3 Wall. Jr. (C. C.) 258; *Ex p.* Girard, 3 Wall. Jr. (C. C.) 263; Torrey v. Beardsly, 4 Wash. (U. S.) 242; Beardsley v. Torrey, 4 Wash. (U. S.) 286; *Ex p.* Andrews, 40 Ala. 639; Calderwood v. Braly, 28 Cal. 97; Miller v. Lynde, 2 Root (Conn.) 444; Withers v. Hopkins Place Sav. Bank, 104 Ga. 89; Western Union Tel. Co. v. Griffith, 104 Ga. 56; Young v. Oakes, 104 Ga. 62; Angier v. East Tennessee, etc., R. Co., 74 Ga. 634; Bliss v. Rawson, 43 Ga. 181; Bryan v. Ponder, 23 Ga. 480; Chesapeake, etc., R. Co. v. Dixon, (Ky. 1898) 47 S. W. Rep. 615; Howland Coal, etc., Works v. Brown, 13 Bush (Ky.) 681; Parberry v. Goram, 3 Bibb (Ky.) 107; Tibbatts v. Berry, 10 B. Mon. (Ky.) 490; New Orleans v. Seixas, 35 La. Ann. 36; New Orleans Canal, etc., Co. v. Recorder of Mortgages, 27 La. Ann. 291; Tesson v. Gusman, 26 La. Ann. 248; Martin v. Coons, 24 La. Ann. 169; Baxter v. Proctor, 139 Mass. 151; Broadway Nat. Bank v. Adams, 130 Mass. 433; Florence Sewing Mach. Co. v. Grover, etc., Sewing Mach. Co., 110 Mass. 79; Mutual L. Ins. Co. v. Allen, 134 Mass. 389; Crane v. Reeder, 28 Mich. 534; Yawkey v. Richardson, 9 Mich. 531; Horne v. Boston, etc., R. Co., 62 N. H. 454; Fisk v. Chicago, etc., R. Co., 53 Barb. (N. Y.) 481, 3 Abb. Pr. N. S. (N. Y.) 453; Miller v. Kent, (Supm. Ct.) 60 How. Pr. (N. Y.) 451; Fairchild v. Durand, (N. Y. Super. Ct. Spec. T.) 8 Abb. Pr. (N. Y.) 305; Leonard v. Jamison, 2 Edw. (N. Y.) 136; North River Steam Boat Co. v. Hoffman, 5 Johns. Ch. (N. Y.) 300; Sifford v. Beaty, 12 Ohio St. 189; Shelby v. Hoffman, 7 Ohio St. 453; Nye v. Nightingale, 6 R. I. 439; Dunn v. Waggoner, 3 Yerg. (Tenn.) 59; Guarantee Co. v. Lynchburg First Nat. Bank, 95 Va. 480; Washington, etc.,

named in the record whose presence would defeat the jurisdiction.¹

Immaterial that All Join in Petition for Removal. — If one of the defendants is a citizen of the same state as one of the plaintiffs the suit is not removable though all of the defendants unite in the petition for removal.²

Joint Personal Representatives. — Where a suit is brought by or against joint executors or administrators, the personal citizenship of all of them must be such as to confer jurisdiction on the federal court, in order to warrant a removal.³

New Defendants Brought In by Amendment stand as original parties so far as removal on the ground of diverse citizenship is concerned.⁴

Diverse Citizenship Between Parties on Same Side. — The difference of citizenship must exist between the plaintiffs on the one hand and the defendants on the other; diversity of citizenship as to those between whom the controversy exists is alone regarded.⁵

(b) **Formal, Nominal, or Unnecessary Parties** — *aa.* **GENERAL STATEMENT OF RULE.** — It is well settled that in applications for removal on the ground of diverse citizenship, the citizenship of formal parties, or nominal parties, or parties without interest united with the

R. Co. v. Alexandria, etc., R. Co., 19 Gratt. (Va.) 601; Beery v. Irick, 22 Gratt. (Va.) 487; Kennedy v. Ehlen, 31 W. Va. 540; Bell v. Bell, 3 W. Va. 183.

The Leading Case on this point since the word "suit" in the Judiciary Act of 1789 was changed by the Act of 1875 to "suit * * *" in which there shall be a controversy," appears to be Blake v. McKim, 103 U. S. 336.

Citizen of Territory or District of Columbia. — Thus if one of the necessary parties is a citizen of a territory or of the District of Columbia the suit cannot be removed by a party who is a citizen of a state unless there is a separable controversy in the suit. Chapman v. Chapman, 28 Fed. Rep. 1. See also *supra*, p. 187.

1. *In re Stutsman County*, 88 Fed. Rep. 337, citing *Osborn v. U. S. Bank*, 9 Wheat. (U. S.) 857. See also *McHenry v. New York, etc., R. Co.*, 25 Fed. Rep. 67.

Contra. — *Baxter v. Proctor*, 139 Mass. 151, where one of several *cestuis que trustent* brought a suit for the removal of the trustee and the appointment of another in his place. The trustee, who was the only defendant and a citizen of a different state from the plaintiff, filed a petition for removal. It was held that the other *cestuis que trustent* were indispensable

parties, and consideration of the petition for removal was postponed until the plaintiff had an opportunity to bring them in, so as to enable the court to determine whether the controversy was really between citizens of different states, and it was intimated that if they were not brought in the bill might be dismissed. See also *Gordon v. Green*, 113 Mass. 259, a bill by a trustee for instructions in the execution of his trust where all the *cestuis que trustent* were not before the court.

2. *Smith v. Horton*, 7 Fed. Rep. 270; *Ex p. Girard*, 3 Wall. Jr. (C. C.) 263; *Van Brunt v. Corbin*, 14 Blatchf. (U. S.) 496; *Ruble v. Hyde*, 1 McCrary (U. S.) 514, 3 Fed. Rep. 330.

3. *Hubbard v. Northern R. Co.*, 3 Blatchf. (U. S.) 84, 25 Vt. 715.

4. *Merchants' Nat. Bank v. Thompson*, 4 Fed. Rep. 876; *Young v. Oakes*, 104 Ga. 62, where the presence of the new defendants of the same citizenship as the plaintiff prevented a removal by the original defendants whose citizenship was diverse.

5. *Petterson v. Chapman*, 13 Blatchf. (U. S.) 399, where the court said that the statute affirms nothing "as to diversity of citizenship between the plaintiffs, on the one hand, alone, and between the defendants alone, on the other; for between them there would be no controversy."

real parties, will be ignored, and the citizenship of the real parties is alone to be considered.¹ The rule is usually laid down substantially in that form; but a more accurate and satisfactory statement is that the citizenship of one who is not an *indispensable* party will be disregarded.² Nor is it material that he was made

1. *Wilson v. Oswego Tp.*, 151 U. S. 64; *Bacon v. Rives*, 106 U. S. 104; *Removal Cases*, 100 U. S. 469; *Wood v. Davis*, 18 How. (U. S.) 467; *Garrard v. Silver Peak Mines*, 76 Fed. Rep. 1; *Missouri v. Alt*, 73 Fed. Rep. 302; *Carver v. Jarvis-Conklin Mortg. Trust Co.*, 73 Fed. Rep. 9; *Shattuck v. North British, etc., Ins. Co.*, 58 Fed. Rep. 609; *Dow v. Bradstreet Co.*, 46 Fed. Rep. 826; *Overman Wheel Co. v. Pope Mfg. Co.*, 46 Fed. Rep. 577; *Henderson v. Cabell*, 43 Fed. Rep. 257; *Brown v. Murray*, 43 Fed. Rep. 614; *Ferguson v. Ross*, 38 Fed. Rep. 161; *Seddon v. Virginia, etc., Steel, etc., Co.*, 36 Fed. Rep. 7; *Judah v. Iowa Barb-Wire Co.*, 32 Fed. Rep. 561; *Sioux City, etc., R. Co. v. Chicago, etc., R. Co.*, 27 Fed. Rep. 770; *Hack v. Chicago, etc., R. Co.*, 23 Fed. Rep. 356; *Bates v. New Orleans, etc., R. Co.*, 16 Fed. Rep. 294; *Deford v. Mehaffy*, 14 Fed. Rep. 181; *Price v. Foreman*, 12 Fed. Rep. 302; *Texas v. Lewis*, 12 Fed. Rep. 1; *Pond v. Sibley*, 7 Fed. Rep. 120, 19 *Blatchf.* (U. S.) 189; *Sands v. Smith*, 1 *Abb.* (U. S.) 372; *Wilder v. Union Nat. Bank*, 9 *Biss.* (U. S.) 182; *Aroma Tp. v. Auditor of Public Accounts*, 9 *Biss.* (U. S.) 289; *Hervey v. Illinois Midland R. Co.*, 7 *Biss.* (U. S.) 103; *Chicago, etc., R. Co. v. McComb*, 17 *Blatchf.* (U. S.) 371; *Hatch v. Chicago, etc., R. Co.*, 6 *Blatchf.* (U. S.) 105; *Field v. Lownsdale*, *Deady* (U. S.) 291; *Chester v. Wellford*, 2 *Flipp.* (U. S.) 347; *Goodnow v. Litchfield*, 4 *McCrary* (U. S.) 215; *Wilson v. Blodget*, 4 *McLean* (U. S.) 362; *Ward v. Arredondo*, 1 *Paine* (U. S.) 410; *Edgerton v. Gilpin*, 3 *Woods* (U. S.) 277; *Girardey v. Moore*, 3 *Woods* (U. S.) 401; *Jones v. Foreman*, 66 *Ga.* 382; *Wortsmann v. Wade*, 77 *Ga.* 651; *Steiner v. Mathewson*, 77 *Ga.* 657; *Withers v. Hopkins Place Sav. Bank*, 104 *Ga.* 89; *Vimont v. Chicago, etc., R. Co.*, 64 *Iowa* 517; *Sachse v. Citizens' Bank*, 37 *La. Ann.* 364; *Denniston v. Potts*, 11 *Smed. & M.* (Miss.) 42; *Livingston v. Gibbons*, 4 *Johns. Ch.* (N. Y.) 94; *Livermore v. Jenks*, (Supm. Ct. Spec. T.) 11 *How. Pr.* (N. Y.) 479; *Tate v. Douglas*, 113 *N. Car.* 191; *Hadley v. Dunlap*, 10 *Ohio St.* 1; *James v.*

Thurston, 6 *R. I.* 431; *Henderson v. Cabell*, 83 *Tex.* 545.

"It would be a very dangerous doctrine, one utterly destructive of the rights which a man has to go into the federal courts on account of his citizenship, if the plaintiff in the case, in instituting his suit, can, without any right or reason or just cause, and with the express declaration that he asks no relief from them, join persons who have not the requisite citizenship and thereby destroy the rights of the parties in federal courts. We must, therefore, be astute not to permit devices to become successful which are used for the very purpose of destroying that right." *Per* Mr. Justice Miller in *Arapahoe County v. Kansas Pac. R. Co.*, 4 *Dill.* (U. S.) 283.

"Persons who are only nominally interested in the controversy cannot confer jurisdiction and cannot take it away." *Per* Justice Bradley in *Girardey v. Moore*, 3 *Woods* (U. S.) 401.

2. "This rule, we think, may be extracted from the cases, that although one may be a proper party, yet if he is not an indispensable party, he may be treated as a nominal or formal party, and therefore as not standing in the way of a removal." *Per* *Acheson, J.*, in *McHenry v. New York, etc., R. Co.*, 25 *Fed. Rep.* 67.

"The question * * * is whether the party whose presence would defeat the jurisdiction is an indispensable party to the controversy between the parties who are citizens of different states." *Perrin v. Lepper*, 26 *Fed. Rep.* 548.

See generally in support of the text *Wilson v. Oswego Tp.*, 151 U. S. 56; *Merchants Cotton Press, etc., Co. v. Insurance Co. of North America*, 151 U. S. 381; *East Tennessee, etc., R. Co. v. Grayson*, 119 U. S. 243; *Peper v. Fordyce*, 119 U. S. 471; *Coney v. Winchell*, 116 U. S. 230; *St. Louis, etc., R. Co. v. Wilson*, 114 U. S. 62; *Sully v. Drennan*, 113 U. S. 291; *Thayer v. Life Assoc. of America*, 112 U. S. 719; *Barnes v. Latham*, 103 U. S. 214, where the distinction between proper and indispensable parties is expressly made;

a party on the motion of the petitioner for removal.¹ The fact that a formal and unnecessary defendant has filed an answer does not affect the right of removal by the real parties.²

Rule Applies to Plaintiffs as Well as Defendants.— In most of the adjudged cases the question arose with respect to the interest of one who was joined as a defendant, but the rule applies also to parties joined as plaintiffs who are not indispensable.³

Federal Jurisdiction Refused if Question Doubtful.— Where a cause is removed upon the theory that one of the defendants is not an indispensable party it will be remanded if the question is one of doubt.⁴

bb. WHO ARE AND WHO ARE NOT FORMAL OR UNNECESSARY PARTIES — In General — In Equity.— The tests by which to determine who are and who are not indispensable parties in suits in equity,⁵ on appli-

Blake v. McKim, 103 U. S. 338; Oakes v. Yonah Land, etc., Co., 89 Fed. Rep. 243; Sweeney v. Grand Island, etc., R. Co., 61 Fed. Rep. 5; New York Constr. Co. v. Simon, 53 Fed. Rep. 4; Le Mars v. Iowa Falls, etc., R. Co., 48 Fed. Rep. 662; Rogers v. Van Nortwick, 45 Fed. Rep. 514; Patchin v. Hunter, 38 Fed. Rep. 53; Vinal v. Continental Constr., etc., Co., 35 Fed. Rep. 673; Grinnell v. Johnson, 28 Fed. Rep. 4; Lyddy v. Gano, 26 Fed. Rep. 177; Perrin v. Lepper, 26 Fed. Rep. 547; Chicago, etc., R. Co. v. New York, etc., R. Co., 24 Fed. Rep. 517; New York v. New Jersey Steam Boat Transp. Co., 24 Fed. Rep. 818; Long v. Buford, 24 Fed. Rep. 246; Capital City Bank v. Hodgins, 22 Fed. Rep. 211; Mills v. Central R. Co., 20 Fed. Rep. 451; Deford v. Mehaffy, 14 Fed. Rep. 181; Price v. Foreman, 12 Fed. Rep. 803; Stevens v. Richardson, 9 Fed. Rep. 193; Hanover F. Ins. Co. v. Keogh, 7 Fed. Rep. 765; Ruckman v. Palisade Land Co., 1 Fed. Rep. 369; Ruckman v. Ruckman, 1 Fed. Rep. 590; Sheldon v. Keokuk Northern Line Packet Co., 1 Fed. Rep. 793; Chester v. Wellford, 2 Flipp. (U. S.) 347; Steinkuhl v. York, 2 Flipp. (U. S.) 379; Ward v. Arredondo, 1 Paine (U. S.) 412; Taylor v. Rockefeller, 18 Am. L. Reg. N. S. 307; Security Co. v. Pratt, 65 Conn. 176; Withers v. Hopkins Place Sav. Bank, 104 Ga. 89; Wortsman v. Wade, 77 Ga. 653; Townsend v. Sykes, 38 La. Ann. 411.

1. Calloway v. Ore Knob Copper Co., 74 N. Car. 200.

2. Carver v. Jarvis-Conklin Mortg. Trust Co., 73 Fed. Rep. 12.

3. Cooke v. Seligman, 7 Fed. Rep.

263; Missouri v. Alt, 73 Fed. Rep. 302.

Where it sufficiently appears in the record that one of the plaintiffs is simply an agent or attorney of the other plaintiff, and has no personal interest in the controversy, his presence is of no importance with respect to the defendant's right of removal. Overman Wheel Co. v. Pope Mfg. Co., 46 Fed. Rep. 577.

A party suing on a legal title cannot prevent a removal by joining as co-plaintiff a party having an equitable title. Oyer v. Lake Erie, etc., R. Co., 63 Fed. Rep. 34.

4. Evans v. Faxon, 10 Fed. Rep. 312. See also *infra*, I. 40. §. (3) *Cause Remanded Where Jurisdiction Doubtful*.

5. Hatch v. Chicago, etc., R. Co., 6 Blatchf. (U. S.) 116; Golden v. Brunning, 72 Fed. Rep. 4.

Party Essential to Complete Relief.— A defendant is indispensable when his presence is essential to give effect to any decree establishing the right of the plaintiff against another defendant. Nye v. Nightingale, 6 R. I. 439. Thus, where a suit was brought against a corporation and a stockholder thereof to determine the ownership of certain shares of stock and to obtain a decree for their transfer to the plaintiff the corporation was an indispensable party. Rogers v. Van Nortwick, 45 Fed. Rep. 513. A corporation defendant is a necessary party to a bill to enforce a judgment against it by compelling contribution from its stockholders. Walsh v. Memphis, etc., R. Co., 2 McCrary (U. S.) 156, 6 Fed. Rep. 797.

Plaintiffs Entitled to No Decree are not

cations for removal, are not different from those which control in general equity practice and which are chiefly to be found in

to be treated as parties, though joined, upon the question of removal. *James v. Thurston*, 6 R. I. 431.

One who is made a coplaintiff in a bill not with a view of obtaining any decree in his favor, but solely for the purpose of securing the rights of the other plaintiffs, must be regarded as a merely formal party. *Hazard v. Robinson*, 21 Fed. Rep. 193.

Defendants Not Amenable to Decree. — Defendants against whom no relief is prayed or against whom no decree can be rendered are merely nominal parties. *Wilson v. Blodget*, 4 McLean (U. S.) 362; *New York Constr. Co. v. Simon*, 53 Fed. Rep. 4; *Wellman v. Howland Coal, etc., Works*, 19 Fed. Rep. 51; *James v. Thurston*, 6 R. I. 431. See also *Ward v. Arredondo*, 1 Paine (U. S.) 413.

A defendant against whom no relief is prayed, and who disclaims all interest, and has assigned his interest to a codefendant who petitions for removal, is not a substantial party. *Calloway v. Ore Knob Copper Co.*, 74 N. Car. 202.

Bills for Injunction. — On a bill filed by a corporation against another corporation to restrain the latter from prosecuting proceedings to condemn land by eminent domain, where the only question in controversy is which corporation has the better right to take the land, the sheriff and commissioners appointed in the proceedings who are made codefendants are merely nominal parties. *Sioux City, etc., R. Co. v. Chicago, etc., R. Co.*, 27 Fed. Rep. 770.

In a taxpayer's suit against a judgment creditor of a city to restrain the collection of a tax to pay the judgment, and also to set aside the judgment for fraud, city officials who are made defendants for the purpose of restraining them from paying the judgment *pendente lite* and are not charged with participation in the fraud are merely nominal parties, and their presence does not affect the right of removal by the judgment creditor. *May v. St. John*, 38 Fed. Rep. 770.

Where the subject-matter of the suit is the ownership of a bond and mortgage, which is claimed by the plaintiff and by one defendant, the mortgagor against whom an injunction is sought

to prevent him from paying the mortgage debt is not a necessary party. *Ruckman v. Ruckman*, 1 Fed. Rep. 587.

In a suit by a town to have certain township bonds declared void and the levy of a tax for their payment enjoined, the holders of the bonds may remove the cause without regard to the citizenship of the public officers who are joined for the purpose of making the injunction effective. *Aroma Tp. v. Auditor of Public Accounts*, 9 Biss. (U. S.) 289.

An officer appointed by a court to execute its decree of sale is not a necessary party to a suit to nullify the decree on the ground of fraud, and by consequence enjoin the sale. *Carver v. Jarvis-Conklin Mortg. Trust Co.*, 73 Fed. Rep. 9.

Officers of Corporations. — In a suit against a corporation and its grantee of land to set aside the conveyance on the ground of fraud, an officer of the corporation who is in possession of the land is not a necessary party. *National Bank v. Wells River Mfg. Co.*, 7 Fed. Rep. 750.

Where a corporation and its officers are made codefendants in a suit and the relief prayed for is the same in respect to all of the defendants, and no relief is prayed against any officer in his individual capacity, such officers are merely nominal parties. *Hatch v. Chicago, etc., R. Co.*, 6 Blatchf. (U. S.) 105. See also *Pond v. Sibley*, 7 Fed. Rep. 129, 19 Blatchf. (U. S.) 189.

"Where a corporation is the principal, no amount of mere pecuniary interest in the corporation by an individual stockholder will make him a necessary or indispensable party." *New York v. New Jersey Steam-Boat Transp. Co.*, 24 Fed. Rep. 819.

Where a defendant is sued jointly with the corporation of which he is an officer, for the purpose of obtaining some specific relief against him on a personal liability, he is not a merely nominal party. *Hatch v. Chicago, etc., R. Co.*, 6 Blatchf. (U. S.) 115.

In a Suit Against Executors, each of whom has qualified, all are indispensable parties. *Blake v. McKim*, 103 U. S. 338, a leading case.

Bill for Construction of Will. — In a suit by an executor against several

other parts of this work.¹ Where the averments of the plaintiff's pleading are so general as to be capable of different constructions, it is proper for the court to examine other parts of the record to see what is the nature and probable character of the suit, and thus to determine who are and who are not the real parties in interest.²

Special Statutory Regulations in Federal Courts. — The provisions of section 737 of the United States Revised Statutes,³ so far as they

beneficiaries claiming conflicting interests in the will, to obtain a construction of the instrument, the executor is an indispensable party. *Security Co. v. Pratt*, 64 Fed. Rep. 405.

Defendants Charged with Fraud. — Where relief is sought on the ground of fraud, defendants who are charged as actual participants in the fraudulent acts are not nominal parties. *Fox v. Mackay*, 60 Fed. Rep. 4.

Suits Relating to Mortgages. — A mortgagor is a necessary party to a suit against him and the mortgagee to cancel the mortgage on the ground of fraud and collusion. *Oakes v. Yonah Land, etc., Co.*, 89 Fed. Rep. 243, *citing* as in point *Marsh v. Atlanta, etc., R. Co.*, 53 Fed. Rep. 168.

In a Bill of Interpleader the plaintiff is an indispensable party until he has been dismissed, *Leonard v. Jamison*, 2 Edw. (N. Y.) 136; and both defendants are necessary parties, *George v. Pilcher*, 28 Gratt. (Va.) 299.

Defunct Corporation. — In a suit by a creditor against a stockholder in a corporation to enforce liability for his unpaid subscription, the corporation is not a necessary party where its property and franchise have been sold, and it has no organization, officers, or agents anywhere. *Wellman v. Howland Coal, etc., Works*, 19 Fed. Rep. 51.

Principal and Indemnitor. — In a suit in equity to recover from an insolvent defendant damages occasioned by its negligence, and also to enforce, in partial satisfaction of such damages, the liability of another defendant, a casualty insurance company, on a policy held by the receiver of the insolvent as a part of the assets of his trust, the receiver is a necessary party, and his claim hostile to that of the plaintiff. *Moore v. Los Angeles Iron, etc., Co.*, 89 Fed. Rep. 73, *citing* *Anoka Lumber Co. v. Fidelity, etc., Co.*, 63 Minn. 286, and holding that *Bacon v. Rives*, 106 U. S. 99, was not applicable.

In a Suit to Obtain the Restoration of

Stock conveyed by the plaintiff to one of the defendants by mutual mistake, and by him transferred to the other defendant with notice, both defendants are indispensable parties. *Vinal v. Continental Constr. etc., Co.*, 35 Fed. Rep. 673.

Suit Against Pledgor and Pledgee. — In an action against the maker and the guarantor of a note seeking a personal judgment against the latter and a sale of property pledged to him by the maker as security for the guaranty, the maker is a necessary party. *Howland Coal, etc., Works v. Brown*, 13 Bush (Ky.) 681.

Suits Relating to Administration of Trusts. — All the *cestuis que trustent* are necessary parties to a bill for removal of the trustee and appointment of another in his place, *Baxter v. Proctor*, 139 Mass. 151; or to a bill by a trustee for instructions in the execution of his trust, *Gordon v. Green*, 113 Mass. 259.

In *Ex p. Grimbail*, 61 Ala. 598, the trustee of certain property under a will filed a bill against parties claiming the property (*viz.*, the brothers and sisters of the deceased, her administrator, and her husband) for the settlement of his trust and for instructions as to the disposition of the property. All the parties except the husband, who resided in New York, were residents of Alabama. It was held that he was not entitled to remove the case to a federal court, as the plaintiff was a necessary party to the controversy between himself and the other defendants.

1. See article PARTIES TO ACTIONS, vol. 15, p. 584 *et seq.*

2. *New York v. New Jersey Steam-Boat Transp. Co.*, 24 Fed. Rep. 817, an action for injunction and accounting where the plaintiff's affidavits for a preliminary injunction were scrutinized.

3. Act of Feb. 28, 1839, 5 U. S. Stat. at L. 321, c. 36, § 1; Rev. Stat. U. S., § 737. For the substance of the statute and its effect on federal practice see

have any remedial efficacy in suits in equity, do not apply in removal proceedings.¹

Agents, Garnishees, or Trustees.—Where a party is joined as an agent, garnishee, or trustee of a defendant, and is under no obligation to the plaintiff, and has no active duty to perform, his presence for jurisdictional purposes may be ignored.² But where the party thus joined occupies the relation of a trustee for both parties to the controversy and is under an obligation the performance of which the plaintiff seeks to enforce, he is an indispensable party.³

the article PARTIES TO ACTIONS, vol. 15, p. 704.

1. *Ames v. Chicago, etc., R. Co.*, 39 Fed. Rep. 885; *Patchin v. Hunter*, 38 Fed. Rep. 51; *James v. Thurston*, 6 R. I. 432, holding that one who is actually joined and is a proper party cannot be treated as unnecessary by virtue of the federal statute; *Denniston v. Potts*, 11 Smed. & M. (Miss.) 37.

2. **Agents.**—Thus, in *Wood v. Davis*, 18 How. (U. S.) 470, a suit had been brought by a citizen of Illinois against citizens of Pennsylvania for an accounting concerning certain transactions, and to obtain the cancellation of a certain note executed by the plaintiff, on the ground that it had been fully paid. An agent of the defendants, who was a citizen of Illinois, and in whose hands the note had been placed merely for the purpose of collection, was joined as a codefendant of the nonresident defendants, and as against him a temporary injunction was asked to prevent him from surrendering the note to his principals during the pendency of the litigation. The suit was held to be removable to the federal court by the nonresident defendants, on the ground that the agent was merely a formal and disinterested party. For other cases holding that the citizenship of a mere agent or attorney was immaterial, see *Brown v. Murray*, 43 Fed. Rep. 614; *Myers v. Murray*, 43 Fed. Rep. 695; *Wilson v. Blodget*, 4 McLean (U. S.) 362.

Garnishees.—In *Bacon v. Rives*, 106 U. S. 99, it was held that the right of a nonresident defendant to remove a case to the federal court was not defeated by the fact that a resident of the state had been made a party defendant merely as an equitable garnishee, and to prevent him, during the pendency of the suit, from paying over certain funds which belonged to the nonresident defendant. The case was *disting-*

guished in *Wilson v. Oswego Tp.*, 151 U. S. 64.

In *New York Constr. Co. v. Simon*, 53 Fed. Rep. 1, which was a suit brought by the maker of a note against a nonresident indorsee and owner thereof, for the purpose of having the note canceled, it was held that the fact that a banking corporation of the state, which held the note merely for collection, had been made a party defendant would not prevent the nonresident owner and indorsee from removing the case to the federal court. See further to the point that the citizenship of a garnishee in a case is not regarded on a petition for removal by the defendant, *Cook v. Whitney*, 3 Woods (U. S.) 715; *American Nat. Bank v. National Ben., etc., Co.*, 70 Fed. Rep. 422.

A Trustee under a deed of trust to secure the payment of certain notes is not an indispensable party to a bill to cancel the notes because they have been paid. *Chester v. Wellford*, 2 Flipp. (U. S.) 347, *distinguishing* *Gardiner v. Brown*, 21 Wall. (U. S.) 36.

3. *Scoutt v. Keck*, 73 Fed. Rep. 900, wherein the court said: "The case, therefore, cannot be distinguished in principle from the recent case of *Wilson v. Oswego Tp.*, 151 U. S. 56. In that case a controversy arose between the plaintiff, a citizen of Missouri, and the defendant, a citizen of Kansas, relative to the right of possession of certain bonds that were in the custody of a bank, which was a corporation of the state of Missouri. The bank was made a party defendant to the suit, although it was a mere bailee of the bonds, having received them for safekeeping and having agreed to surrender them on the completion of certain work and on the return of a certain receipt. It was held, however, that inasmuch as the suit was brought to obtain possession of the bonds which were in the bank's custody, the bank was a necessary

Class Suits. — Where citizen plaintiffs sue as a class for the benefit of a class all of whom, whether named as plaintiffs or not, may avail themselves of the benefit of the decree if obtained, one of the class who is an alien and coplaintiff is a formal and unnecessary party whose joinder does not prevent a removal.¹

Parties Made Indispensable by Statute. — Parties joined in obedience to an express requirement of a statute must be regarded as indispensable.²

party, and that the suit could not be removed to the federal court by its codefendant, a citizen of Kansas, between whom and the plaintiff a real controversy existed as to the right of possession of the bonds." See also *Thayer v. Life Assoc. of America*, 112 U. S. 717; *St. Louis, etc., R. Co. v. Wilson*, 114 U. S. 60; *Central R. Co. v. Mills*, 113 U. S. 249; *Crump v. Thurber*, 115 U. S. 56; *Pittsburgh, etc., R. Co. v. Baltimore, etc., R. Co.*, 61 Fed. Rep. 705; *Myers v. Swann*, 107 U. S. 546; *Peper v. Fordyce*, 119 U. S. 469; *Winchester v. Loud*, 108 U. S. 130; *Mayer v. Denver, etc., R. Co.*, 41 Fed. Rep. 723; *Moore v. North River Constr. Co.*, 19 Fed. Rep. 803; *Ex p. Grimbail*, 61 Ala. 598; *Dunn v. Waggoner*, 3 Yerg. (Tenn.) 59.

"Where a party occupies a neutral position, and is in a manner a stakeholder or trustee, or otherwise bound to account to one of two other parties, he is an indispensable party to the controversy between them, if he still has possession of the fund or property to be accounted for." *Perrin v. Lepper*, 26 Fed. Rep. 548.

In *Bailey v. New York Sav. Bank*, 2 Fed. Rep. 14, 18 Blatchf. (U. S.) 77, an action was brought by a widow to recover moneys deposited by her husband in a New York savings bank. On petition of the bank, under a state statute, an alleged executor of the decedent, a resident of Connecticut, was made a party defendant. The bank subsequently put in an answer, setting up that it could not ascertain which of the two claimants was entitled to the money, and prayed that when all the parties necessary to render the judgment of the court a protection to it should be brought in, such parties might interplead and settle their rights among themselves, and that the bank might pay the money into court to await the final determination of the action. It was held by Circuit Judge Blatchford that until the moneys had

been paid into court and the liability of the deposit had ceased, the bank was a necessary party to the suit, and the cause could not be removed. The court distinguished *Wehl v. Wald*, 17 Blatchf. (U. S.) 342, and *Healy v. Prevost*, (U. S. Cir. Ct. 1879) 8 Rep. 103, on the ground that in those cases "the original debtor had ceased to be a party, the money was in court, and the two remaining parties were of diverse citizenship."

Where one holds the legal title to property for the joint use and benefit of himself and another, and both are made defendants in a suit concerning it, the holder of the legal title is a necessary and not a merely nominal party. *Rand v. Walker*, 117 U. S. 344.

Where a party, though a trustee, would be personally bound by a decree against his codefendant, he is not a merely nominal party. *Evans v. Faxon*, 10 Fed. Rep. 312. See also *Ribon v. Railroad Companies*, 16 Wall. (U. S.) 446.

A trustee charged with having fraudulently disposed of trust property is a necessary party to a suit against the fraudulent grantees to reclaim the property. *Missouri v. New Madrid County*, 73 Fed. Rep. 304.

1. *McHenry v. New York, etc., R. Co.*, 25 Fed. Rep. 65.

2. *Reed v. Reed*, 31 Fed. Rep. 49, a statutory action to contest a probated will, the statute providing that "all the devisees, legatees, and heirs of the testator and other interested persons, including the executor or administrator, must be made parties to the action;" *Lyddy v. Gano*, 26 Fed. Rep. 177, a bill in equity by a creditor against the heirs of a deceased debtor to reach real estate descended, the statute requiring all the heirs to be made defendants. See also *McElmurray v. Loomis*, 31 Fed. Rep. 395; *Townsend v. Sykes*, 38 La. Ann. 411. Compare *Ellerman v. New Orleans, etc., R. Co.*, 2 Woods (U. S.) 120.

In Actions at Law the question as to who are necessary parties will be governed by the law of the state in which the suit is pending.¹

(c) **Sham Defendants.** — The joinder of a sham defendant to defeat the jurisdiction of the federal court cannot prevent removal.² Such cases are where on the face of the plaintiff's pleading no cause of action is stated against the defendant whose joinder is apparently an obstacle to removal.³ Cases where the plaintiff's pleading stated an apparently good cause of action against a defendant fraudulently joined are treated in the following subdivision of this section. The petition for removal need not, it seems, allege the fraudulent purpose of the joinder.⁴

(d) **Defendants Fraudulently Joined to Prevent Removal.** — Where the court is legally satisfied that one of several defendants against whom an apparent cause of action is stated was joined for the sole purpose of defeating the right of removal, he will be considered as a sham defendant whose citizenship may be disregarded.⁵ But in order that such joinder should be regarded as fraudulent, it must be alleged in the petition for removal not only that it was made for the purpose of avoiding the jurisdiction of the federal court, but also that the plaintiff's averments of joint liability are unfounded in fact, and were not made in good faith with the expectation of proving them at the trial.⁶ The fraudu-

1. See *Mitchell v. Smale*, 140 U. S. 416.

Action Against Principal and Surety. — "In an action to enforce a bond, note, or other contract which is brought against the principal therein and his surety, it cannot be said that the surety is merely a 'nominal or formal party.'" *Mutual Reserve Fund L. Assoc. v. Farmer*, 77 Fed. Rep. 931. See also *Guarantee Co. v. Lynchburg First Nat. Bank*, 95 Va. 480.

Action by Officer on Forthcoming Bond. — In an action by a marshal on a forthcoming bond for the use of the plaintiff in attachment the marshal is a merely nominal party. *Wortsmann v. Wade*, 77 Ga. 651.

2. *Powers v. Chesapeake, etc.*, R. Co., 65 Fed. Rep. 132. See also *Hax v. Caspar*, 31 Fed. Rep. 501; *Nelson v. Hennessey*, 33 Fed. Rep. 113; *Rivers v. Bradley*, 53 Fed. Rep. 305, where a servant sued his master and a coservant for injuries received in the master's employment, but failed to allege any negligence or breach of duty on the part of the coservant, and it was held that the latter must be regarded as a merely nominal defendant.

3. **Instances of Such Cases Are,** *Arapahoe County v. Kansas Pac. R. Co.*, 4

Dill, (U. S.) 277; *Arrowsmith v. Nashville, etc.*, R. Co., 57 Fed. Rep. 165; *Collins v. Wellington*, 31 Fed. Rep. 244.

4. *Collins v. Wellington*, 31 Fed. Rep. 244, where a motion to remand was denied upon proof that the co-defendant was a mere sham defendant having no place or interest in the controversy, although it was conceded that he was not joined for the purpose of preventing a removal. The court said, however, that if it should appear thereafter that there was any ground for making him a party the cause would be remanded. See also *Texas, etc., R. Co. v. Bloom*, 85 Tex. 285; *Nelson v. Hennessey*, 33 Fed. Rep. 113. But compare *Arrowsmith v. Nashville, etc., R. Co.*, 57 Fed. Rep. 168, where the petition for removal which is there quoted contained the allegation of fraudulent intent.

5. The United States Supreme Court has not expressly so held, but it is "the necessary implication" of the decisions. *Per Taft, J.*, in *Hukill v. Maysville, etc.*, R. Co., 72 Fed. Rep. 751.

6. *Warax v. Cincinnati, etc., R. Co.*, 72 Fed. Rep. 640; *Illinois Cent. R. Co. v. Le Blanc*, 74 Miss. 643, holding that

lent purpose and the nonliability of the defendant fraudulently joined must be proved.¹ But the state court cannot inquire into

the mere allegation of fraudulent joinder, which is quoted in the opinion, was not sufficient; *Bowley v. Richmond, etc., R. Co.*, 110 N. Car. 317. See also *Louisville, etc., R. Co. v. Wangelin*, 132 U. S. 603; *Chesapeake, etc., R. Co. v. Dixon*, (Ky. 1898) 47 S. W. Rep. 615.

In *Little v. Giles*, 118 U. S. 596, where a bill in equity charged the defendants jointly with having fraudulently deprived the plaintiff of her property, Mr. Justice Bradley said that one of the defendants "could not, by merely making contrary averments in his petition for removal, and setting up a case inconsistent with the allegations of the bill, segregate himself from the other defendants, and thus entitle himself to remove the case into the United States court."

Precedents of Averments. — For allegations of fraudulent joinder see the removal petitions quoted in *Warax v. Cincinnati, etc., R. Co.*, 72 Fed. Rep. 639; *Hukill v. Maysville, etc., R. Co.*, 72 Fed. Rep. 748; *Deere v. Chicago, etc., R. Co.*, 85 Fed. Rep. 877; *Hukill v. Chesapeake, etc., R. Co.*, 65 Fed. Rep. 139. See further, as to the proper form of averments, *Powers v. Chesapeake, etc., R. Co.*, 65 Fed. Rep. 132; *Hukill v. Chesapeake, etc., R. Co.*, 65 Fed. Rep. 141; *Dow v. Bradstreet Co.*, 46 Fed. Rep. 828.

Amendment of Petition. — Mere defects and evident mistakes in the details of an averment of fraudulent joinder may be cured by amendment of the petition for removal after the case reaches the federal court. *Powers v. Chesapeake, etc., R. Co.*, 65 Fed. Rep. 132.

1. *Louisville, etc., R. Co. v. Wangelin*, 132 U. S. 599; *Golden v. Bruning*, 72 Fed. Rep. 4; *Bowley v. Richmond, etc., R. Co.*, 110 N. Car. 318.

In *Plymouth Gold Min. Co. v. Amador, etc., Canal Co.*, 118 U. S. 264, a suit by a canal company against a mining corporation and its agents for polluting a stream of water belonging to the plaintiff was held to have been rightly remanded to the state court, although the corporation's petition for removal alleged that it was the only real defendant, and that the other defendants were nominal parties only, and were sued for the purpose of preventing the corporation from removing

the cause into the federal court, no attempt being made to prove the averment.

Character and Amount of Proof. — It must be proved that the averments of liability "are so unfounded and incapable of proof as to justify the inference that they were not made in good faith with the hope and intention of proving them." * * * One who has a real cause of action for joint tort against two persons cannot be deprived of the right to bring his action against both and to retain both in the case, and to have the case heard with both as defendants, merely because he joined them for the purpose of avoiding the jurisdiction of the federal court. If the right exists, the motive for its exercise cannot defeat it. It should be said, however, that where, as in this case, there is manifested a desire to prevent a removal by the unusual course of joining a locomotive engineer with a railroad company, the court will not be astute, by any strained construction, to make the averments of the petition [declaration or complaint] support the plaintiff's right to join the defendants." *Per Taft, J.*, in *Warax v. Cincinnati, etc., R. Co.*, 72 Fed. Rep. 640, holding that the mere fact that the plaintiff had once brought suit on the same cause of action against the petitioning defendant without joining the other was not sufficient proof of nonliability of the latter. To the same effect see *Hukill v. Maysville, etc., R. Co.*, 72 Fed. Rep. 745; *Deere v. Chicago, etc., R. Co.*, 85 Fed. Rep. 876, holding that proof that the codefendant is without means and that, if recovered, a judgment against him cannot be collected is not sufficient proof of his nonliability.

In *Dow v. Bradstreet Co.*, 46 Fed. Rep. 824, the plaintiff sued the Bradstreet Company and one Green for damages alleged to have been caused to him by the circulation of a report touching his business and financial standing, which was alleged to be false; it being charged by the plaintiff that Green was the agent of the Bradstreet Company, by whom the report was gotten up, which the company furnished to its subscribers. The Bradstreet Company sought to remove the case from the state to the federal

and decide issues of fact made upon the petition for removal.¹ The proof must be produced in the federal Circuit Court,² and

court, and averred in the petition for removal that Green was not and never had been the agent of the company, did not in fact make or forward the alleged untrue report, and had no connection therewith, and, upon these facts, averred that Green was made a party defendant solely for the purpose of defeating a removal of the case. The petition for removal was supported by the affidavit of Green, reciting the same facts. It was held by the federal court that the facts averred in the petition for removal were *prima facie* sufficient to sustain the removal. In *Durkee v. Illinois Cent. R. Co.*, 81 Fed. Rep. 1, the same rule was followed, the averments in the petition for removal showing that the Cherokee and Dakota Railroad Company, which was joined as a defendant, was not an existing corporation, and had in fact nothing to do with the operation of the train upon which the alleged accident to the plaintiff happened. See also *Shepherd v. Bradstreet Co.*, 65 Fed. Rep. 142.

Where the plaintiff voluntarily dismisses codefendants, and admits that he joined them, not for the purpose of taking judgment against them, but merely to evade the jurisdiction of the federal court, fraudulent joinder and nonliability are conclusively shown. *Hukill v. Maysville, etc.*, R. Co., 72 Fed. Rep. 751; *Hukill v. Chesapeake, etc.*, R. Co., 65 Fed. Rep. 138.

The fact that suit was previously brought on the same cause of action against the petitioner for removal alone would tend to show a fraudulent joinder of the codefendant in the present suit. *Warax v. Cincinnati, etc.*, R. Co., 72 Fed. Rep. 640.

An attempt by the plaintiff to dismiss the action, immediately upon the filing of a petition for removal, together with a statement then made by the plaintiff's attorney that he intended to institute a new suit for a sum less than the jurisdiction of the federal court, was held to be strong proof of fraudulent joinder in *Shepherd v. Bradstreet Co.*, 65 Fed. Rep. 144. See also *Arrowsmith v. Nashville, etc.*, R. Co., 57 Fed. Rep. 170.

Allegations in a verified petition for removal are not alone sufficient proof when a motion to remand takes issue

upon them. They must be proved "by circumstantial and detailed evidence, so that the court may judge whether the charge of bad faith in the averments, for the purpose of evading the jurisdiction of the court, is sustained." *Landers v. Felton*, 73 Fed. Rep. 313. But if the motion to remand does not take issue on the facts averred in a verified petition, they must be assumed to be true. *Dow v. Bradstreet Co.*, 46 Fed. Rep. 824.

1. *Pirie v. Tvedt*, 115 U. S. 44. If the petition for removal makes a *prima facie* case in its averments of fraudulent joinder, etc., the state court is thereupon deprived of jurisdiction where the removal depends solely upon that question. *Arrowsmith v. Nashville, etc.*, R. Co., 57 Fed. Rep. 170; *Dow v. Bradstreet Co.*, 46 Fed. Rep. 828. Compare *Monroe v. Connecticut River Lumber Co.*, 66 N. H. 628, where the question whether the state court should try the issue of fact seems to have been regarded as one of expediency, the court conceding, however, that the issue could "finally be determined only by the federal court."

2. See the preceding note.

Method of Raising Issue and Trial Thereof. — In *Dow v. Bradstreet Co.*, 46 Fed. Rep. 828, the court said that "by filing affidavits in support of the facts averred in the petition for removal formal evidence is submitted for the consideration of the federal court, and if the facts set forth in the affidavits are deemed sufficient, no further evidence need be submitted unless issue is taken in some form upon the allegations of fact, when such issue will stand for trial in the federal court upon the evidence to be introduced by both parties thereon." In *Hukill v. Maysville, etc.*, R. Co., 72 Fed. Rep. 748, and *Warax v. Cincinnati, etc.*, R. Co., 72 Fed. Rep. 639, the plaintiff filed an answer in the federal court denying the averments of fraudulent joinder, etc., made in the petition for removal, and evidence was heard on the issue. See also *Deere v. Chicago, etc.*, R. Co., 85 Fed. Rep. 876; *Golden v. Bruning*, 72 Fed. Rep. 4. In *Arrowsmith v. Nashville, etc.*, R. Co., 57 Fed. Rep. 170, a plea in abatement to the petition for removal was filed in the federal court.

"It is permissible to this court, in a

the affirmative of the issue is on the removing defendant.¹

(e) **Rearrangement of Parties.** — The Judiciary Act of 1789 provided for a removal where "a suit" was brought against an alien or a citizen of another state.² Under that act the rights of the parties in respect to a removal were determined solely according to the position they occupied in the pleadings as plaintiffs or defendants in the suit.³ But the Act of 1875, as well as the "separable controversy" Act of 1866, and the "prejudice or local influence" Act of 1867, provided,⁴ and the Act of 1887-1888 now provides,⁵ for removal of a suit "in which there shall be a controversy between" citizens of different states. Under this legislation, for the purposes of removal the matter in dispute may be ascertained, and the parties to the suit arranged on opposite sides of that dispute regardless of the relative positions occupied by them in the pleadings; and if in such arrangement it appears that those on one side are all citizens of different states from those on the other, the case is removable so far as diversity of citizenship is concerned.⁶

contention like this, to entertain affidavits to get at the real state of the facts respecting the object of such joinder, to enable the court to see whether or not there be a joint cause of action against all the defendants, or whether or not it be one only by averment." *Shepherd v. Bradstreet Co.*, 65 Fed. Rep. 144, where counter-affidavits were used. *Citing Nelson v. Hennessey*, 33 Fed. Rep. 113; *Rivers v. Bradley*, 53 Fed. Rep. 305; *Ferguson v. Chicago, etc., R. Co.*, 63 Fed. Rep. 177; *Dow v. Bradstreet Co.*, 46 Fed. Rep. 824.

Record on Appeal. — In order to present the question for review by the Supreme Court, the transcript on appeal should contain the affidavits or other evidence produced on the hearing of the motion to remand, in support of the allegations of fraudulent joinder. *Plymouth Gold Min. Co. v. Amador, etc., Canal Co.*, 118 U. S. 269.

1. *Louisville, etc., R. Co. v. Wangelin*, 132 U. S. 602; *Plymouth Gold Min. Co. v. Amador, etc., Canal Co.*, 118 U. S. 264.

2. 1 U. S. Stat. at L. 79, § 12.

3. *Removal Cases*, 100 U. S. 457, *citing* *Susquehanna, etc., R., etc., Co. v. Blatchford*, 11 Wall. (U. S.) 174. See also *Bybee v. Hawke*, 5 Fed. Rep. 6, 6 Sawy. (U. S.) 593.

4. Act of 1875, 18 U. S. Stat. at L. 470, c. 137; Act of 1866, 14 U. S. Stat. at L. 306, c. 288; Act of 1867, 14 U. S. Stat. at L. 558, c. 196.

5. 24 U. S. Stat. at L. 552, c. 373; 25 U. S. Stat. at L. 433, c. 866.

6. *Removal Cases*, 100 U. S. 457; *Evers v. Watson*, 156 U. S. 527; *Merchants' Cotton Press, etc., Co. v. Insurance Co. of North America*, 151 U. S. 385; *Wilson v. Oswego Tp.*, 151 U. S. 63; *Brown v. Trousdale*, 138 U. S. 389; *Peninsular Iron Co. v. Stone*, 121 U. S. 632; *Carson v. Hyatt*, 118 U. S. 286; *Turner v. Farmers' L. & T. Co.*, 106 U. S. 555; *Harter v. Kernochan*, 103 U. S. 562; *Blake v. McKim*, 103 U. S. 337; *Pacific R. Co. v. Ketchum*, 101 U. S. 289; *Oakes v. Yonah Land, etc., Co.*, 89 Fed. Rep. 243; *Mecke v. Valley Town Mineral Co.*, 89 Fed. Rep. 213; *Deere v. Chicago, etc., R. Co.*, 85 Fed. Rep. 881; *Hutton v. Bancroft*, 77 Fed. Rep. 481; *Scoutt v. Keck*, 73 Fed. Rep. 903; *Lake St. El. R. Co. v. Farmers' L. & T. Co.*, 72 Fed. Rep. 808; *Security Co. v. Pratt*, 64 Fed. Rep. 406; *Wolcott v. Sprague*, 55 Fed. Rep. 545; *Reeves v. Corning*, 51 Fed. Rep. 774; *Insurance Co. of North America v. Delaware Mut. Ins. Co.*, 50 Fed. Rep. 250; *Le Mars v. Iowa Falls, etc., R. Co.*, 48 Fed. Rep. 661, 4 McCrary (U. S.) 218; *Adelbert College v. Toledo, etc., R. Co.*, 47 Fed. Rep. 836; *McNulty v. Connecticut Mut. L. Ins. Co.*, 46 Fed. Rep. 306; *In re San Antonio, etc., R. Co.*, 44 Fed. Rep. 145; *Brown v. Murray*, 43 Fed. Rep. 614; *Mayer v. Denver, etc., R. Co.*, 41 Fed. Rep. 723; *Anderson v. Bowers*, 40 Fed. Rep. 709; *May v. St.*

(5) *Citizenship in State Where Suit Is Brought — Of Plaintiff.* — Under the Judiciary Act of 1789 it was necessary that the plaintiff, or each of the plaintiffs if there were several, should be a citizen of the state where the suit was brought.¹ This was not necessary under the Act of 1875;² and under the Act of 1887–1888 it is not required that either party shall be a citizen of the state wherein the suit is brought,³ except where removal is sought on the ground of prejudice or local influence.⁴

Of Defendant. — Unless there is a separable controversy,⁵ or removal is sought on the ground of prejudice or local influence,⁶ the general rule is that where there are several defendants each of them must be a citizen of a state other than that in which the suit is brought.⁷

(6) *Suits by Assignees.* — The first section of the Act of 1887–1888, which prescribes the original jurisdiction of federal courts, provides substantially that no Circuit or District Court shall have cognizance of any suit to recover the contents of a chose in action in favor of an assignee unless such suit might have been prosecuted therein to recover such contents if no assignment had

John, 38 Fed. Rep. 771; Woodrum v. Clay, 33 Fed. Rep. 899; Thompson v. Dixon, 28 Fed. Rep. 8; Perrin v. Leeper, 26 Fed. Rep. 547; Pollok v. Louchheim, 19 Fed. Rep. 465; Langdon v. Fogg, 18 Fed. Rep. 5; Snow v. Texas Trunk R. Co., 16 Fed. Rep. 3, 4 Woods (U. S.) 394; Illinois v. Illinois Cent. R. Co., 16 Fed. Rep. 881; Sayer v. La Salle, etc., Gas Light, etc., Co., 14 Fed. Rep. 69; Greene v. Klinger, 10 Fed. Rep. 690; Bybee v. Hawkett, 5 Fed. Rep. 6; Ketchum v. Black River Lumber Co., 4 Fed. Rep. 143; Burke v. Flood, 1 Fed. Rep. 541; Walsh v. Memphis, etc., R. Co., 2 McCrary (U. S.) 158, 6 Fed. Rep. 797; Springer v. Sheets, 115 N. Car. 370.

"Where the controversy is between the complainant and the removing defendant, who are citizens of different states, the fact that there is another defendant who is a citizen of the complainant's state does not prevent the case from being removed where the interest of such codefendant is identical with that of complainant. Brown v. Murray, 43 Fed. Rep. 614." Hutton v. Bancroft, 77 Fed. Rep. 482.

Rearrangement Preventing Removal. — A rearrangement of the parties is usually sought for the purpose of making a suit removable that could not otherwise be removed, as appears by most of the foregoing cases; but the parties may be transposed though the result may prevent a removal. See Thomp-

son v. Dixon, 28 Fed. Rep. 8; Adelbert College v. Toledo, etc., R. Co., 47 Fed. Rep. 836.

Joinder in Petition for Removal. — Where by such rearrangement one or more plaintiffs are found to be defendants, according to their real interests they should join in the petition for removal. See Wilson v. Oswego Tp., 151 U. S. 63, and *infra*, I. 19. a. (5) *Joinder of All Defendants.*

1. Hubbard v. Northern R. Co., 3 Blatchf. (U. S.) 84, 25 Vt. 715; Eureka Consol. Min. Co. v. Richmond Consol. Min. Co., 2 Fed. Rep. 829; *Ex p.* Turner, 3 Wall. Jr. (C. C.) 258; Dennistoun v. New York, etc., R. Co., 1 Hilt. (N. Y.) 62; Hazard v. Durant, 9 R. I. 607; James v. Thurston, 6 R. I. 428.

2. Petterson v. Chapman, 13 Blatchf. (U. S.) 398; Eureka Consol. Min. Co. v. Richmond Consol. Min. Co., 2 Fed. Rep. 829.

3. Kansas City, etc., R. Co. v. Interstate Lumber Co., 37 Fed. Rep. 3; Alley v. Edward Hines Lumber Co., 64 Fed. Rep. 903. See also *supra*, p. 190.

4. See *infra*, I. 17. u. (2) (b) *Citizenship of Plaintiffs.*

5. See *infra*, I. 16. b. (2) *Citizenship of Parties to Separable Controversy.*

6. See *infra*, I. 17. a. (2) (c) *Citizenship of Defendants.*

7. See *infra*, I. 19. a. (3) (a) *In General*, and I. 19. a. (5) *Joinder of All Defendants.*

been made, while the second section of the act provides for the removal of suits "of which the Circuit Courts of the United States are given original jurisdiction by the preceding section."¹ Therefore a suit by an assignee in the class of cases just mentioned cannot be removed to the federal court unless the citizenship of his assignor is different from that of the defendant.²

b. DIVERSE CITIZENSHIP AND SEPARABLE CONTROVERSY —
 (1) *History and Remedial Purpose of Separable Controversy Clause.* — Under the Judiciary Act of 1789 it was necessary that the character of citizenship requisite to give jurisdiction to the federal court by removal should be common to all the plaintiffs or defendants.³ A class of cases had been mentioned in the opinions of the federal judiciary which ought to constitute exceptions to that rule, cases where the interests of the parties were so entirely distinct that a judgment or decree could be rendered in reference to a part without affecting the others.⁴ No regulation

1. 24 U. S. Stat. at L. 552, c. 373; 25 U. S. Stat. at L. 433, c. 866.

2. Mexican Nat. R. Co. v. Davidson, 157 U. S. 201; Sharkey v. Port Blakely Mill Co., 92 Fed. Rep. 425; McNulty v. Connecticut Mut. L. Ins. Co., 46 Fed. Rep. 305.

Contra under Prior Removal Acts. — Similar provisions in respect of the original jurisdiction of the federal courts in the Judiciary Act of 1789, 1 U. S. Stat. at L. 73, § 11, and in the Act of 1875, 18 U. S. Stat. at L. 470, c. 137, § 1, did not restrict the right of removal, since the following section, which provided for removal, was not made dependent upon the preceding section. *Green v. Custard*, 23 How. (U. S.) 484; *Bushnell v. Kennedy*, 9 Wall. (U. S.) 387; *Claffin v. Commonwealth Ins. Co.*, 110 U. S. 81; *Delaware County v. Dietbold Safe, etc., Co.*, 133 U. S. 473; *Barclay v. Levee Com'rs*, 1 Woods (U. S.) 254; *Glenn v. Walker*, 27 Fed. Rep. 577; *Rosenblatt v. Reliance Lumber Co.*, 18 Fed. Rep. 705; *Hobby v. Allison*, 13 Fed. Rep. 401; *Waterbury v. Laredo*, 3 Woods (U. S.) 371; *Leutze v. Butterfield*, (C. Pl. Gen. T.) 1 Abb. N. Cas. (N. Y.) 367, 52 How. Pr. (N. Y.) 376; *Ayres v. Western R. Corp.*, 45 N. Y. 260. *Compare* *Ferry v. Merrimack*, 18 Fed. Rep. 657; *Ferry v. Westfield*, 19 Fed. Rep. 155; *Berger v. Douglas County*, 5 Fed. Rep. 23, 2 McCrary (U. S.) 483; *Hardin v. Olson*, 14 Fed. Rep. 705; *Bell v. Noonan*, 19 Fed. Rep. 225; *New Orleans Canal, etc., Co. v. Recorder of Mortgages*, 27 La. Ann. 291; *Anderson*

v. Manufacturers' Bank, (Supm. Ct. Gen. T.) 14 Abb. Pr. (N. Y.) 436.

3. 1 U. S. Stat. at L. 79, § 12.

"According to the uniform decisions of this court it applied only to cases in which all the plaintiffs were citizens of the state in which the suit was brought, and all the defendants citizens of other states. It made no distinction between a suit and the different controversies which might arise therein between the several parties; that is, Congress, when authorizing the removal of the suit, did not permit any controversy therein between particular parties to be carried into the federal court. * * * If the whole suit could not be removed, no part of it could be taken from the state court." *Barney v. Latham*, 103 U. S. 209.

"The term 'the defendant,' although used in the singular number, was construed in a collective sense, so as to include all the persons sued, be they many or few. If any of these persons were not aliens or nonresidents, then this technical defendant, constituted of all the individual defendants, was held not to be an alien or nonresident, and therefore not entitled to a removal. To remedy this evil, so far as practicable, the Act of 1866 was passed." *Per* Deady, J., in *Fields v. Lamb*, Deady (U. S.) 432.

4. In *Strawbridge v. Curtiss*, 3 Cranch (U. S.) 267, Chief Justice Marshall made an intimation that while, as a general rule, jurisdiction dependent upon citizenship could be sustained only where all the parties on the same

was made for such cases until the Act of 1866.¹ That act and its successors² were designed to provide for those cases, which had been the subject of judicial comment.³ The original surmise that the operation of the provisions would be chiefly confined to chancery cases⁴ was correct, as was also the judicial forecast that

side were competent to sue or liable to be sued, yet a different rule might prevail where several parties represented several distinct interests, and some of those parties were and others were not competent to sue or liable to be sued in the federal courts. Judge Thompson in *Ward v. Arredondo*, 1 Paine (U. S.) 410, intimated that there might be cases in equity where several parties represented distinct interests, so that separate decrees might be made, where possibly some of the parties might take the cause into the Circuit Court and others remain in the state court; but that it ought, even in such cases, to be a very strong case of separate and distinct interests to sanction such a course. See also *Cameron v. M'Roberts*, 3 Wheat. (U. S.) 591.

1. Act of July 27, 1866, 14 U. S. Stat. at L. 306, c. 288.

Suit to Restrain or Enjoin.—The Act of 1866 above cited contained, in addition to the so-called separable controversy provision, a clause authorizing the removal by a nonresident defendant joined with resident defendants of a suit "instituted or prosecuted for the purpose of restraining or enjoining" the former. For cases which arose under that clause see *Jones v. Foreman*, 66 Ga. 371; *Stewart v. Mordecai*, 40 Ga. 1; *Clark v. Opdyke*, 10 Hun (N. Y.) 383; *Girardey v. Moore*, 3 Woods (U. S.) 397.

2. Rev. Stat. U. S., § 639; Act of 1875, 18 U. S. Stat. at L. 470, c. 137; Act of 1887-1888, 24 U. S. Stat. at L. 552, c. 373, 25 U. S. Stat. at L. 433, c. 866. The foregoing and the Act of 1866 are the only provisions ever made for removal of separable controversies.

Text of the Act.—The Act of 1887-1888, above cited, section 2, provides in respect of removals on the grounds of diverse citizenship and a separable controversy as follows: "Any other suit of a civil nature, at law or in equity, of which the Circuit Courts of the United States are given jurisdiction by the preceding section, and which are now pending or which may hereafter be brought in any state court,

may be removed into the Circuit Court of the United States for the proper district by the defendant or defendants therein, being nonresidents of that state. And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the Circuit Court of the United States for the proper district."

3. *Field v. Lownds*, 40 Ala. 647; *Ex p. Andrews*, 40 Ala. 647; *Crane v. Reeder*, 28 Mich. 534.

"The evident purpose of the Act of 1866 was to relieve a person sued with others in the courts of a state of which he was not a citizen, by one who was a citizen, from the disabilities of his co-defendants in respect to the removal of the litigation to the courts of the United States, if he could separate the controversy, so far as it concerned him, from the others, without prejudice to his adversary." *Yulee v. Vose*, 99 U. S. 545.

"The precise object of the act was to supply this deficiency in the existing laws." *Goodrich v. Hunton*, 29 La. Ann. 373.

"The main purpose of the law of 1866 appears to have been the prevention of a practice which took advantage of a construction of the Act of 1789, and served in many cases to defeat the benign purpose of the law. It came to be held that alien and nonresident citizen defendants could not take steps to remove when impleaded with others who were citizens of the state in which the suit was brought; and on the footing of this interpretation plaintiffs were led to implead or join a resident citizen with no other real object than to preclude the right of removal. To remedy this mischief and carry out the original policy of the Act of 1789, Congress intervened in 1866 and passed the act of that year." *Per Graves, C. J.*, in *Crane v. Reeder*, 28 Mich. 534.

4. *Ex p. Andrews*, 40 Ala. 647.

it would not prove to be of much benefit.¹

(2) *Citizenship of Parties to Separable Controversy.* — In order that a suit may be removed on the ground of a separable controversy therein, the requisite diversity of citizenship must exist between the parties to the separable controversy itself.² If an alien is a necessary party thereto the suit cannot be removed;³ and even if there are two separate controversies in a suit it is not removable by a defendant in one of the controversies if another defendant in the same controversy is a citizen of the same state with the plaintiff.⁴

Rearrangement of Parties. — The position of the parties on the record is immaterial, and the court will arrange them on either side according to the nature and character of the controversy.⁵

(3) *Separable Character of Controversy* — (a) **General Tests** — *aa.* **SUIT MUST CONTAIN SEPARATE CAUSES OF ACTION** — **Rule Stated.** — There must exist a separate and distinct cause of action on which a separate and distinct suit might have been brought and complete relief afforded as to such cause of action, with all the parties on one side of that controversy citizens of different states from those on the other.⁶

Susceptible of Separate Trials. — The separate controversies must be

1. In the vast majority of cases, especially in the federal Supreme Court, the courts have held that there was no separable controversy.

2. *George v. Pilcher*, 28 Gratt. (Va.) 305.

In a suit by a State it was held that "neither the whole of plaintiff's suit nor a separate controversy embraced therein can be removed." *Texas v. Day Land, etc., Co.*, 49 Fed. Rep. 597.

3. *Hervey v. Illinois Midland R. Co.*, 7 Biss. (U. S.) 107.

Alien Plaintiff. — A suit cannot be removed on the ground of a separable controversy between a citizen defendant and an alien plaintiff. *Deakin v. Lea*, 11 Biss. (U. S.) 30; *Creagh v. Equitable L. Assur. Soc.*, 88 Fed. Rep. 1.

An Alien Defendant cannot remove the suit on this ground. See *infra*, I. 19. *e.* (1) *Only Nonresident Citizen Defendant Actually Interested.*

4. *Sloane v. Anderson*, 117 U. S. 279; *Creagh v. Equitable L. Assur. Soc.*, 88 Fed. Rep. 1; *Scoutt v. Keck*, 73 Fed. Rep. 906; *Thompson v. Dixon*, 28 Fed. Rep. 8, where for the sake of argument the court conceded that there was a separable controversy, but remanded the cause for the reason that one of the necessary parties to the separable controversy whose interest was adverse to that of the petitioner for removal was

a citizen of the same state with him; *Mutual L. Ins. Co. v. Allen*, 134 Mass. 389.

The suit is not removable unless the citizenship of the parties to the alleged separable controversy is such that if it had been sued on alone the defendants therein could have removed it. *Hyde v. Ruble*, 104 U. S. 410.

5. *Insurance Co. of North America v. Delaware Mut. Ins. Co.*, 50 Fed. Rep. 250, where the court said: "But this always has reference to the controversies made by the pleadings, and does not authorize the interjection of a suit not made by the pleadings, nor authorize the court to construct pleadings that do not exist for such interjected suit. The controversy must be in the shape of a suit, and not a bare abstract idea, which might take the form of a suit if the parties were so minded."

6. *Ayres v. Wiswall*, 112 U. S. 192; *Louisville, etc., R. Co. v. Ide*, 114 U. S. 55; *Fraser v. Jennison*, 106 U. S. 194; *Hyde v. Ruble*, 104 U. S. 409; *Barney v. Latham*, 103 U. S. 205, in which case this condition was fulfilled; *Mutual Reserve Fund L. Assoc. v. Farmer*, 77 Fed. Rep. 931; *Security Co. v. Pratt*, 64 Fed. Rep. 406; *Burgunder v. Browne*, 59 Fed. Rep. 498; *Le Mars v. Iowa Falls, etc., R. Co.*, 48 Fed. Rep. 662; *Patchin v. Hunter*,

such as would admit in a just sense of separate and distinct trials,¹ and although, as will presently appear,² a removal carries

38 Fed. Rep. 53; *Rumsey v. Call*, 28 Fed. Rep. 770; *Thompson v. Dixon*, 28 Fed. Rep. 7; *Perrin v. Lepper*, 26 Fed. Rep. 547; *New Jersey Zinc, etc., Co. v. Trotter*, 18 Fed. Rep. 337; *Connell v. Utica, etc., R. Co.*, 13 Fed. Rep. 241; *Le Mars v. Iowa Falls, etc., R. Co.*, 4 McCrary (U. S.) 218; *Townsend v. Sykes*, 38 La. Ann. 410; *O'Kelly v. Richmond, etc., R. Co.*, 89 N. Car. 58; *Faison v. Hardy*, 114 N. Car. 429; *Springer v. Sheets*, 115 N. Car. 379; *National Docks, etc., R. Co. v. Pennsylvania R. Co.*, 52 N. J. Eq. 59; *Northwestern, etc., Hypotheek Bank v. Suksdorf*, 15 Wash. 477.

The removal act "does not contemplate the splitting up into different parts of a cause of action which the plaintiff is entitled to prosecute as a single suit, simply because a part of the cause might be fully determined as between the parties before the court, leaving the other part to be determined in another independent suit." *Golden v. Bruning*, 72 Fed. Rep. 5.

Pending a suit praying for the appointment of a receiver of an insolvent railway company, a trustee for mortgage bondholders took possession of the road under the mortgage and was joined as a defendant by an amended bill. It was held that he could not remove the suit, although he was solely interested in the question of the actual possession of the premises, since the solution of that question might depend upon the appointment of a receiver, which could not be made without the presence of the railroad company. *Watson v. Asbury Park, etc., St. R. Co.*, 73 Fed. Rep. 1.

Instances of Separable Controversies. — In *Sharp v. Whiteside*, 19 Fed. Rep. 150, the question was whether the plaintiff had a right to carry passengers into a park owned by one of the defendants and leased to the other defendants. It was held that the plaintiff and the lessor had a separable controversy.

Where in an action concerning the title to realty the defendant calls in his warrantor against whom the statute provides for no judgment in favor of the plaintiff, but only in favor of the defendant, the latter may remove the suit on account of his separable controversy. *Davis v. Montgomery*, 36 La. Ann. 874. But the warrantor can-

not remove it. *Hebert v. Lefevre*, 31 La. Ann. 363.

A suit against a debtor and one who had assumed his debts presents a separable controversy with the latter. *Mecke v. Valley Town Mineral Co.*, 89 Fed. Rep. 209.

Cause of Action and Separable Controversy Not Identical. — On the other hand, "a separate controversy is not identical in signification with a separable cause of action. There may be separate remedies against several parties for the same cause of action, but there is only one subject-matter of controversy involved." *Gudger v. Western North Carolina R. Co.*, 21 Fed. Rep. 83. See also *Boyd v. Gill*, 19 Fed. Rep. 145; *Western Union Tel. Co. v. National Tel. Co.*, 19 Fed. Rep. 561.

"The Case Must Be One Capable of Separation into Parts, so that in one of the parts a controversy will be presented with citizens of one or more states on one side, and citizens of other states on the other, which can be fully determined without the presence of any of the other parties to the suit as it has been begun." *Per Waite, C. J.*, in *Fraser v. Jennison*, 106 U. S. 194, quoted in *Brown v. Trousdale*, 138 U. S. 396; *Louisville, etc., R. Co. v. Ide*, 114 U. S. 55; *Ayres v. Wiswall*, 112 U. S. 192; *Texas v. Day Land, etc., Co.*, 49 Fed. Rep. 593. See also *Hyde v. Ruble*, 104 U. S. 407; *Barth v. Coler*, 60 Fed. Rep. 466; *Ames v. Chicago, etc., R. Co.*, 39 Fed. Rep. 882; *Sexton v. Seelye*, 39 Fed. Rep. 705; *Anderson v. Appleton*, 32 Fed. Rep. 859; *Waller v. J. B. Pace Tobacco Co.*, 32 Fed. Rep. 860; *Mutual L. Ins. Co. v. Allen*, 134 Mass. 389; *George v. Pilcher*, 28 Gratt. (Va.) 299.

1. *Corbin v. Van Brunt*, 105 U. S. 576, in which case the suit was for the recovery of land and damages for its detention; the controversy in regard to the recovery of the land was between citizens of the same state, and the one for damages for the detention between citizens of different states. The court held that separate and distinct trials of these issues were not admissible, and that the case should be remanded. The principle was applied in *Mills v. Central R. Co.*, 20 Fed. Rep. 449.

2. See *infra*, I. 16. b. (4) *Removal Carries Entire Suit*.

all the controversies in the suit, it should be assumed in determining the question of their separability that the jurisdiction is to be divided between the federal and state courts, and if it then appears that diverse rulings in the different courts on an issue common to all the controversies would confound the just rights of the parties, there can be no removal.¹

bb. MUST AFFORD COMPLETE RELIEF — Acts of 1875 and 1887-1888 Construed Alike. — The Act of 1887-1888, so far as it relates to separable controversies, provides for the removal of a suit in which there "shall be a controversy which is wholly between citizens of different states."² That was also the language of the Act of 1875,³ and the decisions construing the last-mentioned act are followed in construing its counterpart in the Act of 1887-1888.⁴

The Supreme Test. — Under both acts it has been uniformly held that the whole subject-matter of the suit must be capable of being finally determined between the citizens of different states, and complete relief afforded as to the separate cause of action, without the presence of other persons originally made parties to the suit.⁵ This would seem to be the supreme test of separability

1. Stating the proposition in another way, if the rights of all the defendants must be measured and determined by the same rule the controversies cannot be regarded as separate. *In re Foley*, 80 Fed. Rep. 949.

Where the judgment must be for or against all the defendants there is no separable controversy. *State v. Columbus, etc., R. Co.*, 48 Fed. Rep. 626. See also *Rogers v. Van Nortwick*, 45 Fed. Rep. 514.

2. 24 U. S. Stat. at L. 553, c. 373, § 2; 25 U. S. Stat. at L. 434, c. 866, § 2. See the text of the Act, *supra*, p. 208, note 2.

3. 18 U. S. Stat. at L. 470, c. 137, § 2.

The original "separable controversy" Act of 1866, 14 U. S. Stat. at L. 306, c. 288, re-enacted in Rev. Stat. U. S., § 639, provided for removal by a defendant where "there can be a final determination of the controversy so far as concerns him, without the presence of the other defendants as parties in the cause."

The "Prejudice or Local Influence" Act of 1867, 14 U. S. Stat. at L. 558, c. 196, provided for the removal of "a suit * * * in which there is controversy between a citizen of the state in which the suit is brought and a citizen of another state;" and in the *Sewing Mach. Co.'s Case*, 18 Wall. (U. S.) 553, the provision was construed to require a controversy between the citizens of different states exclusively, and not to

permit a removal if indispensable parties on both sides of the suit were citizens of the same state.

4. *New York Constr. Co. v. Simon*, 53 Fed. Rep. 1; *Rogers v. Van Nortwick*, 45 Fed. Rep. 514; *Western Union Tel. Co. v. Griffith*, 104 Ga. 56. See also *Vinal v. Continental Constr., etc., Co.*, 34 Fed. Rep. 228.

Cases under the Act of 1866 are not always applicable because the removal under that act split the suit. See, for instance, *McGinnity v. White*, 3 Dill. (U. S.) 355, where an action on contract against partners was held removable by one of them, and the cause proceeded against the others in the state court. Such a suit would not now be removable. See also *Allen v. Ryerson*, 2 Dill. (U. S.) 503; *Simmons v. Taylor*, 83 N. Car. 148.

5. *Cases in Federal Courts.* — *Hanrick v. Hanrick*, 153 U. S. 196; *Wilson v. Oswego Tp.*, 151 U. S. 67; *Merchants Cotton Press, etc., Co. v. Insurance Co. of North America*, 151 U. S. 368; *Bellaire v. Baltimore, etc., R. Co.*, 146 U. S. 117; *Blake v. McKim*, 103 U. S. 339; *Brooks v. Clark*, 119 U. S. 502; *Crump v. Thurber*, 115 U. S. 56; *Winchester v. Loud*, 108 U. S. 130; *Shainwald v. Lewis*, 108 U. S. 158; *Ayers v. Chicago*, 101 U. S. 184; *East Tennessee, etc., R. Co. v. Grayson*, 119 U. S. 240; *Central R. Co. v. Mills*, 113 U. S. 249; *Davis v. County Ct.*, 88 Fed. Rep. 705; *Sweeney v. Grand Island, etc., R.*

within the contemplation of the removal act, since there is serious doubt of the constitutionality of the act if it were construed

Co., 61 Fed. Rep. 5; *Barth v. Coler*, 60 Fed. Rep. 466; *Security Co. v. Pratt*, 64 Fed. Rep. 406; *Thurber v. Miller*, 67 Fed. Rep. 371; *Thompson v. Dixon*, 28 Fed. Rep. 7; *Perrin v. Lepper*, 26 Fed. Rep. 547; *In re McClean*, 26 Fed. Rep. 49; *Long v. Buford*, 24 Fed. Rep. 241; *Freidler v. Chotard*, 19 Fed. Rep. 227. See also *Gardner v. Brown*, 21 Wall. (U. S.) 36; *St. Louis, etc., R. Co. v. Wilson*, 114 U. S. 60.

Cases in State Courts.—*Townsend v. Sykes*, 38 La. Ann. 410; *Mutual L. Ins. Co. v. Allen*, 134 Mass. 389; *National Docks, etc., R. Co. v. Pennsylvania R. Co.*, 52 N. J. Eq. 59; *O'Kelly v. Richmond, etc., R. Co.*, 89 N. Car. 58; *Faison v. Hardy*, 114 N. Car. 429; *George v. Pilcher*, 28 Gratt. (Va.) 299; *Northwestern, etc., Hypotheek Bank v. Suksdorf*, 15 Wash. 477. See also *Crane v. Seitz*, 30 Mich. 453.

"The test in these cases is not whether the relief which a complainant or plaintiff (as the case may be) shall be able to reach and gain against one defendant is different from that which he may obtain against another defendant. * * * The test is whether the controversies are so blended and commingled as substantially to involve the same inquiries and conclusions." *Per Severens, J.*, in *Lewis v. Weidenfeld*, 76 Fed. Rep. 146.

"It is not enough that citizens of different states must be interested in the same issue or question, or controversy, which arises in the course of the case; but they must have such an interest that when the question to which they are parties is settled, the suit is thereby determined, or the right of removal is not given." *Per Blodgett, J.*, in *Carraher v. Brennan*, 7 Biss. (U. S.) 500.

In *Donohoe v. Mariposa Land, etc., Co.*, 5 Sawy. (U. S.) 169, an equity suit, Judge Sawyer, holding that full relief could not be granted without the presence of all the defendants, said: "It is no answer to say that the whole suit would be transferred, and that then there would be but one decree, which would bind all parties, for we are not discussing the question as to what would be transferred, but are dealing with the test which the statutes have prescribed, by which to determine whether anything can be transferred.

And that test is that there must be a controversy which is wholly between the separate parties, which can be fully determined as between them so as to be effectual in separate actions. If such determination cannot be had separately and independently, then the case is not one which the statute authorizes to be transferred at all, either wholly or in part."

In a Replevin Suit Against Several Attaching Creditors whose attachments were levied by the sheriff simultaneously there is no separable controversy between any of the defendants and the plaintiff. *Temple v. Smith*, 4 Fed. Rep. 392.

Suit on a Judgment.—In a suit to enforce a judgment against the defendant therein, uniting as a defendant, among others, the indorser of the notes on which the judgment was rendered, and seeking to subject securities in his hands to the payment of the judgment, such indorser could not remove the suit, although his liability as indorser was one in which his codefendants had no interest, since "he was united with them in respect to other matters where there could be no final determination of the controversy, so far as it concerned him, without their presence." *Yulee v. Vose*, 99 U. S. 544.

Same Proof Applicable to Ali.—"If a party brings a suit in a state court against two or more defendants, upon a cause of action of such a character that he has a right to proceed to judgment against all, and where the same proof applies to all, it is not a divisible or separable controversy." *Per McCrary, J.*, in *Le Mars v. Iowa Falls, etc., R. Co.*, 4 McCrary (U. S.) 220.

Prayer for Separate Accounting.—In *Vinal v. Continental Constr., etc., Co.*, 34 Fed. Rep. 228, the suit was held to present a separable controversy with the removing defendant "because the bill of complaint avers a cause of action, and prays for damages and an accounting as against that defendant alone, for failure to perform a contract." *Following Boyd v. Gill*, 19 Fed. Rep. 145, 21 Blatchf. (U. S.) 543. See also *Jones v. Foreman*, 66 Ga. 381.

In an action to restrain the operation of an unlicensed ferry it was held that the suit was not removable merely because the plaintiff demanded an ac-

to allow the removal of a single indivisible suit which is not entirely between citizens of different states.¹

Controversy Not Properly in Suit.—A defendant cannot have a removal upon the ground of an alleged separable controversy which cannot possibly be litigated in the suit.²

In a **Suit upon a Right of Action Created by Statute** there is no separable controversy between the plaintiff and any one defendant where

count of "any or either" of the defendants. *New York v. New Jersey Steam-Boat Transp. Co.*, 24 Fed. Rep. 818, where the court said: "The account demanded from each is a mere incident to the principal relief, and does not constitute a separable controversy, as in the cases of *Boyd v. Gill*, 21 Blatchf. (U. S.) 543, and *Langdon v. Fogg*, 18 Fed. Rep. 5, where the cause of action itself was joint and several. On this point also the decision of the circuit judge in the case of *New York v. Independent Steam-Boat Co.*, 21 Fed. Rep. 593, is strictly in point and must be held to be controlling."

1. Constitutional Questions.—No question seems ever to have been made by the federal courts as to the power of Congress to authorize the removal of a cause where there is one controversy between citizens of different states and another between the plaintiff and some defendants who are citizens of the same state with him. See *Corbin v. Boies*, 18 Fed. Rep. 5. Some of the authorities, especially in the federal courts, incline to the opinion, without any express decision on the point, that where there is in any case a substantial controversy between citizens of different states, the constitutional grant of judicial power attaches to it so as to sustain an Act of Congress authorizing the whole case to be removed irrespective of the separability of such controversy, although it is conceded that none of the Acts of Congress has been intended to vitalize the constitutional power to that extent. See the dissenting opinion of Justice Bradley in *Removal Cases*, 100 U. S. 479, and his opinion in *Girardey v. Moore*, 3 Woods (U. S.) 401. See also *Sheldon v. Keokuk Northern Line Packet Co.*, 1 Fed. Rep. 796 *et seq.*; *Ruckman v. Ruckman*, 1 Fed. Rep. 589; *Bybee v. Hawsett*, 5 Fed. Rep. 9; *Chester v. Chester*, 7 Fed. Rep. 5. For contrary views see *Ex p. Andrews*, 40 Ala. 649, where the court said: "The judicial power of the United States does not ex-

tend to cases in which citizens of a state sue citizens of the same state and citizens of another state, and the plaintiff's demand against all the defendants is joint and incapable of separation and division by the defendants." And see *Iowa Homestead Co. v. Des Moines Nav., etc., Co.*, 8 Fed. Rep. 102; *Bliss v. Rawson*, 43 Ga. 183; *Stafford v. Twitchell*, 33 La. Ann. 524; *Florence Sewing Mach. Co. v. Grover, etc.*, *Sewing Mach. Co.*, 110 Mass. 80; *Bryant v. Rich*, 106 Mass. 192.

The Leading Case wherein it was held that there was a separable controversy is *Barney v. Latham*, 103 U. S. 205. In that case the plaintiff sued a corporation and several individual defendants, claiming the equitable title to certain lands of which the corporation held the legal title, and seeking a decree for conveyance thereof to the plaintiff, and also seeking a decree against the individual defendants for a sum that should be found due from them upon an accounting for sales of land made by them before the corporation came into existence. It was held that the individual defendants could remove the case on account of the separable controversy with them. The leading case wherein it was held that no separable controversy existed was formerly considered to be *Blake v. McKim*, 103 U. S. 336. But in present estimation it seems that *Graves v. Corbin*, 132 U. S. 571, has a much stronger claim to be the leading authority.

2. In a Foreclosure Suit a third person who was made a party as claiming some unknown interest appeared and petitioned for removal on the ground of an alleged separable controversy consisting of his claim to the property by an independent and paramount title. It was held that inasmuch as such claim could not, according to the rules of equity pleading, be litigated in the foreclosure suit, he had no right of removal. *California Safe Deposit, etc., Co. v. Cheney Electric Light, etc., Co.*, 56 Fed. Rep. 257.

the statute makes all the defendants indispensable parties to the relief sought.¹

Only One Substantial Defendant. — Where the defendant who petitions for removal is the only substantial defendant, and the interests of the other defendants are subordinated to and dependent on his, it appears that he has a separate controversy.²

cc. SEPARATE DEFENSES IMMATERIAL — (*aa*) *In General* — **The Rule Stated.** — A separate defense by one defendant in a joint suit against him and others upon a joint or a joint and several cause of action does not create a separate controversy so as to entitle that defendant, if the necessary citizenship exists as to him, to a removal of the cause.³

Defense Inuring to Benefit of All. — Nor is a suit made removable because a defendant's separate defense peculiar to himself may defeat the entire suit.⁴

More Proof Required. — The necessity of proving more facts to warrant a recovery against one defendant than are necessary to warrant a recovery against a codefendant cannot be accepted as a test to determine whether a cause of action is divisible.⁵

(*bb*) *Actions on Contracts.* — The interposition of separate defenses

1. *Lyddy v. Gano*, 26 Fed. Rep. 177, a creditors' suit against the heirs of a deceased debtor to subject lands descended to them.

2. In *Mitchell v. Smale*, 140 U. S. 409, an action of ejectment in Illinois against a landlord and his tenant, the latter admitting the tenancy, it was strongly intimated that the landlord would be entitled to a removal on the ground of a separable controversy between him and the plaintiff, the court considering that *Ayers v. Watson*, 113 U. S. 594, sustained this view, though the point was not expressly adjudged in that case. However, three of the justices dissented, insisting that under the Illinois statute the tenant was a necessary party, and that "in *Phelps v. Oaks*, 117 U. S. 236, which was also an action of ejectment, tenant and landlord being parties defendant, the latter coming in as here after the commencement of the suit, this court held that 'the plaintiff has a real and substantial controversy with the defendant (the tenant), within the meaning of the act for removal of causes from state courts, which continues after his landlord is summoned in and becomes a party for the purpose of protecting his own interests.'"

3. *Starin v. New York*, 115 U. S. 259; *Corbin v. Van Brunt*, 105 U. S. 577; *Robbins v. Ellenbogen*, 71 Fed.

Rep. 4; *State v. Columbus, etc.*, R. Co., 48 Fed. Rep. 626, a mandamus proceeding; *Connecticut v. Adams*, 6 Ohio Cir. Dec. 46, 2 Ohio Dec. 119, proceedings in the Probate Court to sell real estate of a decedent to pay debts.

Several Remonstrants in Drainage Proceedings. — In a proceeding to establish and construct a drain and to charge upon all the lands benefited by its construction the amount of such benefits, the fact that each remonstrant has a separate defense by setting up that the proposed drain is not practicable, or is not of public utility, or that his assessment is too large as compared with the assessments of any or all other parties to the proceedings, does not create a separable controversy. *In re Jarnecke Ditch*, 69 Fed. Rep. 161.

4. *In re Jarnecke Ditch*, 69 Fed. Rep. 171. The fact that a defense set up by the defendant who petitions for removal will, if established, inure to the benefit of all the other defendants does not make it removable by him. *Plymouth Gold Min. Co. v. Amador, etc.*, Canal Co., 118 U. S. 269.

5. *Ames v. Chicago, etc.*, R. Co., 39 Fed. Rep. 884, where the court said: "It often occurs in practice, where the cause of action is single, that proof sufficient to establish the liability of one defendant is not sufficient to establish the liability of another."

does not make a suit on a contract divisible for the purpose of removal,¹ and the fact that the state statute allows the plaintiff in an action upon a joint contract to recover against those who are actually liable if it appears that only a portion are bound does not divide the joint suit into separate parts.²

(cc) *Suits in Equity* — **General Rule.** — The rule that a separate defense does not introduce a separate controversy into the suit applies to suits in equity.³

1. Louisville, etc., R. Co. v. Ide, 114 U. S. 52; Putnam v. Ingraham, 114 U. S. 57; Brooks v. Clark, 119 U. S. 511; Texas v. Day Land, etc., Co., 49 Fed. Rep. 597; Patchin v. Hunter, 38 Fed. Rep. 51; Woodrum v. Clay, 33 Fed. Rep. 899. See also Hyde v. Ruble, 104 U. S. 407.

Suit Against Connecting Carriers. — In Louisville, etc., R. Co. v. Ide, 114 U. S. 52, the suit was originally brought by Ide in the Supreme Court of New York against several railroad companies forming a continuous line, including the plaintiff in error, to recover damages for the loss of cotton shipped at one end of the line and destined to the other. The Louisville and Nashville Company separated in pleading, denied that the loss had occurred on its road, and removed the case, alleging in the petition for removal that the controversy with it was a separable one. The Circuit Court remanded the suit, and the order to remand was affirmed.

In an Action on a Policy of Insurance against an insurance company and one claiming the policy as an assignee, the company has no separable controversy with either of the others. McNulty v. Connecticut Mut. L. Ins. Co., 46 Fed. Rep. 305.

Actions Against Principal and Surety. — "The proposition is * * * untenable that an action brought against a principal and his surety on a bond, note, or other obligation involves a separable controversy, such as will entitle one of the defendants to remove the case to the federal court if he and the plaintiff happen to be citizens of different states." Mutual Reserve Fund L. Assoc. v. Farmer, 77 Fed. Rep. 931. See also Western Union Tel. Co. v. Brown, 32 Fed. Rep. 337.

An Action on a Joint Bond against all the obligors presents no separable controversy. Folsom v. Continental Nat. Bank, 14 Fed. Rep. 497.

2. Louisville, etc., R. Co. v. Ide, 114 U. S. 56; Putnam v. Ingraham, 114 U. S. 57.

3. Merchants Cotton Press, etc., Co. v. Insurance Co. of North America, 151 U. S. 381; Rosenthal v. Coates, 148 U. S. 142, a bill in equity by an assignee for the benefit of creditors to disencumber the fund in his possession from alleged liens, each defendant setting up a separate defense to the plaintiff's claim; Graves v. Corbin, 132 U. S. 578; Fidelity Ins. Co. v. Huntington, 117 U. S. 280; Little v. Giles, 118 U. S. 596, a bill to quiet title; Starin v. New York, 115 U. S. 248; St. Louis, etc., R. Co. v. Wilson, 114 U. S. 62; Ayres v. Wiswall, 112 U. S. 187; Guarantee Co. v. Mechanics' Sav. Bank, etc., Co., 80 Fed. Rep. 771; Turnbull Wagon Co. v. Linthicum Carriage Co., 80 Fed. Rep. 6; Thurber v. Miller, 67 Fed. Rep. 374; Sweeney v. Grand Island, etc., R. Co., 61 Fed. Rep. 6; Insurance Co. of North America v. Delaware Mut. Ins. Co., 50 Fed. Rep. 258; Wilder v. Virginia, etc., Steel, etc., Co., 46 Fed. Rep. 682; *In re* San Antonio, etc., R. Co., 44 Fed. Rep. 145; Ames v. Chicago, etc., R. Co., 39 Fed. Rep. 883; Sexton v. Seelye, 39 Fed. Rep. 705; Bissell v. Canada, etc., R. Co., 39 Fed. Rep. 226; Hax v. Caspar, 31 Fed. Rep. 499; Shaver v. Hardin, 30 Fed. Rep. 802; Thompson v. Dixon, 28 Fed. Rep. 5; Rumsey v. Call, 28 Fed. Rep. 771; Long v. Buford, 24 Fed. Rep. 247; Rich v. Gross, 29 Neb. 340; National Docks, etc., R. Co. v. Pennsylvania R. Co., 52 N. J. Eq. 65; Clark v. Opdyke, 10 Hun (N. Y.) 383. Compare Connell v. Smiley, 156 U. S. 340.

"The option is with the plaintiff and not with the defendants to determine whether or not he will have the complete relief to which the rules and practice in equity entitle him, in a single suit or in several suits." Sweeney v. Grand Island, etc., R. Co., 61 Fed. Rep. 5.

Counterclaim. — A separable controversy cannot be created by filing a counterclaim in an equity suit, since such a pleading will not survive a removal to the federal court.¹

Cross-bill. — In an equity suit, if there is no separable controversy made by the original bill, the federal court will not retain the cause on account of any controversy in a cross-bill filed by a codefendant against the plaintiff and the removing defendant.²

(*dd*) **Actions in Tort — Rule Stated.** — An action of tort which might have been brought against many persons or against any one or more of them, and which is brought in a state court against all jointly, contains no separate controversy which will authorize its removal by some of the defendants into the federal Circuit Court, even if they file separate answers and set up different defenses from the other defendants, and allege that they are not jointly liable with them, and that their own controversy with the plaintiff is a separate one.³

1. *Brande v. Gilchrist*, 18 Fed. Rep. 465, pointing out that such a pleading in equity cannot be recognized in the federal courts.

2. *Donohoe v. Mariposa Land, etc., Co.*, 5 Sawy. (U. S.) 163, since a cross-bill cannot "go beyond the matters of the original bill."

In *Maish v. Bird*, 48 Fed. Rep. 608, McCrary, J., said: "It is not necessary to decide whether, in any case, a defendant in a chancery suit can, by allegations in a cross-bill, present issues upon which he can remove the cause to a federal court when the parties to the main controversy, the obligor and obligee in the contract sued on, are citizens of the same state."

3. *Per* Justice Gray, in *Powers v. Chesapeake, etc., R. Co.*, 169 U. S. 97; *Louisville, etc., R. Co. v. Wangelin*, 132 U. S. 601; *Plymouth Gold Min. Co. v. Amador, etc., Canal Co.*, 118 U. S. 264; *Pirie v. Tvedt*, 115 U. S. 43; *Sloane v. Anderson*, 117 U. S. 275; *Little v. Giles*, 118 U. S. 596; *Torrence v. Shedd*, 144 U. S. 530; *Connell v. Smiley*, 156 U. S. 340; *Hyde v. Ruble*, 104 U. S. 407; *Ayres v. Wiswall*, 112 U. S. 192; *Creagh v. Equitable L. Assur. Soc.*, 88 Fed. Rep. 1; *Deere v. Chicago, etc., R. Co.*, 85 Fed. Rep. 881; *Mutual Reserve Fund L. Assoc. v. Farmer*, 77 Fed. Rep. 931; *Brown v. Cox*, 75 Fed. Rep. 689; *Warax v. Cincinnati, etc., R. Co.*, 72 Fed. Rep. 640; *Ferguson v. Chicago, etc., R. Co.*, 63 Fed. Rep. 178; *Arrow-smith v. Nashville, etc., R. Co.*, 57 Fed. Rep. 165; *O'Harrow v. Henderson*, 52 Fed. Rep. 769, an action against two

defendants jointly for malicious prosecution and false imprisonment, where one defendant filed his separate answer and then petitioned for removal; *Dow v. Bradstreet Co.*, 46 Fed. Rep. 826; *First Presb. Soc. v. Goodrich Transp. Co.*, 10 Biss. (U. S.) 319; *Western Union Tel. Co. v. Griffith*, 104 Ga. 56. See also *Nelson v. Hennessey*, 33 Fed. Rep. 113; *Gudger v. Western North Carolina R. Co.*, 21 Fed. Rep. 84; *Smith v. Rines*, 2 Sumn. (U. S.) 338; *Illinois Cent. R. Co. v. Le Blanc*, 74 Miss. 626; *Bowley v. Richmond, etc., R. Co.*, 110 N. Car. 315. *Contra*, *Spangler v. Atchison, etc., R. Co.*, 42 Fed. Rep. 305, which would not now be regarded as sound.

"A defendant has no right to say that an action shall be several which a plaintiff elects to make joint. * * * A separate defense may defeat a joint recovery, but it cannot deprive a plaintiff of his right to prosecute his own suit to final determination in his own way." * * * The fact that a judgment in the action may be rendered against a part of the defendants only does not divide a joint action in tort into separate parts any more than it does a joint action on contract." *Pirie v. Tvedt*, 115 U. S. 43.

There is no separable controversy between the plaintiff and one of several defendants sued as joint trespassers, though the defendant seeking removal alleges in his petition therefor that the other defendants acted as his agents under his express direction, with a bond of indemnity, and though by the state statute his property must

A Fortiori it is not removable where the defendants set up no separate defenses.¹

Election to Sue Less than All. — Nor does a plaintiff by suing less than all of the tortfeasors thereby elect to make the action severable as to any of the defendants.²

An Important Qualification of the General Rule in certain classes of torts is considered in another section.³

(*ee*) **Codefendant Not Served.** — The right of removal on the ground of a separable controversy must be tested solely by the case made by the plaintiff in his pleading.⁴ Hence it is unimportant that one of the defendants has not been served with process and has not appeared.⁵

(*ff*) **Disclaimer or Default of Codefendant.** — The fact that one of the defendants files a disclaimer of interest, and thereby in a sense passes out of the controversy, does not leave a separable controversy as to the other remaining and contesting defendant.⁶ Nor

first be exhausted on execution before that of the other defendants can be sold. *Thorn Wire Hedge Co. v. Fuller*, 122 U. S. 535.

No Cause of Action Alleged Against One. — In *Evans v. Felton*, 96 Fed. Rep. 176, where an action of tort was removed on the ground of an alleged separable controversy, *Kohlsaat, D. J.*, in remanding the cause, said: "Defendant's contention in support of the proposition that the controversy herein is severable as to him is that the declaration fails to state a cause of action as against him, while it does state a good cause of action as against the other defendant. The declaration charges that the two defendants jointly committed the tort. It is admitted that if the averments of fact were sufficient to support this charge the cause would not be severable. *Railroad Co. v. Wangelin*, 132 U. S. 599. I hold that under the facts in this case, where the declaration in form charges a joint tort against two or more defendants, the question of whether or not the declaration states facts sufficient to establish a good cause of action against either of the defendants is one for the determination of the state court."

Instance of Separable Controversy. — In a suit against the sureties in an attachment bond for damages in suing out a wrongful attachment, where only actual damages could be recovered against them, and the parties who sued out the attachment were joined as codefendants against whom vindictive damages were recoverable and claimed, the latter were held to have a separable

and removable controversy with the plaintiff. *Feibleman v. Edmonds*, 69 Tex. 334.

1. *Core v. Vinal*, 117 U. S. 347.

2. *Fox v. Mackay*, 60 Fed. Rep. 4.

3. See *infra*, I. 16. *b.* (3) (*c*) *bb.* (*bb*) *Exception to Rule.*

4. *Ames v. Chicago, etc.*, R. Co., 39 Fed. Rep. 884; *Sexton v. Seelye*, 39 Fed. Rep. 705. See also *infra*, I. 16. *b.* (3) (*c*) *bb.* (*aa*) *General Rule.*

5. *Ames v. Chicago, etc.*, R. Co., 39 Fed. Rep. 881, holding that the other defendants could not remove the suit; *Patchin v. Hunter*, 38 Fed. Rep. 51.

6. *Hax v. Caspar*, 31 Fed. Rep. 500, where *Brewer, J.*, said: "Recent decisions of the Supreme Court have materially limited what seemed to be the import of the rule in *Barney v. Latham*, 103 U. S. 205, and in effect say that the removal does not depend upon the question of what issue remains to be tried, but it is to be determined by the nature of the cause of action presented in the complaint." *Citing Louisville, etc.*, R. Co. *v. Ide*, 114 U. S. 57, and *Putnam v. Ingraham*, 114 U. S. 57. See also *Rumsey v. Call*, 28 Fed. Rep. 770; *Washington v. Columbus, etc.*, R. Co., 53 Fed. Rep. 673. But compare *Reed v. Hardman County*, 77 Tex. 165.

Withdrawal of Defense. — In *Brown v. Trousdale*, 138 U. S. 389, a petition for removal by one of the defendants in an equity suit. It was held not to be a controlling circumstance that on the day of the order of removal the other necessary defendants withdrew their pleadings and made affidavit that they

does the fact that a necessary defendant has suffered a default for want of an answer put him outside of the case with reference to the right of the other defendants to a removal,¹ even where such defendant's default has been followed by a final judgment against him,² since a removal, if allowed, would carry the entire case,³ including that judgment, and the federal court would have the anomalous duty of executing the judgment of a state court.⁴

dd. EVENT OF SUIT NOT TEST. — Where there is community of citizenship between some of the parties to a suit, the fact that the suit actually terminates in a judgment or decree between parties having the requisite diversity of citizenship will not prevent the cause from being remanded by the federal Supreme Court on appeal or error.⁵

ee. MISJOINDER OR MULTIFARIOUSNESS. — A Misjoinder of Parties may constitute a defense for one or all of the defendants, but such defense is not a controversy within the meaning of the statute.⁶

believed the justice of the cause was with the plaintiffs, that they therefore did not choose to resist in the premises, and denied at the same time all collusion.

1. *Wilson v. Oswego Tp.*, 151 U. S. 66, reversing 30 Fed. Rep. 521; *Putnam v. Ingraham*, 114 U. S. 59; *In re Jarnecke Ditch*, 69 Fed. Rep. 169; *Faison v. Hardy*, 114 N. Car. 434; *Tate v. Douglas*, 113 N. Car. 190.

2. *Burch v. Davenport, etc., R. Co.*, 46 Iowa 454; *Brooks v. Clark*, 119 U. S. 502, holding that the case differed from *Putnam v. Ingraham*, 114 U. S. 57, cited in the preceding note, "only in degree and not in kind," and *distinguishing Yulee v. Vose*, 99 U. S. 539, on the ground that the latter case was decided under the Act of July 27, 1866, 14 U. S. Stat. at L. 306, c. 288, which provided for a removal of the separable controversy and not the entire suit. See also *Fairchild v. Durand*, (N. Y. Super. Ct. Spec. T.) 8 Abb. Pr. (N. Y.) 305.

In *Rosenthal v. Coates*, 148 U. S. 147, a species of interpleader suit, the plaintiff, under a mistaken notion of the law, paid to some of the defendants the amount due them, pending an appeal, but it was held that as they were still parties to the record, against whom the plaintiff might be entitled to some sort of relief, they were not eliminated from the suit so as to enable the sole remaining defendant to remove the cause on the ground of a separable controversy. *Distinguishing Yulee v. Vose*, 99 U. S. 539.

Appeal Pending. — *A fortiori* a judg-

ment by default against some of the defendants does not end the controversy as to them where they have appealed from the judgment. *Mooney v. Agnew*, 4 Fed. Rep. 7.

3. See *infra*, I. 16. b. (4) *Removal Carries Entire Suit*.

Judgment Satisfied Before Removal. — In Removal Cases, 100 U. S. 469, a judgment against some of the defendants in respect of one part of the suit had been disposed of by levy and sale under execution. Thereupon another defendant who was then first brought into the suit by actual service of process was held entitled to remove the suit as to his controversy with the plaintiff.

4. *Brooks v. Clark*, 119 U. S. 513. See also *Burch v. Davenport, etc., R. Co.*, 46 Iowa 454, and another point suggested in *Fairchild v. Durand*, (N. Y. Super. Ct. Spec. T.) 8 Abb. Pr. (N. Y.) 310.

5. *Crump v. Thurber*, 115 U. S. 60, where the court said that "the event of the suit * * * is not a proper test of the jurisdiction."

6. *Deere v. Chicago, etc., R. Co.*, 85 Fed. Rep. 876, where *Shiras, J.*, said: "If, upon the face of the petition [the plaintiff's pleading], it appears that the plaintiff has joined therein two controversies, separate and distinct, and that one of them is between citizens of different states and involves the requisite amount, then the right of removal is shown to exist, no matter whether the two actions could be properly joined in one suit or not. A misjoinder of parties as defendants to one

Multifariousness in Bill in Equity. — If a bill in equity presents separable controversies it is no objection to removal that the bill is multifarious in that regard.¹

ff. MAIN AND INCIDENTAL CONTROVERSIES. — Although the removal statute contains no suggestion of any particular kind or degree of controversy as a main or principal one, or a minor or incidental one, and some of the earlier cases did not make that distinction,² it is now the settled doctrine that where the relief sought against one of several defendants is merely incidental to the main purpose of the suit, the fact that such incidental relief relates to only one of the defendants does not make it a separable controversy in the sense of the removal act.³

Cause of action does not give a right of removal under the federal statute. A misjoinder of several causes of action in one suit is not a ground of removal. The fact that in one suit are embraced two or more severable controversies will justify a removal, provided one of the controversies is between citizens of different states, and it includes the requisite amount; and the right of removal in such case is not affected either way by the question whether the severable controversies actually included in the suit are properly so included or not." *Distinguishing Warax v. Cincinnati, etc., R. Co.*, 72 Fed. Rep. 637, on the ground that in the latter there was a joinder of defendants on distinct grounds of liability, and not a mere misjoinder of parties to one cause of action.

1. *Barney v. Latham*, 103 U. S. 216, where the court said: "The state court ought not to disregard the petition upon the ground that in its opinion the plaintiffs, against whom a removal is sought, had united causes of action which should or might have been asserted in separate suits. Those are matters more properly for the determination of the trial court, that is the federal court, after the cause is there docketed. If that court should be of opinion that the suit is obnoxious to the objection of multifariousness or misjoinder, and for that reason should require the pleadings to be reformed, both as to subject-matter and parties, according to the rules and practice which obtain in the courts of the United States, and if, when that is done, the cause does not really and substantially involve a dispute or controversy within the jurisdiction of that court, it can, under the fifth section of the Act of 1875, dismiss the suit or re-

mand it to the state court as justice requires." See also *Carter v. Scott*, 82 Ga. 297; *Hax v. Caspar*, 31 Fed. Rep. 501; *Thompson v. Dixon*, 28 Fed. Rep. 7.

2. Thus in *Bybee v. Hawkett*, 5 Fed. Rep. 1, 6 Sawy. (U. S.) 593, it was held that where there is a controversy in a suit, even if it is not the main controversy therein, which is wholly between citizens of different states, and which can be fully determined as between them, then any one of the defendants actually interested in such controversy may remove the suit.

3. *Ames v. Chicago, etc., R. Co.*, 39 Fed. Rep. 884, citing *Fidelity Ins. Co. v. Huntington*, 117 U. S. 280. See also *Torrence v. Shedd*, 144 U. S. 527; *Corbin v. Van Brunt*, 105 U. S. 576; *Shainwald v. Lewis*, 108 U. S. 158; *Bellaire v. Baltimore, etc., R. Co.*, 146 U. S. 117; *Thurber v. Miller*, 67 Fed. Rep. 373; *Sweeney v. Grand Island, etc., R. Co.*, 61 Fed. Rep. 6; *Le Mars v. Iowa Falls, etc., R. Co.*, 48 Fed. Rep. 662, 4 McCrary (U. S.) 220; *Maish v. Bird*, 48 Fed. Rep. 608; *Wilder v. Virginia, etc., Steel, etc., Co.*, 46 Fed. Rep. 681; *Bissell v. Canada, etc., R. Co.*, 39 Fed. Rep. 225; *McElmurray v. Loomis*, 31 Fed. Rep. 396; *Winchell v. Coney*, 27 Fed. Rep. 482; *New York v. New Jersey Steam-Boat Transp. Co.*, 24 Fed. Rep. 818; *Mills v. Central R. Co.*, 20 Fed. Rep. 449; *First Presb. Soc. v. Goodrich Transp. Co.*, 10 Biss. (U. S.) 319; *Carraher v. Brennan*, 7 Biss. (U. S.) 501; *Chicago v. Gage*, 6 Biss. (U. S.) 472; *Commercial, etc., Bank v. Corbett*, 5 Sawy. (U. S.) 172; *Winchell v. Coney*, 54 Conn. 32; *Burts v. Loyd*, 45 Ga. 105; *Burch v. Davenport, etc., R. Co.*, 46 Iowa 454.

A separable controversy within the meaning of the statute must be some-

gg. SEPARATE SUITS DISTINGUISHED FROM SEPARATE CONTROVERSIES. — Where a single proceeding consists of several suits triable separately, each is a separate suit and not a separable controversy, and may be removed without regard to the citizenship of the parties to any of the other suits.¹

hh. SEPARABLE CONTROVERSY WITH ONE OF SEVERAL PLAINTIFFS. — The question of separable controversy usually arises in cases where one defendant seeks to segregate his controversy from that of his codefendants with a common plaintiff. A single cause of action is not rendered separable because several plaintiffs having separate and distinct interests elect to join in a suit to enforce a right which is common to all, though all need not have joined in enforcing it.² There can be no removal on the ground of a separable controversy with one of several plaintiffs who is a merely formal party.³

ii. SEVERANCE BY ELECTION OF PLAINTIFF. — When a plaintiff elects to sue defendants jointly on a joint and several cause of action, and the cause is removed by one defendant without objection, and proceeds to judgment in the federal court against him alone, the plaintiff consenting, on appeal the suit may be regarded as

thing more than a mere collateral or incidental dispute or question of fact or of law. *Security Co. v. Pratt*, 64 Fed. Rep. 406.

In *Concord Coal Co. v. Haley*, 76 Fed. Rep. 883, the court pronounced it doubtful whether a separable controversy existed between the plaintiff in an action accompanied by trustee process under the *New Hampshire* practice and an intervening claimant of the fund attached by the process. The trustee or garnishee has no separable controversy with the plaintiff. *Weeks v. Billings*, 55 N. H. 371.

1. *In re Stutsman County*, 88 Fed. Rep. 337, a statutory proceeding to collect a list of delinquent taxes for various amounts against many parcels of land and many owners; *Pacific R. Removal Cases*, 115 U. S. 1, a proceeding against many persons to assess local improvement benefits; the statute in each of the foregoing cases providing for separate trials. See also *Lackawanna Coal, etc., Co. v. Bates*, 56 Fed. Rep. 740.

2. *Merchants Cotton Press, etc., Co. v. Insurance Co. of North America*, 151 U. S. 384; *Peninsular Iron Co. v. Stone*, 121 U. S. 633. See also *New Orleans v. Winter*, 1 Wheat. (U. S.) 91, where Chief Justice Marshall, referring to what had been decided in *Strawbridge v. Curtiss*, 3 Cranch (U. S.) 267,

said that "having elected to sue jointly, the court is incapable of distinguishing their case, so far as respects jurisdiction, from one in which they were compelled to unite."

In an Action on an Insurance Policy by the personal representative of the assured and one claiming the policy as assignee, there is no separable controversy between the defendant and either of the plaintiffs. *McNulty v. Connecticut Mut. L. Ins. Co.*, 46 Fed. Rep. 306.

A Joint Action by an Insurer and the Assured against one whose negligence caused the destruction of the property insured is one and indivisible. *First Presb. Soc. v. Goodrich Transp. Co.*, 10 Biss. (U. S.) 312.

Action by Tenants in Common. — In *Rumsey v. Call*, 28 Fed. Rep. 769, a suit to quiet title properly brought jointly by several tenants in common, it was held that there was only one controversy.

A Joint Suit by Separate Judgment Creditors to set aside as fraudulent a general assignment of the debtor, the latter and his assignee being made defendants, shows no separable controversy with either of the plaintiffs, where the validity of none of the judgments is attacked. *Reineman v. Ball*, 33 Fed. Rep. 692.

3. *Hazard v. Robinson*, 21 Fed. Rep. 195.

severable at the time when the removal was effected.¹

(b) **Tests Applied to Various Classes of Suits** — *aa. EMINENT DOMAIN AND LOCAL ASSESSMENT PROCEEDINGS.* — A proceeding to condemn land for a local improvement or other public purpose, either with or without an assessment of benefits therefor, where there are several and distinct lots owned by different persons, presents a separable controversy with each of the owners;² but not where there is only one tract, though several defendants have distinct interests therein and might be entitled to separate awards of damages,³ nor where the primary question is the right to make the improvement for which it is sought to condemn the land,⁴ nor where the rule of assessment makes a just assessment in an individual case impossible without having as parties all other lot owners involved.⁵

bb. CREDITORS' BILLS AND SUITS INVOLVING PRIORITY OF LIENS. — A creditor's bill to subject encumbered property to the payment of the

1. *Guarantee Co. v. Mechanics' Sav. Bank, etc., Co.*, 80 Fed. Rep. 771, which was a suit by a bank against its teller and a guaranty company on a joint and several bond, removed by the guaranty company without objection, the plaintiff taking a separate judgment against it without any motion to remand, and virtually submitting to a dismissal of the suit as to the other defendant upon a demurrer for want of equity.

2. *Pacific R. Removal Cases*, 115 U. S. 1; *Chicago v. Hutchinson*, 15 Fed. Rep. 129, 11 Biss. (U. S.) 484; *Sugar Creek, etc., R. Co. v. McKell*, 75 Fed. Rep. 34, upon the ground that whatever judgment the court should enter as to the tract of land owned by one would in no wise affect the rights and interests of the owner of another tract; *distinguishing* *Bellaire v. Baltimore, etc., R. Co.*, 146 U. S. 117, cited in the following note. See also *New York, etc., R. Co. v. Cockcroft*, 46 Fed. Rep. 881.

3. *Bellaire v. Baltimore, etc., R. Co.*, 146 U. S. 117, in which case the court held that the fact that the defendants had distinct interests in the single tract of land which it was sought to condemn, the interest of one being the lease of the whole lot and the interest of the other being the reversion of the whole lot, did not introduce a separable controversy into the case. This case was *followed* in *Washington v. Columbus, etc., R. Co.* 53 Fed. Rep. 673, which held that the fact that the lease was for ninety-nine years, renewable

forever, and that the lessor filed a disclaimer of all interest in the property, did not create a separable controversy, since "the plaintiff * * * was not bound to accept the disclaimer, or if it did, was entitled to a judgment respecting the costs and passing upon the effect of the disclaimer." To the main point see also *Le Mars v. Iowa Falls, etc., R. Co.*, 48 Fed. Rep. 661, 4 McCrary (U. S.) 218. *Compare* *Northern Pac. Terminal Co. v. Lowenberg*, 18 Fed. Rep. 339, 9 Sawy. (U. S.) 348, decided before the limitations of the separable controversy clause had been thoroughly developed by the Supreme Court.

4. *In re Jarnecke Ditch*, 69 Fed. Rep. 161, a proceeding to condemn land for the construction of a drain and assess the benefits, where the court said: "Whether a removal could be had if the sole issue presented by the remonstrants was the amount of the assessments it is not necessary to determine. But see *Brooks v. Clark*, 119 U. S. 502."

5. *In re Chicago*, 64 Fed. Rep. 897, where each assessment required for its ascertainment the aggregate of expense to be assessed and the aggregate value of benefits, and by reason of this factor *distinguishing* *Pacific R. Removal Cases*, 115 U. S. 1, where, under the provisions of the statute, the assessment against each parcel of land could be worked out independently, and *Chicago v. Hutchinson*, 11 Biss. (U. S.) 484, 15 Fed. Rep. 129. The cases were also distinguishable on other grounds

plaintiff's judgment by a sale and a distribution of proceeds among lienholders according to their priorities is not a divisible suit, and therefore is not removable on the ground of a separable controversy.¹ And generally a lienholder cannot be separated from the general owner in any controversy concerning the title.²

cc. **BILLS FOR PARTITION AND BILLS TO QUIET TITLE.** — In a Suit for Partition all the defendants are indispensable parties, and none of

stated in the opinion in the case first above cited.

1. *Young v. Parker*, 132 U. S. 270; *Fidelity Ins. Co. v. Huntington*, 117 U. S. 280; *Graves v. Corbin*, 132 U. S. 571; *Torrence v. Shedd*, 144 U. S. 531, where Mr. Justice Gray said: "This for the following reasons: There is but a single cause of action, the equitable execution of a judgment against the property of the judgment debtor, and this cause of action is not divisible. The judgment sought against the incumbrancer is incidental to the main purpose of the suit, and the fact that this incident relates to him alone does not separate this part of the controversy from the rest of the action. What the plaintiff wants is not partial relief, settling his rights in the property as against this defendant alone, but a complete decree, which will give him a sale of the entire property, free of all incumbrances, and a division of the proceeds as the adjusted equities of each and all the parties shall require. The answer of this defendant shows the questions that will arise under this branch of the one controversy, but it does not create another controversy. The remedy which the plaintiff seeks requires the presence of all the defendants, and the settlement, not of one only, but of all the branches of the case." In the same category are *Turnbull Wagon Co. v. Linthicum Carriage Co.*, 80 Fed. Rep. 4; *Sweeney v. Grand Island, etc.*, R. Co., 61 Fed. Rep. 4; *Marsh v. Atlanta, etc.*, R. Co., 53 Fed. Rep. 168; *In re San Antonio, etc.*, R. Co., 44 Fed. Rep. 145; *Bissell v. Canada, etc.*, R. Co., 39 Fed. Rep. 225, where the court said: "The controversy here claimed to be separable is simply a question of priority of liens and is determinable as an incident to the issues tendered," etc.; *Pollok v. Louchheim*, 19 Fed. Rep. 465; *Donohue v. Mariposa Land, etc.*, Co., 5 Sawy. (U. S.) 163; *Darst v. Bates*, 51 Ill. 439; *Burch v. Davenport, etc.*, R.

Co., 46 Iowa 454; *Flynn v. Des Moines, etc.*, R. Co., 63 Iowa 494.

Injunction Against Fraudulent Grantee. — In *Moore v. North River Constr. Co.*, 19 Fed. Rep. 803, a creditor sued his debtor and one to whom the debtor had conveyed real estate in fraud of the plaintiff. The relief sought was a sale of the land and an injunction restraining both defendants from disposing of it. No judgment was asked against the debtor, but it was held that he had no removable separable controversy with the plaintiff.

2. *Steinkuhl v. York*, 2 Flipp. (U. S.) 382. In *Bissell v. Canada, etc.*, R. Co., 39 Fed. Rep. 225, Woods, J., said: "I suppose it to be unknown to practice, and not permissible, that lienholders whose claims remain unadjudicated as against the debtor shall bring one another into court, in an action to which the debtor is not made a party, merely to settle a question of priority; and, this being so, it cannot well be contended that, all the parties being in court under a bill to establish and enforce the complainant's lien, one of the defendants can claim to have in such action a separable controversy in respect to that which he could not have litigated in an independent action."

Where the sole object of the suit was to establish the right of the plaintiff as receiver to enforce a trust in behalf of creditors which was expressly imposed upon property which he alleged to be in the possession and control of the defendants, and there was only one definite equity as a ground for relief, it was held that the suit was indivisible. *Long v. Buford*, 24 Fed. Rep. 241.

A Suit by a Subcontractor to Enforce a Mechanics' Lien against the contractor and the owner of the property was held not to present a separable controversy between the plaintiff and the owner. *Ames v. Chicago, etc.*, R. Co., 39 Fed. Rep. 881.

Foreclosure Suits. — See *infra*, p. 225.

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them can claim a separable controversy with the plaintiff.¹

Bills to Quiet Title. — It is possible that separable controversies may exist in a suit against several defendants to quiet title to real estate, especially where the defendants claim by independent titles.² But it is doubtful whether one of several defendants who are tenants in common can remove the suit.³

1. *Hanrick v. Hanrick*, 153 U. S. 198. See also *De La Vega v. League*, 64 Tex. 205; *Stark v. Carroll*, 66 Tex. 393.

In a bill for partition of lands in *Illinois* the principal object of which was to assign to all the tenants in common their shares in severalty, one defendant claimed an equitable estate in whatever should be set off to the plaintiff, and the other defendants denied that the plaintiff had any title whatsoever. It was held that the controversy of the plaintiff with the first-mentioned defendant was merely incidental to the main object of the suit, could not be determined as between them without the presence of the other defendants, and did not constitute such a separate controversy as would justify a removal. *Torrence v. Shedd*, 144 U. S. 527, where the court said: "By the law of *Illinois*, indeed, the court might, in the suit for partition, determine all questions of conflicting or controverted titles to the whole land or to any share thereof. But the determination of such questions of title was incidental to the main object of the suit, and in order to do complete justice between all the parties, and avoid further litigation." The court further observed that none of the parties to the alleged separable controversy could recover judgment setting off to him any share in the land, without establishing a title, not only as between themselves, but also as against all the other defendants.

2. In *Des Moines Nav., etc., Co. v. Iowa Homestead Co.*, 123 U. S. 558, the court said that in *Homestead Co. v. Valley R. Co.*, 17 Wall. (U. S.) 153, (a case more fully reported and described in *Stryker v. Goodnow*, 123 U. S. 530 *et seq.*), a bill to quiet title to several tracts of land, there was a separate and distinct controversy between the plaintiff and each of the defendants in relation to the several tracts claimed by each defendant individually, and not as joint owners with the other defendants. See also *Connell v. Smiley*, 156 U. S. 340.

A bill to quiet title requiring each

defendant to set up any claim or right he may have, or be forever barred from so doing, and framed for the purpose of including in one suit as many separable controversies as the defendants may be able to assert, was held to present separable controversies in *Bacon v. Felt*, 38 Fed. Rep. 870, where the court pointed out that a decree barring the right of one defendant in the portion of the property claimed by him would not settle the controversy between the plaintiff and another defendant claiming a different portion of the property. See also for a similar case held removable, *Stanbrough v. Cook*, 38 Fed. Rep. 369.

In *Steinkuhl v. York*, 2 Flipp. (U. S.) 379, it was held that in determining whether there is a separable controversy between the plaintiff and any of the defendants in a bill to quiet title, the holder of the legal title is regarded as an indispensable party, whether he be a mortgagee holding in fee or a trustee holding it in part.

Fraudulent Grantee and His Tenant. — In a bill to quiet title against one alleged to have procured a deed from the plaintiff by fraud, joining a tenant of the grantee and a grantee of the latter, there is no separable controversy between the plaintiff and the tenant. *Miller v. Sharp*, 37 Fed. Rep. 161.

3. In *Goodenough v. Warren*, 5 Sawy. (U. S.) 494, and *Field v. Lownsdale*, *Deady* (U. S.) 288, it was held that a suit to quiet title against tenants in common might be removed as to one of them, but those cases were decided before the Supreme Court had developed the doctrines adverse to removals on this ground. It was held that a tenant had no separable controversy in *Stafford v. Twitchell*, 33 La. Ann. 523; *Gillespie v. Twitchell*, 34 La. Ann. 288. See also *Rumsey v. Call*, 28 Fed. Rep. 769.

A Suit under the Illinois Burnt Records Act, to perfect and establish title against several claimants, was held not to make a separable controversy with any of the defendants. *Carraher v. Brennan*, 7 Biss. (U. S.) 497.

dd. SUITS AGAINST PARTNERS OR INVOLVING PARTNERSHIP AFFAIRS — **Actions at Law.** — There is no separable controversy in an action against partners on a joint contract¹ nor in an action against them for a joint tort.²

In Suits in Equity by one partner where the main object is to settle the partnership affairs there is no separable controversy.³

ee. SUITS RELATING TO WILLS AND ADMINISTRATION — **Suits and Proceedings Relating to Wills.** — In a will contest in the probate court,⁴ or in a statutory suit to establish a will⁵ or to contest a will,⁶ or in a suit by an executor against several beneficiaries claiming conflicting interests under the will to obtain a construction of the instrument,⁷ there can be no separate controversy between the plaintiff and any of the defendants.

Administration Suits and Proceedings. — Proceedings in the probate court to obtain an order of sale of a decedent's lands,⁸ or pro-

1. *Brooks v. Clark*, 119 U. S. 502; *Stone v. South Carolina*, 117 U. S. 433; *Fletcher v. Hamlet*, 116 U. S. 410; *Putnam v. Ingraham*, 114 U. S. 59; *Hyde v. Ruble*, 104 U. S. 407; *Patchin v. Hunter*, 38 Fed. Rep. 51, an action on a partnership note; *Woodrum v. Clay*, 33 Fed. Rep. 897; *Fusz v. Trager*, 38 La. Ann. 173.

2. *Blum v. Thomas*, 60 Tex. 159.

3. *Levy v. O'Neil*, (C. Pl. Spec. T.) 14 Abb. Pr. N. S. (N. Y.) 63, a suit by one partner against his copartners for accounting and settlement.

Bill by Partners Against Copartners and Others. — In a bill by a partner against a copartner and another to have certain property adjudged to be partnership property and to obtain a decree liquidating the affairs of the partnership there were no separable controversies. *Yearian v. Horner*, 36 Fed. Rep. 130.

In a suit brought by one partner for a settlement of the partnership affairs, a judgment creditor of the defendant and a receiver appointed in a suit upon the judgment were admitted as defendants, and it was held that there was no separable controversy between them and the plaintiff which would entitle them to remove the case, the court saying: "The main dispute is about the existence of the partnership. All the other questions in the case are dependent on that. If the partnership is established, the rights of the defendants are to be settled in one way; if not, in another. There is no controversy in the case now which can be separated from that about the partner-

ship, and fully determined by itself." *Shainwald v. Lewis*, 108 U. S. 158.

In a Suit by the Administrator of a Deceased Partner against the surviving partner and others claiming an interest in the partnership real estate, to reach all of the partnership assets and have a complete and final accounting and settlement thereof, the surviving partner cannot claim a separable controversy with himself. *Golden v. Brunning*, 72 Fed. Rep. 2.

4. In *Fraser v. Jennison*, 106 U. S. 191, the subject in controversy was the probate of a will, which was offered for probate by the executors therein named, who were citizens of Michigan, the contestants being the heirs at law, part of whom were citizens of Michigan and part citizens of other states. The latter petitioned for removal, but it was held that the case did not present separate and distinct controversies within the meaning of the removal act; that the suit embraced but one controversy and in that all the heirs at law were interested.

5. *Anderson v. Appleton*, 32 Fed. Rep. 855, a suit under the provision of the *New York Code Civ. Pro.*, § 1866.

6. *Reed v. Reed*, 31 Fed. Rep. 49, an action under the *Ohio* statute to contest a probated will, holding also that those whom the statute requires to be made defendants must be regarded as necessary parties.

7. *Security Co. v. Pratt*, 64 Fed. Rep. 405, 65 Conn. 161.

8. In a proceeding in the probate court by the personal representative of a decedent to obtain a license to sell

ceedings on exceptions to a trustee's account,¹ or a proceeding by a widow claiming community property² or to have an allowance for present support set apart to her under the state statute,³ or an administrator's suit to marshal assets,⁴ cannot be separated into parts so as to be removable by less than the whole number of defendants.

ff. FORECLOSURE SUITS. — In suits for foreclosure and sale against the mortgagor and one claiming title adversely to the plaintiff,⁵ and in suits against the mortgagor and other incumbrancers⁶ or

real estate for the payment of debts, requiring an adjudication of the priority of liens, and provision for charging them upon the fund, there is no separable controversy between a particular lienholder and the personal representative. *Connecticut v. Adams*, 6 Ohio Cir. Dec. 46, 2 Ohio Dec. 119.

1. Where several beneficiaries in a testamentary trust file exceptions to the account of the trustee in the Orphans' Court, the presence of all is essential to complete relief, since the object of the proceeding is the preservation and due administration of the trust estate, and there is no separable controversy between any exceptant and the trustee. *In re McClean*, 26 Fed. Rep. 49.

2. A proceeding in the probate court by a widow to have the question determined whether the property of her deceased husband is separate or community property makes no separable controversy with any of the distributees. *In re Foley*, 80 Fed. Rep. 949.

3. *McElmurray v. Loomis*, 31 Fed. Rep. 396, where the point was not expressly ruled in judgment, but Speer, J., said: "The application of the widow for a year's support is a mere incident of the administration, and it is not to be expected that this will be segregated from all the other matters in the management of estates pending in the local courts, and carried to the United States court."

4. Where an administrator files a bill to marshal assets of an insolvent decedent's estate, a nonresident creditor has no separable part in the case so as to enable him to remove it. *Burts v. Loyd*, 45 Ga. 105. See also *Bliss v. Rawson*, 43 Ga. 181.

"It could never have been the intention of Congress that in case of a bill filed by an administrator against numerous legatees and creditors, for direction in the administration of the

estate of a deceased person, a single creditor or legatee who may chance to live in another state, by coming in and making himself or herself a defendant to the bill, can in this way transfer the whole litigation from the state court to the federal court." *Peters v. Peters*, 41 Ga. 250. For similar views in respect of claims against the insolvent estate of a decedent, see *Du Vivier v. Hopkins*, 116 Mass. 127.

5. *Hax v. Caspar*, 31 Fed. Rep. 499; *Thompson v. Dixon*, 28 Fed. Rep. 5.

6. "A bill for the foreclosure of a mortgage which asks for a decree for the amount of the mortgage debt and the sale of the mortgaged premises to satisfy the same, and alleges that the lien of the complainants' mortgage is prior and superior to the liens of some of the defendants named in the bill, presents but a single cause of action." *Thurber v. Miller*, 67 Fed. Rep. 373, where the court also said: "The ascertainment of the relative rank of the liens is incidental to the main purpose of the suit." See also *Robbins v. Ellenbogen*, 71 Fed. Rep. 4. And see *Sweeney v. Grand Island, etc., R. Co.*, 61 Fed. Rep. 4; *Springer v. Sheets*, 115 N. Car. 370.

In a foreclosure suit the controversy is not separable as between the owners of the equity, the trustee in the trust deed, and subsequent incumbrancers or lienors. *Maher v. Tower Hotel Co.*, 94 Fed. Rep. 225. Compare *Osgood v. Chicago, etc., R. Co.*, 6 Biss. (U. S.) 330.

Validity of Mortgage Disputed. — In a foreclosure suit against the mortgagor and a subsequent incumbrancer the latter has no separable controversy with the plaintiff, though the validity of the mortgage be in dispute. *Donohue v. Mariposa Land, etc., Co.*, 5 Sawy. (U. S.) 163. *Contra*, in some of the earlier cases. *Capital City Bank v. Hodgkin*, 22 Fed. Rep. 209; *Snow v. Texas Trunk R. Co.*, 16 Fed. Rep. 1,

parties claiming some interest,¹ or in a foreclosure suit against the mortgagor and his grantee wherein the plaintiff seeks a money decree against the mortgagor for a balance of the mortgage debt,² or one wherein the mortgagor's liability for the debt is to be saved and the value of the mortgaged property applied in payment to be conclusively settled against him,³ there is no separable controversy between the plaintiff and either of the defendants.

eg. TAXPAYERS' AND STOCKHOLDERS' SUITS. — In suits by taxpayers to restrain unlawful tax levies where the creditors of the municipality are joined as defendants, there is rarely any separable controversy.⁴

4 Woods (U. S.) 394; Rich v. Gross, 29 Neb. 337; Burnham v. Chicago, etc., R. Co., 4 Dill. (U. S.) 507. See also Foster v. Chesapeake, etc., R. Co., 47 Fed. Rep. 376.

1. Merchants' Nat. Bank v. Thompson, 4 Fed. Rep. 876, a suit against the mortgagor and a purchaser of part of the mortgaged property; Shaver v. Hardin, 30 Fed. Rep. 801; Maish v. Bird, 48 Fed. Rep. 607, where the defendant thus joined filed a cross-bill alleging that the mortgage was fraudulent and praying that it be set aside; Darst v. Bates, 51 Ill. 439; Flynn v. Des Moines, etc., R. Co., 63 Iowa 494; Burch v. Davenport, etc., R. Co., 46 Iowa 454; Connecticut v. Adams, 6 Ohio Cir. Dec. 46, 2 Ohio Dec. 119; Northwestern, etc., Hypotheek Bank v. Suksdorf, 15 Wash. 475.

2. In Ayres v. Wiswall, 112 U. S. 187, it was decided that in a suit for the foreclosure of a mortgage by sale, in which it was sought to charge the mortgage debtor with the payment of any balance of the mortgage debt that might remain due after the security was exhausted, the debtor was a necessary party, and that if his citizenship stood in the way the suit could not be removed even though, were he not a party, the persons with whom he had been joined and to whom he had conveyed the property after the mortgage would be entitled to a removal. See also Lewis v. Weidenfeld, 76 Fed. Rep. 145.

3. In a suit for strict foreclosure of a mortgage, the mortgagor and his grantee being made defendants, where by the state statute the plaintiff may have in the same suit an appraisal of the property which will be conclusive upon the mortgagor in a future action against him for a deficiency, but the

mortgagor will be discharged from all liability unless he is made a party to the foreclosure suit, there can be no separable controversy between the plaintiff and the mortgagor's grantee. Coney v. Winchell, 116 U. S. 227, where the court said that the plaintiff "has but a single cause of action and that his mortgage."

4. *Taxpayers' Suits.* — Brown v. Trousdale, 138 U. S. 389, was a class suit by taxpayers against a county sheriff, county court judge, and all the holders of an issue of municipal aid bonds, for the purpose of restraining the levy of a particular tax to pay interest, and all future levies in the premises, and to have all the bonds declared invalid. It was held that individual nonresident bondholders had no separable controversy with the plaintiffs. "The plaintiffs were not prosecuting an action against individual bondholders for the cancellation of individual bonds. They were attacking the validity of the entire subscription and seeking a decree which would invalidate the entire issue." See also Anderson v. Bowers, 40 Fed. Rep. 708, a similar case, where the court said: "The decision of the one question of the validity of the bonds * * * decides alike the question whether the county officials should be restrained from collecting the tax and the question whether the bonds shall be decreed to be void." But the court also held that the case would have been removable by nonresident bondholders if the record had shown that the plaintiff's controversy with them related to the validity of an entirely different issue or series of bonds from that held by the resident bondholders. The order remanding the cause was approved by the state court in subsequent

Stockholders' Suits against the corporation and others involving the validity of issues of stock, or to compel transfers of stock, cannot usually be removed by one defendant alone.¹

h. h. MISCELLANEOUS SUITS IN EQUITY. — The question whether a suit in equity involves several and separate controversies so as to authorize its removal by less than all of the defendants is to be determined largely by the general rules of equity practice in respect of necessary parties,² which have been discussed in another part of this work.³ In some cases the question is

proceedings in the same case. *Anderson v. Orient F. Ins. Co.*, 88 Iowa 588.

Where the object of a taxpayer's bill was to restrain county officials from erecting a court house and a contractor from executing his contract to build it, there was held to be no separable controversy with the contractor, since in order to make the injunction effective it should operate against both defendants, whose presence was therefore essential to complete relief for the plaintiff. *Compare Aroma Tp. v. Auditor of Public Accounts*, 9 Biss. (U. S.) 289.

In a taxpayer's suit to set aside a fraudulent judgment against the city and to restrain the levy of a tax, the judgment creditor has no separable controversy with the plaintiff. *May v. St. John*, 38 Fed. Rep. 770.

1. *Stockholders' Suits.* — In a suit by a minority stockholder of a corporation to set aside a lease made by it to another corporation and to restrain the former from carrying into effect a resolution of its stockholders authorizing the payment of money in cancellation of the lease, both corporations being made defendants, there is no separable controversy with the lessee corporation, where according to the allegations of the bill the majority stockholders in both corporations have combined to sacrifice the rights of the plaintiff. *East Tennessee, etc., R. Co. v. Grayson*, 119 U. S. 240, *following Central R. Co. v. Mills*, 113 U. S. 249.

In a suit by stockholders against the corporation to have an issue of certain shares of stock to another corporation declared invalid, an officer of the latter who holds the stock and is made a party has no separable controversy with the plaintiffs where the only question is the validity and not the ownership of the stock. *Shumway v. Chicago, etc., R. Co.*, 4 Fed. Rep. 385.

In a suit against a corporation and one of its stockholders to determine the

ownership of shares of stock and obtain a decree for their transfer to the plaintiff there is no separable controversy between the defendant stockholder and the plaintiff. *Rogers v. Van Nortwick*, 45 Fed. Rep. 513.

A suit against a corporation to compel it to cancel shares of stock issued to another defendant who has transferred them to a third defendant, and to compel the corporation to issue certificates of the stock to the plaintiff, contains no separable controversy between the plaintiff and the transferee of the stock so as to enable the latter to remove the cause. *Crump v. Thurber*, 115 U. S. 56. See also *St. Louis, etc., R. Co. v. Wilson*, 114 U. S. 60.

2. "A complicated chancery suit may almost necessarily involve in some of its collateral issues the rights and interests of citizens of different states, but unless the original controversy which the suit is brought to determine be between citizens of different states, or between such parties as give the federal courts jurisdiction, it would hardly seem that Congress intended to provide for the removal thereof, inasmuch as the whole case must be removed instead of that collateral branch or part involving a controversy between citizens of different states." *Chicago v. Gage*, 6 Biss. (U. S.) 472.

In one of the early cases it was said that "it is for the good sense of the court in each case to discover whether there is one distinct and independent controversy between citizens of different states." *Merchants' Nat. Bank v. Thompson*, 4 Fed. Rep. 879.

3. See the article PARTIES TO ACTIONS, vol. 15, p. 584 *et seq.*

That the general principles of equity practice are constantly resorted to, see *Graves v. Corbin*, 132 U. S. 586; *Golden v. Bruning*, 72 Fed. Rep. 4; *New Jersey Zinc, etc., Co. v. Trotter*, 18 Fed. Rep. 337; *Chester v. Chester*, 7 Fed. Rep. 4; *Snow v. Smith*, 88 Fed. Rep.

scarcely distinguishable from the question considered in another part of this article, as to what parties are indispensable in a suit containing only a single controversy.¹ The separability of controversies has been presented for adjudication in interpleader suits,² in suits for cancellation,³ in suits relating to trusts⁴ or trustees,⁵ in bills for specific performance,⁶ and in bills to set

657, a suit in equity holding that under the circumstances there was a separable controversy.

Section 737 of the United States Revised Statutes, relating to parties who may be omitted without prejudice to the federal jurisdiction, which is fully described in the article PARTIES TO ACTIONS, vol. 15, p. 704, is confined in its operation to suits originally brought in the federal courts and cannot be invoked to aid a petition for removal. *Ames v. Chicago, etc.*, R. Co., 39 Fed. Rep. 885; *Patchin v. Hunter*, 38 Fed. Rep. 51.

In a Suit to Obtain the Restoration of Stock conveyed to one of the defendants by mutual mistake and by him to the other defendant with notice, neither defendant can remove the suit for a separable controversy. *Vinal v. Continental Constr. etc., Co.*, 35 Fed. Rep. 673.

1. See *supra*, p. 197 *et seq.*

2. **A Bill of Interpleader** is of such a nature that a separation of it into parts necessarily destroys it; hence it cannot be removed by one of the defendants. *Mutual L. Ins. Co. v. Allen*, 134 Mass. 389; *George v. Pilcher*, 28 Gratt. (Va.) 299. See also *Leonard v. Jamison*, 2 Edw. (N. Y.) 136.

3. **Suits for Cancellation.**—In a suit to cancel judgments, the judgment creditor and the alleged assignee of the judgment being joined as defendants, neither has a separable controversy with the plaintiff. *Independent Dist. v. Rock Rapids Bank*, 48 Fed. Rep. 2.

In a bill by the grantor in a deed of trust to enjoin a sale of the property and secure a cancellation of the trust debt, the trustee and the creditor being made joint defendants, the trustee is an indispensable party adverse to the interest of the plaintiff, and there is no separable controversy between the plaintiff and the creditor. *Peper v. Fordyce*, 119 U. S. 469; *Thayer v. Life Assoc. of America*, 112 U. S. 717.

In a suit to cancel a note, a controversy with one defendant involving the question of fraud and want of consider-

ation on his part in obtaining the note is separate from a controversy with the other defendant involving the question whether the latter is a *bona fide* holder of the paper for value, in due course of trade and without notice, and either defendant may remove the suit. *New York Constr. Co. v. Simon*, 53 Fed. Rep. 1.

In a suit against a mortgagor and mortgagee to cancel the mortgage on the ground of fraud and collusion, there is no separable controversy between the plaintiff and the mortgagee. *Oakes v. Yonah Land, etc., Co.*, 89 Fed. Rep. 243. See also *Seddon v. Virginia, etc., Steel, etc., Co.*, 36 Fed. Rep. 6.

4. **Suits Relating to Trusts.**—In a suit to enforce the execution of a trust, where the existence of the trust is disputed, and full and complete relief cannot be had without establishing it, there is but a single controversy. *Winchester v. Loud*, 108 U. S. 130.

In *Chester v. Chester*, 7 Fed. Rep. 1, the suit as described by the court was one to establish a fraudulent conspiracy through which the plaintiff claimed a resulting trust in land in possession of a mortgagor, to which suit the plaintiff had properly made the mortgagee, whom he charged with notice and participation in the fraud, a defendant. It was held that the controversy with the mortgagee was inseparable from that with the mortgagor.

5. **Suit for Removal of Trustee.**—In a suit by a *cestui que trust* against a trustee to have him removed and a suitable person appointed in his place, the other *cestuis que trustent* being made codefendants, it seems that there is no separable controversy between the trustee and the plaintiff. *Baxter v. Proctor*, 139 Mass. 151.

6. **In a Bill for Specific Performance** of a contract to convey land, brought against the vendor and his alleged fraudulent grantee and lessee, there is no separable controversy with the vendor. *Tyler v. Hagerty*, 2 Flipp. (U. S.) 257.

aside fraudulent conveyances.¹

(c) **Separability, How Determined** — *aa*. BY STATE OF RECORD AT TIME OF FILING PETITION — **Rule Stated.** — The question whether there is a separable controversy warranting a removal must be determined by the state of the pleadings and the record of the case at the time of the application for removal, and not by the allegations of the petition therefor or the subsequent proceedings which may be had in the federal Circuit Court.² Since the petition for removal is now usually filed before plea or answer,³ and it is well settled that separate defenses do not create separable controversies,⁴ the character of the controversy is always determined by an inspection of the plaintiff's pleading.⁵

Amendment After Petition Filed. — After the filing of a sufficient petition and bond for removal, the plaintiff cannot defeat a removal by amending his pleading and striking out the prayers for relief which create the separable controversy.⁶

bb. PLAINTIFF'S PLEADING CONSIDERED AS TRUE — (*aa*) **General Rule.** — In determining whether there is a separable controversy the cause of action is, for all the purposes of the suit, whatever the plaintiff declares it to be in his pleadings,⁷ and the allegations of the plaintiff must be accepted as true.⁸ Thus, a defendant has no

1. *Townsend v. Sykes*, 38 La. Ann. 410, holding that a suit against the fraudulent grantor and grantee could not be removed by the former alone.

2. *Wilson v. Oswego Tp.*, 151 U. S. 65; *Merchant's Cotton Press, etc., Co. v. Insurance Co. of North America*, 151 U. S. 384; *Louisville, etc., R. Co. v. Wangelin*, 132 U. S. 601; *In re Jarnecke Ditch*, 69 Fed. Rep. 168; *Hazard v. Robinson*, 21 Fed. Rep. 193.

"The right of removal * * * depends upon the case disclosed by the pleadings as they stand when the petition for removal is filed." *Barney v. Latham*, 103 U. S. 216.

3. See *infra*, I. 20. *a*. **Terms and General Purpose and Policy of Removal Acts.**

4. See *supra*, p. 214 *et seq.*

5. See *Winchester v. Loud*, 108 U. S. 131; *Thorn Wire Hedge Co. v. Fuller*, 122 U. S. 535; *Deere v. Chicago, etc., R. Co.*, 85 Fed. Rep. 881; *Ames v. Chicago, etc., R. Co.*, 39 Fed. Rep. 884; *Sexton v. Seelye*, 39 Fed. Rep. 705.

"The existence or nonexistence of a separable controversy must in every case be tested by the inquiry whether the declaration or complaint discloses more than one cause of action." *Mutual Reserve Fund L. Assoc. v. Farmer*, 77 Fed. Rep. 932.

"The case as made by the bill, and as it stood at the time of the petition for removal, is the test of the right to removal." *Graves v. Corbin*, 132 U. S. 585.

6. *Jones v. Foreman*, 66 Ga. 381.

7. *Torrence v. Shedd*, 144 U. S. 530; *Mitchell v. Smale*, 140 U. S. 409; *Louisville, etc., R. Co. v. Ide*, 114 U. S. 52; *Little v. Giles*, 118 U. S. 601; *Moore v. Los Angeles Iron, etc., Co.*, 89 Fed. Rep. 73; *Kane v. Indianapolis*, 82 Fed. Rep. 770.

Thus in *Mitchell v. Smale*, 140 U. S. 409, an action of ejectment, the court was of opinion that one defendant could not have a removal upon his allegation that the other defendants, whom the plaintiff had joined apparently in good faith, had relinquished their interest by conveyance before suit to the defendant seeking removal.

8. *Plymouth Gold Min. Co. v. Amador, etc., Canal Co.*, 118 U. S. 270; *Deere v. Chicago, etc., R. Co.*, 85 Fed. Rep. 881; *Warax v. Cincinnati, etc., R. Co.*, 72 Fed. Rep. 640; *Arrowsmith v. Nashville, etc., R. Co.*, 57 Fed. Rep. 165; *Rivers v. Bradley*, 53 Fed. Rep. 305; *Wilder v. Virginia, etc., Steel, etc., Co.*, 46 Fed. Rep. 682; *Dow v. Bradstreet Co.*, 46 Fed. Rep. 825; *Kai-tel v. Wylie*, 38 Fed. Rep. 865; *Western Union Tel. Co. v. Griffith*, 104 Ga. 56;

right to say that an action which a plaintiff elects to make joint shall be several.¹

(bb) *Exception to Rule.* — There is a line of decisions in the federal Circuit Courts holding that when several defendants are sued jointly and the plaintiff's declaration or complaint shows affirmatively that the liability, if any, is several and not joint, either defendant may properly claim that there is a separable controversy between himself and the plaintiff.²

Applied to actions of tort against master and servant, the doctrine is that when a declaration or complaint shows that the liability of the master is for a negligent or wrongful act of his servant, solely upon the ground of the relationship between

National Docks, etc., R. Co. v. Pennsylvania R. Co., 52 N. J. Eq. 65; Springer v. Sheets, 115 N. Car. 381.

"The rights of the parties must be ascertained and measured by an analysis of the bill of complaint." Vinal v. Continental Constr., etc., Co., 35 Fed. Rep. 673

In East Tennessee, etc., R. Co. v. Grayson, 119 U. S. 244, a suit in equity against two corporations, the question was whether there was a separable controversy between one of them and the plaintiff which would warrant a removal, and it was held that the allegations of the bill must for the purposes of that inquiry be taken as confessed.

In Louisville, etc., R. Co. v. Wangelin, 132 U. S. 603, the declaration charged two corporations with having jointly trespassed on the plaintiff's lands, and it was held that one of the defendants could not remove the case upon an allegation in its petition that it was the only real defendant and that at the time of the trespass complained of the other defendant was not in existence. The court said: "This was a matter affecting the merits of the case, and one which the plaintiff was entitled to deny and disprove at the trial upon the issues joined by the pleadings. Both the defendants were sued and served as corporations, and pleaded as such in the state court; and it is not denied that each of them was a corporation when the action was brought. The question whether one of them was in existence as a corporation at the time of the alleged trespass did not affect the question whether it could be now sued, but the question of its liability in the action; in other words, not the jurisdiction, but the merits, to be determined when the case came to

trial. It could not be tried and determined in advance as incidental to a petition by a codefendant to remove the case."

1. Carr v. Kansas City, 87 Fed. Rep. 1; Wilder v. Virginia, etc., Steel, etc., Co., 46 Fed. Rep. 682; Arrowsmith v. Nashville, etc., R. Co., 57 Fed. Rep. 165; Ames v. Chicago, etc., R. Co., 39 Fed. Rep. 883; Sexton v. Seelye, 39 Fed. Rep. 705; Vinal v. Continental Constr., etc., Co., 35 Fed. Rep. 673; Woodrum v. Clay, 33 Fed. Rep. 898; Chapman v. Chapman, 28 Fed. Rep. 1; *Ex p.* Andrews, 40 Ala. 639; Western Union Tel. Co. v. Griffith, 104 Ga. 56; Gudger v. Western North Carolina R. Co., 87 N. Car. 325; O'Kelly v. Richmond, etc., R. Co., 85 N. Car. 58.

"In any case where the plaintiff may elect to sue jointly or severally, if he elects to sue jointly, so far as respects jurisdiction, the case must be treated the same as though the cause of action was joint." Kane v. Indianapolis, 82 Fed. Rep. 772.

"The cause of action alleged in the plaintiff's pleading must be accepted as the only criterion of decision, and * * * if it is there alleged that the wrong was committed by all the defendants jointly, or that the cause of action is joint, the suit is not removable." National Docks, etc., R. Co. v. Pennsylvania R. Co., 52 N. J. Eq. 65.

A *Beplevin Suit* against an alleged fraudulent vendee, the purchaser at an execution sale against the latter, and the sheriff executing the process, does not upon the face of the record show a separable controversy with any of the defendants. Winnemans v. Edgington, 27 Fed. Rep. 324.

2. Such is the doctrine of those cases as stated in Creagh v. Equitable L. Assur. Soc., 88 Fed. Rep. 3.

them and the application of the rule of *respondeat superior*, and not by reason of any personal participation in the negligent or wrongful act, he is liable severally, and not jointly, with the servant, and either may remove the suit on the ground of a separable controversy.¹ As applied to that class of cases, the soundness of the doctrine has not been expressly adjudged by the United States Supreme Court.² If the petitioner for removal is

1. The rule was applied in:

Sixth Circuit. — *Warax v. Cincinnati*, etc., R. Co., 72 Fed. Rep. 647; *Hukill v. Maysville*, etc., R. Co., 72 Fed. Rep. 753; *Landers v. Felton*, 73 Fed. Rep. 311. Compare *Powers v. Chesapeake*, etc., R. Co., 65 Fed. Rep. 129, and *Hukill v. Chesapeake*, etc., R. Co., 65 Fed. Rep. 138, explained in the two cases first above cited.

Seventh Circuit. — *Gableman v. Peoria*, etc., R. Co., 82 Fed. Rep. 790.

Eighth Circuit. — *Beuttel v. Chicago*, etc., R. Co., 26 Fed. Rep. 50, an action against the master and the fellow servant of the plaintiff; *Ferguson v. Chicago*, etc., R. Co., 63 Fed. Rep. 177, a similar case; *Hartshorn v. Atchison*, etc., R. Co., 77 Fed. Rep. 9.

The Leading Case upholding this doctrine is *Warax v. Cincinnati R. Co.*, 72 Fed. Rep. 637, commonly called the *Warax Case*, which was an action by a servant against his master and a fellow servant, wherein Taft, J., delivered an opinion of characteristic ability. The opinion is carefully examined and the case distinguished in *Deere v. Chicago*, etc., R. Co., 85 Fed. Rep. 876 (*following* *Plymouth Gold Min. Co. v. Amador*, etc., Canal Co., 118 U. S. 264), wherein it was held that there was no separable controversy, since each of the defendants was charged with a primary liability, and not with a liability based upon the doctrine of *respondeat superior*.

Common-law and Statutory Liability Joined. — Where an alleged purely statutory liability of a railway company to a servant for the negligence of a co-servant is joined with an asserted common-law liability of the co-servant for his own personal negligence, separable controversies are presented. *Beuttel v. Chicago*, etc., R. Co., 26 Fed. Rep. 50.

Other Considerations Involved. — The doctrine stated in the text rests upon the hypothesis that such causes of action cannot be joined. In *Warax v. Cincinnati*, etc., R. Co., 72 Fed. Rep. 641, Taft, J., said: "The question

whether the master and the servant can be joined as the perpetrators of a joint tort, for the injury inflicted by the negligence of the servant, without the presence of the master, and without his express direction, is one upon which the authorities do not agree. The affirmative of the proposition is supported by the cases of *Wright v. Wilcox*, 19 Wend. (N. Y.) 343; *Suydam v. Moore*, 8 Barb. (N. Y.) 358; *Montfort v. Hughes*, 3 E. D. Smith (N. Y.) 591; *Phelps v. Wait*, 30 N. Y. 78; *Wright v. Compton*, 53 Ind. 337; *Greenberg v. Whitcomb Lumber Co.*, 90 Wis. 225; *Newman v. Fowler*, 37 N. J. L. 89. It is contended that the case of *Martin v. Louisville*, etc., R. Co., 95 Ky. 612, is also an authority in support of this contention. An examination of the case, however, will show that the question was not decided. * * *

The cases which support the view that the master cannot be joined as defendant in the action against his servant for negligence, where the master is not personally concerned in the negligence, either by his presence or express direction, are as follows: *Parsons v. Winchell*, 5 Cush. (Mass.) 592; *Mulchey v. Methodist Religious Soc.*, 125 Mass. 487; *Clark v. Fry*, 8 Ohio St. 377; *Seelen v. Ryan*, 2 Cinc. Super. Ct. 158; *Campbell v. Portland Sugar Co.*, 62 Me. 553; *Beuttel v. Chicago*, etc., R. Co., 26 Fed. Rep. 50; *Page v. Parker*, 40 N. H. 68; *Bailey v. Rusing*, 37 Conn. 351." He then proceeds to demonstrate that the cases last cited take the correct view of the question.

Precedent of Removal Petition. — See the petition for removal set forth in *Deere v. Chicago*, etc., R. Co., 85 Fed. Rep. 878, containing allegations of facts tending to show that the alleged liability was several and not joint.

2. In *Powers v. Chesapeake*, etc., R. Co., 169 U. S. 92, Mr. Justice Gray said that the Circuit Court for the sixth circuit, "upon a review of conflicting authorities, and referring to the distinction taken under the old system of

at liberty to show that codefendants are not liable, and have been joined for the fraudulent purpose of preventing a removal,¹ or, in other words, if he may in certain cases secure a removal by proving that the plaintiff's allegations of fact are false, it would seem reasonable to hold that he may with a like result prove to the satisfaction of the court that the plaintiff's allegations of joint liability are such that the law pronounces them false.² In the latter case he raises an issue of law on the face of the record, which may as easily be determined in the removal proceeding, or on a motion to remand, as at a trial on the merits in the state court.

It appears that the foregoing exception to the rule is not confined to actions of tort.³

(4) *Removal Carries Entire Suit.* — In removals under the Act of 1866 and its substantial reproduction in the second subdivision

special pleading between trespass and trespass on the case, has held that a master and servant cannot be joined in an action for a tort, and therefore the controversy between each of them and the plaintiff is a separate controversy." *Citing Warax v. Cincinnati, etc., R. Co., 72 Fed. Rep. 637; Hukill v. Maysville, etc., R. Co., 72 Fed. Rep. 745.* The justice, after remarking that in the earlier case of *Powers v. Chesapeake, etc., R. Co., 65 Fed. Rep. 129*, the same Circuit Court had apparently decided otherwise, concluded by saying that "it is unnecessary now to consider which of the views of the Circuit Court upon this question is the correct one." Nevertheless, this case, *Powers v. Chesapeake, etc., R. Co., 169 U. S. 92*, is actually cited, among other Supreme Court cases, in *Creagh v. Equitable L. Assur. Soc., 88 Fed. Rep. 1* (ninth circuit), to the proposition that the Supreme Court has definitely declared that there is no separable controversy in such cases. On the contrary, however, the Supreme Court has carefully kept the question open by pointing out in all the cases of tort where it held that there was no separable controversy, that all of the defendants were charged with actual participation in the wrongs complained of. Thus in *Pirie v. Tvedt, 115 U. S. 43*, the action was for malicious prosecution "by all the defendants acting in concert," and "the plaintiffs might have sued each defendant separately or all jointly." In *Starin v. New York, 115 U. S. 258*, the suit was against all the defendants jointly, "on the allegation that, acting in com-

mon," they were all engaged in violating the rights of the plaintiff by their "united efforts." In *Plymouth Gold Min. Co. v. Amador, etc., Canal Co., 118 U. S. 270*, the alleged tort was committed by the "united action of all the defendants working together." In *Sloane v. Anderson, 117 U. S. 277*, the defendants were sued in trespass for the wrongful seizure of the plaintiff's property, the complaint alleging that the act was done by the united efforts of all the defendants acting in common. Obviously the plea in abatement interposed by each of the defendants alleging that they were not jointly concerned in the wrongful acts, and therefore that there was a misjoinder, raised only an issue of fact on the plaintiff's allegations and could be determined only by evidence.

1. See *supra*, p. 202.

2. See falsity in fact and falsity in law placed in juxtaposition by Taft, J., in *Warax v. Cincinnati, etc., R. Co., 72 Fed. Rep. 640.*

3. *Chicago, etc., R. Co. v. New York, etc., R. Co., 24 Fed. Rep. 516*, was a suit against several defendants to restrain the violation of a contract and for an accounting. The court construed the contract to be a several and not a joint undertaking, and sustained a removal by one of the defendants. Wallace, J., said: "Although a joint accounting is demanded, the liability of each defendant is several, and the complainant cannot convert a controversy which is wholly between itself and each of the two defendants into one between itself and both defendants by treating it as joint in the prayer

of section 639 of the United States Revised Statutes,¹ only the separate controversy of the petitioning defendant could be removed, and the plaintiff was allowed to proceed against all the other defendants, in the state court, as to the remaining controversies in the suit, the same as if no removal had been had.² Under the Act of 1875³ a removal on the ground of a separable controversy took the whole suit and left nothing behind for trial in the state court;⁴ and under the present law, the Act of 1887—

for relief. It is only where the cause of action is founded upon a joint and several liability that a plaintiff may, at his election, proceed against both defendants jointly, or each severally."

1. 14 U. S. Stat. at L. 306, c. 288, which provided for "the removal of the cause as against him," the petitioning defendant; and Rev. Stat. U. S., § 639, subdiv. 2, providing that "such removal shall not take away or prejudice the right of the plaintiff to proceed at the same time with the suit in the state court as against the other defendants."

2. *Brooks v. Clark*, 119 U. S. 502, where the court said the removal had the effect of making two suits out of one; *King v. Cornell*, 106 U. S. 396; *Barney v. Latham*, 103 U. S. 212; *Fisk v. Union Pac. R. Co.*, 6 Blatchf. (U. S.) 377; *Dart v. McKinney*, 9 Blatchf. (U. S.) 360; *Allen v. Ryerson*, 2 Dill. (U. S.) 503; *McGinnity v. White*, 3 Dill. (U. S.) 355; *Field v. Lowsdale*, *Deady* (U. S.) 288; *Chambers v. Holland*, 11 Fed. Rep. 210; *Missouri v. Tiedermann*, 10 Fed. Rep. 20; *Wormser v. Dahlman*, 16 Blatchf. (U. S.) 319, 57 How. Pr. (N. Y.) 286; *Jones v. Foreman*, 66 Ga. 371; *Bliss v. Rawson*, 43 Ga. 183; *Stewart v. Mordecai*, 40 Ga. 7; *Stanbrough v. Griffin*, 52 Iowa 113; *Stafford v. Twitchell*, 33 La. Ann. 523; *Simmons v. Taylor*, 83 N. Car. 148; *George v. Pilcher*, 28 Gratt. (Va.) 307. See also *Hyde v. Ruble*, 104 U. S. 408; *Vannevar v. Bryant*, 21 Wall. (U. S.) 43.

3. 18 U. S. Stat. at L. 471, c. 137, § 2, which provided for a removal of "said suit."

4. *Brooks v. Clark*, 119 U. S. 512; *Barney v. Latham*, 103 U. S. 212; *Atlantic, etc., Fertilizing Co. v. Carter*, 88 Fed. Rep. 707, 4 Hughes (U. S.) 217; *Freidler v. Chotard*, 19 Fed. Rep. 229; *Corbin v. Boies*, 18 Fed. Rep. 4; *Northern Pac. Terminal Co. v. Lowenberg*, 18 Fed. Rep. 342; *Hollister v. Bell*, 17 Fed. Rep. 705; *Chambers v. Holland*, 11 Fed. Rep. 209; *Iowa*

Homestead Co. v. Des Moines Nav., etc., Co., 8 Fed. Rep. 102; *Chester v. Chester*, 7 Fed. Rep. 6; *Monney v. Agnew*, 4 Fed. Rep. 8; *Sheldon v. Keokuk Northern Line Packet Co.*, 1 Fed. Rep. 795; *Atlantic, etc., Fertilizing Co. v. Carter*, 4 Hughes (U. S.) 217, 88 Fed. Rep. 707; *Tuedt v. Carson*, 4 McCrary (U. S.) 426, 13 Fed. Rep. 353; *Goodenough v. Warren*, 5 Sawy. (U. S.) 497; *Arapahoe County v. Kansas Pac. R. Co.*, 4 Dill. (U. S.) 277; *Carraher v. Brennan*, 7 Biss. (U. S.) 497; *Stapleton v. Reynolds*, 16 Am. L. Reg. N. S. 48; *Osgood v. Chicago, etc., R. Co.*, 6 Biss. (U. S.) 330; *Chicago v. Gage*, 6 Biss. (U. S.) 472; *Burch v. Davenport, etc., R. Co.*, 46 Iowa 454; *Stafford v. Twitchell*, 33 La. Ann. 523; *Clark v. Opdyke*, 10 Hun (N. Y.) 383; *O'Kelly v. Richmond, etc., R. Co.*, 89 N. Car. 58 [correcting *Simmons v. Taylor*, 83 N. Car. 148]; *Meyer v. Schining*, 55 Tex. 431; *Feibleman v. Edmonds*, 69 Tex. 334.

"Much confusion and embarrassment, as well as increase in the cost of litigation, had been found to result from the provision in the former act [Act of 1866] permitting the separation of controversies arising in a suit, removing some to the federal court, and leaving others in the state court for determination." *Barney v. Latham*, 103 U. S. 213.

Contra in Early Cases. — It was at first supposed that the Act of 1875 did not repeal Rev. Stat. U. S., § 639, and that part of a case could still be removed. See *Wormser v. Dahlman*, 16 Blatchf. (U. S.) 321, 57 How. Pr. (N. Y.) 286; *Girardey v. Moore*, 3 Woods (U. S.) 397, 5 Cent. L. J. 78.

Retention of Part by Consent. — In *St. Louis, etc., R. Co. v. Ransom*, 29 Kan. 298, one defendant filed a petition for removal on the ground of a separable controversy expressly, and the court made an order removing the separable part, but not the entire suit. The suit proceeded to judgment in the state court against the remaining defendant,

1888,¹ a removal carries into the federal court the entire original suit,² and part of a suit cannot be removed.³ But where a proceeding consists of several suits so distinct in character that each is triable in the state court separately, one may be removed without affecting the others.⁴

c. CASES INVOLVING FEDERAL QUESTIONS—(1) *What Constitutes Federal Question*—(a) *In General*.—The Act of 1887–1888 provides for the removal of “any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority,” of which, by the same act, original jurisdiction is given to the federal Circuit Court.⁵ Cases of that nature are commonly described as involving a “federal question.” Since the jurisdiction of that class of cases is coextensive with the original jurisdiction of the Circuit Court, and nearly though not quite commensurate with the jurisdiction of the Supreme Court by writ of error to the state court in cases of that character, an exhaustive discussion of the subject is incompatible with the scope and reasonable limits of this article. A case may be considered to arise under the Constitution or a law of the United States whenever its correct decision depends upon the construction of either.⁶

who made no objection whatever to the jurisdiction. It was held, *Brewer, J.*, writing the opinion, that he thereby waived his right to go with the removing defendant into the federal court, and that his objection to the validity of the judgment could not be first raised on appeal. *Distinguishing National Steam Ship Co. v. Tugman*, 15 Cent. L. J. 448.

1. 24 U. S. Stat. at L. 553, c. 373, § 2; 25 U. S. Stat. at L. 435, c. 866, § 2, providing for a removal of “said suit.”

2. *Connell v. Smiley*, 156 U. S. 335; *Sharkey v. Port Blakely Mill Co.*, 92 Fed. Rep. 426; *Sugar Creek, etc., R. Co. v. McKell*, 75 Fed. Rep. 36; *Le Mars v. Iowa Falls, etc., R. Co.*, 48 Fed. Rep. 661; *Patchin v. Hunter*, 38 Fed. Rep. 51; *Bacon v. Felt*, 38 Fed. Rep. 873; *Insurance Co. of North America v. Delaware Mut. Ins. Co.*, 50 Fed. Rep. 257; *Bowley v. Richmond, etc., R. Co.*, 110 N. Car. 317.

It follows that if part of a suit is not removable, because it embraces a cause of action of a criminal nature, there can be no removal. *Texas v. Day Land, etc., Co.*, 49 Fed. Rep. 597.

3. *Atlantic, etc., Fertilizing Co. v. Carter*, 88 Fed. Rep. 707, 4 Hughes (U. S.) 217. See also *Chambers v. Holland*,

11 Fed. Rep. 209; *Northern Pac. Terminal Co. v. Lowenberg*, 18 Fed. Rep. 339; *Clark v. Chicago, etc., R. Co.*, 11 Fed. Rep. 355; *Mooney v. Agnew*, 4 Fed. Rep. 8.

4. In *Pacific R. Removal Cases*, 115 U. S. 23, a city instituted proceedings to widen a street, condemn land therefor, and assess benefits. From the award of damages and assessments of benefits made by a jury and confirmed by a municipal board, several property owners took separate appeals to the state court, and one of them thereupon removed his controversy to the federal court. It was held that the rest of the proceeding in the state court remained there, although it might have to await the result in the federal court. See also *In re Stutsman County*, 88 Fed. Rep. 343, a proceeding to collect a list of delinquent taxes against various parcels of land with various owners.

5. 24 U. S. Stat. at L. 553, c. 373, § 2; 25 U. S. Stat. at L. 434, c. 866, § 2. The right of removal upon this ground was not given by the Judiciary Act of 1789, and the jurisdiction was first conferred by the Act of 1875, 18 U. S. Stat. at L. 470, c. 137.

6. *Cohens v. Virginia*, 6 Wheat. (U. S.) 379; *Kansas Pac. R. Co. v. Atchi-*

Citizenship of Parties Immaterial. — When the suit presents a federal question, it is removable without regard to the character of the parties, and a suit brought by a state or by a plaintiff who is a

son, etc., R. Co., 112 U. S. 416, where the court said: "The same thing is expressed by the statement that a case arises under the Constitution or laws of the United States whenever the rights set up by a party may be defeated by one construction or sustained by the opposite construction." *Citing Osborn v. U. S. Bank*, 9 Wheat. (U. S.) 738. See also *Tennessee v. Davis*, 100 U. S. 257.

For cases wherein it was held that no federal question was involved within the meaning of the Act of Congress, see *Hoadley v. San Francisco*, 94 U. S. 4; *Metcalf v. Watertown*, 128 U. S. 586; *Gibbs v. Crandall*, 120 U. S. 105; *Leather Manufacturers' Bank v. Cooper*, 120 U. S. 778; *Gold-Washing, etc., Co. v. Keyes*, 96 U. S. 199; *Chicago, etc., R. Co. v. Wiggins Ferry Co.*, 108 U. S. 18; *Central R. Co. v. Mills*, 113 U. S. 249; *Starin v. New York*, 115 U. S. 248; *Germania Ins. Co. v. Wisconsin*, 119 U. S. 473; *Prescott v. Haughey*, 65 Fed. Rep. 653; *Fitzgerald v. Missouri Pac. R. Co.*, 45 Fed. Rep. 812; *Kenyon v. Knipe*, 46 Fed. Rep. 309; *Hoyt v. Bates*, 81 Fed. Rep. 641; *In re Helena, etc., Smelting, etc., Co.*, 48 Fed. Rep. 609; *State v. Columbus, etc., R. Co.*, 48 Fed. Rep. 626; *Johnson v. Wells*, 91 Fed. Rep. 1; *Lincoln v. Lincoln St. R. Co.*, 77 Fed. Rep. 658; *Argonaut Min. Co. v. Kennedy Min., etc., Co.*, 84 Fed. Rep. 1; *Reed v. Northern Pac. R. Co.*, 86 Fed. Rep. 817; *Blue Bird Min. Co. v. Largey*, 49 Fed. Rep. 289; *Iowa v. Chicago, etc., R. Co.*, 33 Fed. Rep. 391; *Los Angeles Farming, etc., Co. v. Hoff*, 48 Fed. Rep. 340; *Berger v. Douglas County*, 5 Fed. Rep. 23, 2 McCrary (U. S.) 483; *Teas v. Albright*, 13 Fed. Rep. 406; *Mills v. Central R. Co.*, 20 Fed. Rep. 449; *Rothschild v. Matthews*, 22 Fed. Rep. 6; *New York v. Independent Steam-Boat Co.*, 22 Fed. Rep. 801; *Hambleton v. Duham*, 22 Fed. Rep. 465; *McFadden v. Robinson*, 22 Fed. Rep. 10; *Virginia Coupon Cases*, 25 Fed. Rep. 666; *King v. Neill*, 26 Fed. Rep. 721; *Kansas v. Bradley*, 26 Fed. Rep. 289; *McLane v. Leicht*, 27 Fed. Rep. 887, 69 Iowa 401; *Kessinger v. Vannatta*, 27 Fed. Rep. 890; *Wiggins Ferry Co. v. Chicago, etc., R. Co.*, 3 McCrary (U. S.)

609; *Wilder v. Union Nat. Bank*, 9 Biss. (U. S.) 178; *Com. v. Louisville Bridge Co.*, 42 Fed. Rep. 241; *Gay v. Lyons*, 3 Woods (U. S.) 56; *Trafton v. Nougues*, 4 Sawy. (U. S.) 179; *Austin v. Gagan*, 39 Fed. Rep. 626; *Upham v. Scoville*, 40 Ark. 170; *Illinois Cent. R. Co. v. Chicago, etc., R. Co.*, 122 Ill. 473; *Dickinson v. Heeb Brewing Co.*, 73 Iowa 705; *Lemen v. Wagner*, 68 Iowa 660; *Judge v. Arlen*, 71 Iowa 186; *Drake v. Kaiser*, 73 Iowa 703; *Drake v. Jordan*, 73 Iowa 707; *Walker v. Coleman*, 55 Kan. 381; *Clark v. Opdyke*, 10 Hun (N. Y.) 383; *Lalor v. Dunning*, (C. Pl. Spec. T.) 56 How. Pr. (N. Y.) 209; *Setzer v. Douglass*, 91 N. Car. 426; *State v. Southern Pac. R. Co.*, 23 Oregon 424; *McKee v. Coffin*, 66 Tex. 304; *Galveston, etc., R. Co. v. State*, (Tex. Civ. App. 1896) 36 S. W. Rep. 111; *Houston, etc., R. Co. v. State*, (Tex. Civ. App. 1897) 41 S. W. Rep. 157.

For cases holding that a federal question was involved see *Mitchell v. Smale*, 140 U. S. 406; *Bock v. Perkins*, 139 U. S. 628; *Tennessee v. Whitworth*, 117 U. S. 129; *Feibelman v. Packard*, 109 U. S. 421; *Coosaw Min. Co. v. South Carolina*, 144 U. S. 550; *Crawford v. Hubbell*, 89 Fed. Rep. 1; *People v. Rock Island, etc., R. Co.*, 71 Fed. Rep. 753; *Auburn Sav. Bank v. Hayes*, 61 Fed. Rep. 911; *Bailey v. Mosher*, 63 Fed. Rep. 488; *Minnesota v. Duluth, etc., R. Co.*, 87 Fed. Rep. 497; *Hurst v. Cobb*, 61 Fed. Rep. 1; *Lowry v. Chicago, etc., R. Co.*, 46 Fed. Rep. 83; *American Solid Leather Button Co. v. Empire State Nail Co.*, 47 Fed. Rep. 741; *Walker v. Richards*, 55 Fed. Rep. 129; *Southern Pac. R. Co. v. Townsend*, 62 Fed. Rep. 161; *South Carolina v. Port Royal, etc., R. Co.*, 56 Fed. Rep. 333; *Burke v. Bunker Hill, etc., Min., etc., Co.*, 46 Fed. Rep. 644; *Dunton v. Muth*, 45 Fed. Rep. 390; *Carr v. Fife*, 44 Fed. Rep. 713; *Lacroix v. Lyons*, 27 Fed. Rep. 403; *Miller v. Wattier*, 24 Fed. Rep. 49; *Houser v. Clayton*, 3 Woods (U. S.) 273; *Miller v. Tobin*, 18 Fed. Rep. 609; *Mallon v. Hyde*, 76 Fed. Rep. 388; *Frank G. & S. M. Co. v. Larimer M. & S. Co.*, 8 Fed. Rep. 724; *Lawrence v. Norton*, 13 Fed. Rep. 1; *Ellis v. Norton*, 16 Fed. Rep. 4;

citizen of the same state as the defendant is not exempted from the operation of the statute.¹

(b) **Suit By or Against Federal Corporation — In General.** — It is now well settled that a suit by or against a corporation created by an Act of Congress, except a national bank, raises a federal question *ipso facto* and is removable to a federal court on that ground if it involves the requisite jurisdictional amount.²

People v. Chicago, etc., R. Co., 16 Fed. Rep. 706; *Illinois v. Illinois Cent. R. Co.*, 16 Fed. Rep. 881; *New Orleans Nat. Bank v. Merchant*, 18 Fed. Rep. 841; *Willard v. Mueller*, 23 Fed. Rep. 209; *State v. Walruff*, 26 Fed. Rep. 178; *Kessinger v. Hinkhouse*, 27 Fed. Rep. 883; *Mahin v. Pfeiffer*, 27 Fed. Rep. 892; *Orner v. Saunders*, 3 Dill. (U. S.) 284; *Connor v. Scott*, 4 Dill. (U. S.) 242; *Van Allen v. Atchison*, etc., R. Co., 1 McCrary (U. S.) 598; *San Mateo County v. Southern Pac. R. Co.*, 13 Fed. Rep. 145; *Illinois v. Illinois Cent. R. Co.*, 33 Fed. Rep. 721; *Richards v. Rock Rapids*, 72 Iowa 77; *Johnson v. New Orleans Nat. Banking Assoc.*, 33 La. Ann. 479; *McKee v. Brooks*, 64 Tex. 255; *Kenyon v. Squire*, 1 Wash. 9.

Action Against Officers of National Bank. — In *Bailey v. Mosher*, 63 Fed. Rep. 488, an action for damages against the officers and directors of a national bank, it was held that the complaint, the allegations in which are substantially set out in the report, sufficiently disclosed a federal question by charging the defendants with a violation of a national banking law, although some of the averments in the complaint stated a case of deceit at common law.

An Action for Malicious Prosecution Against a United States District Attorney in causing the plaintiff to be indicted, arrested, and tried for an alleged violation of the pension laws may be removed by the defendant on the ground that he was a United States official acting under the Constitution and laws of the United States. *Eighmy v. Poucher*, 83 Fed. Rep. 855, where the court said that the trial of the action might "involve and draw in question, directly or indirectly, the federal laws, practice, and procedure, the validity of the organization of the grand jury, and the title, authority, and power of several executive and judicial officers of the general government."

Title to Public Land. — A controversy

between a settler claiming title to land as a pre-emptor under the laws of the United States and a railroad company claiming title under an Act of Congress presents a federal question. *Spokane Falls, etc., R. Co. v. Ziegler*, 167 U. S. 65.

1. *Ames v. Kansas*, 111 U. S. 449; *Jewett v. Whitcomb*, 69 Fed. Rep. 417; *Lund v. Chicago, etc., R. Co.*, 78 Fed. Rep. 385.

2. *Texas, etc., R. Co. v. Cody*, 166 U. S. 606; *Texas, etc., R. Co. v. Barrett*, 166 U. S. 617; *Oregon Short Line, etc., R. Co. v. Skottowe*, 162 U. S. 490; *Texas, etc., R. Co. v. Cox*, 145 U. S. 593; *Pacific R. Removal Cases*, 115 U. S. 1; *Lund v. Chicago, etc., R. Co.*, 78 Fed. Rep. 385; *Supreme Lodge, etc., v. Hill*, 76 Fed. Rep. 468; *Knights of Pythias v. Kalinski*, 163 U. S. 289; *Supreme Lodge, etc., v. Wilson*, 66 Fed. Rep. 785; *People v. Colorado Cent. R. Co.*, 42 Fed. Rep. 638; *Union Pac. R. Co. v. McComb*, 1 Fed. Rep. 799, 17 Blatchf. (U. S.) 510; *Turton v. Union Pac. R. Co.*, 3 Dill. (U. S.) 366; *Texas, etc., R. Co. v. Bloom*, 85 Tex. 279.

Section 640 of the United States Revised Statutes authorized any suit commenced in a state court against any corporation, other than a banking corporation, organized under a law of the United States, to be removed into the Circuit Court of the United States upon the petition of the defendant stating that it had a defense arising under or by virtue of the Constitution or of any treaty or law of the United States. But that section was expressly repealed by the Act of 1887-1888, 24 U. S. Stat. at L. 555, c. 373, § 6; 25 U. S. Stat. at L. 436, c. 866, § 6. For cases arising under the section of the statute above mentioned before it was repealed, see *Texas v. Texas, etc., R. Co.*, 3 Woods (U. S.) 308; *Jones v. Oceanic Steam Nav. Co.*, 11 Blatchf. (U. S.) 406; *Gard v. Durant*, 4 Cliff. (U. S.) 113; *Fisk v. Union Pac. R. Co.*, (U. S. Cir. Ct.) 10 Abb. Pr. N. S. (N. Y.) 457; *Ellis v. Atlantic, etc., R. Co.*, 134 Mass. 338;

Suits By or Against National Banks. — By Act of Congress a national bank is a citizen of the state wherein it is located,¹ and it has the same right to remove a suit upon the ground that it arises under the Constitution or laws of the United States as any citizen of the state in which it is located.² But a suit by or against a national bank does not *ipso facto* raise a federal question by reason of its character as a federal corporation.³

(c) **Suit By or Against Receiver Appointed by Federal Court — In General.** — Any suit by or against a receiver appointed by a federal court concerning the performance of his official duties raises a federal question and is removable if the requisite amount is involved.⁴

Ancillary Suits. — And it has been held that an action against such receiver in respect of any act or transaction of his in carrying on the business connected with the property in his charge⁵ is ancillary to the suit in which he was appointed and may be removed regardless of either the citizenship of the parties or the amount in controversy.⁶

Scheffer v. National L. Ins. Co., 25 Minn. 534; *Hazard v. Durant*, 9 R. I. 602; *Texas, etc., R. Co. v. McAllister*, 59 Tex. 349.

1. Act of 1887-1888, 24 U. S. Stat. at L. 554, c. 373, § 4; 25 U. S. Stat. at L. 436, c. 866, § 4, which provides as follows: "All national banking associations established under the laws of the United States shall, for the purposes of all actions by or against them, real, personal, or mixed, and all suits in equity, be deemed citizens of the states in which they are respectively located; and in such cases the circuit and district courts shall not have jurisdiction other than such as they would have in cases between individual citizens of the same state. The provisions of this section shall not be held to affect the jurisdiction of the courts of the United States in cases commenced by the United States or by direction of any officer thereof, or cases for winding up the affairs of any such bank."

2. *Leather Manufacturers' Bank v. Cooper*, 120 U. S. 778. See also *Wichita Nat. Bank v. Smith*, 72 Fed. Rep. 570.

3. *National Bank of Commerce v. Galland*, 14 Wash. 502; *Leather Manufacturers' Bank v. Cooper*, 120 U. S. 778; *Wichita Nat. Bank v. Smith*, 72 Fed. Rep. 568; *Burnham v. Bank*, 53 Fed. Rep. 163.

4. *Texas, etc., R. Co. v. Cox*, 145 U. S. 593; *Smith v. Greenhow*, 109 U. S. 669; *Gableman v. Peoria, etc., R. Co.*, 82 Fed. Rep. 790; *Lund v. Chicago,*

etc., R. Co., 78 Fed. Rep. 385; *Washington v. Northern Pac. R. Co.*, 75 Fed. Rep. 333; *Central Trust Co. v. East Tennessee, etc., R. Co.*, 59 Fed. Rep. 523; *Van Wert County v. Peirce*, 90 Fed. Rep. 764; *Evans v. Dillingham*, 43 Fed. Rep. 177; *Jewett v. Whitcomb*, 69 Fed. Rep. 417; *Landers v. Felton*, 73 Fed. Rep. 311; *St. Louis, etc., R. Co. v. Trigg*, 63 Ark. 536; *Hardwick v. Kean*, 95 Ky. 563. Compare *Echols v. Smith*, (Ky. 1897) 42 S. W. Rep. 538.

5. The Act of 1887-1888, 24 U. S. Stat. at L. 554, c. 343, § 3; 25 U. S. Stat. at L. 436, c. 866, § 3, provides as follows: "That every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed, so far as the same shall be necessary to the ends of justice."

6. *Carpenter v. Northern Pac. R. Co.*, 75 Fed. Rep. 850; *Sullivan v. Barnard*, 81 Fed. Rep. 886. See also *White v. Ewing*, 159 U. S. 36; *Rouse v. Letcher*, 156 U. S. 47. Compare *Pitkin v. Cowen*, 91 Fed. Rep. 599. And as to the necessity of a jurisdictional amount in dispute, see *Ray v. Peirce*, 81 Fed. Rep. 881.

(d) **Suit Against Receiver of National Bank.** — A suit against a receiver of a national bank appointed by the comptroller of the currency raises a federal question and is removable upon that ground.¹

(2) **Who May Remove the Suit.** — See *infra*, I. 19. *d. On Ground of Federal Question.*

d. SUITS BY THE UNITED STATES. — The statute authorizes the removal of suits in which the United States are plaintiffs or petitioners.²

e. SUITS BETWEEN CITIZENS AND ALIENS. — The statute authorizes the removal of suits in which there is a controversy between citizens of a state and foreign states, citizens, or subjects.³

A Corporation created by the laws of a foreign government is a foreign citizen within the meaning of the removal act.⁴

Time of Foreign Citizenship. — The alienage of the party must exist both at the commencement of the suit and at the time of filing the petition for removal.⁵

If There Are Several Parties on One or Both Sides of the suit, it cannot be removed under the statute unless all of the necessary parties on one side are citizens of a state and all on the other foreign citizens;⁶ in other words, a suit in which necessary parties on

1. *Speckart v. German Nat. Bank*, 85 Fed. Rep. 12; *Hot Springs Independent School Dist. No. 10 v. Hot Springs First Nat. Bank*, 61 Fed. Rep. 417. See also *Sowles v. St. Albans First Nat. Bank*, 46 Fed. Rep. 513; *Sowles v. Witters*, 43 Fed. Rep. 700. But compare *Wichita Nat. Bank v. Smith*, 72 Fed. Rep. 568; *Tehan v. Auburn First Nat. Bank*, 39 Fed. Rep. 577; *Snohomish County v. Puget Sound Nat. Bank*, 81 Fed. Rep. 518.

2. Act of 1887-1888, 24 U. S. Stat. at L. 552, c. 373; 25 U. S. Stat. at L. 433, c. 866. See *Texas v. Texas*, etc., R. Co., 3 Woods (U. S.) 311.

3. Act of 1887-1888, 24 U. S. Stat. at L. 552, c. 373; 25 U. S. Stat. at L. 434, c. 866. For cases of removal of suits between citizens and aliens, see *Stalker v. Pullman's Palace-Car Co.*, 81 Fed. Rep. 989; *Missouri v. Alt*, 73 Fed. Rep. 302; *Cudahy v. McGeoch*, 37 Fed. Rep. 1; *Uhle v. Burnham*, 42 Fed. Rep. 1; *Purcell v. British Land*, etc., Co., 42 Fed. Rep. 465; *Cooley v. McArthur*, 35 Fed. Rep. 372; *Walker v. O'Neill*, 38 Fed. Rep. 374; *Oscanyan v. Winchester Repeating Arms Co.*, 103 U. S. 261; *Creagh v. Equitable L. Assur. Soc.*, 83 Fed. Rep. 849.

Under the Act of 1789 it was necessary for the plaintiff to be a citizen of the state in which the suit was brought,

and a suit by an alien plaintiff was not removable. *Galvin v. Boutwell*, 9 Blatchf. (U. S.) 470; *Dennistoun v. New York*, etc., R. Co., 1 Hilt. (N. Y.) 62.

4. *Terry v. Imperial F. Ins. Co.*, 3 Dill. (U. S.) 408; *Shattuck v. North British*, etc., Ins. Co., 58 Fed. Rep. 609; *Sherwood v. Newport News*, etc., Co., 55 Fed. Rep. 1; *Pelzer Mfg. Co. v. Hamburg-Bremen F. Ins. Co.*, 62 Fed. Rep. 1.

5. *Creswell v. Belanger*, 56 Fed. Rep. 529; *National Steamship Co. v. Tugman*, 106 U. S. 118.

6. *Tracy v. Morel*, 88 Fed. Rep. 801; *Sawyer v. Switzerland Marine Ins. Co.*, 14 Blatchf. (U. S.) 452; *Ex p. Girard*, 3 Wall. Jr. (C. C.) 265; *Hervey v. Illinois Midland R. Co.*, 7 Biss. (U. S.) 103; *Fields v. Lamb, Deady* (U. S.) 432; *Calderwood v. Braly*, 28 Cal. 97; *People v. Hager*, 20 Cal. 167; *Welch v. Tennent*, 4 Cal. 203; *Crane v. Seitz*, 30 Mich. 453; *Dennistoun v. New York*, etc., R. Co., 1 Hilt. (N. Y.) 65. For the same principle see *supra*, I. 16. *u. (4) (a) The Rule Stated.*

Compare Guarantee Co. v. Lynchburg First Nat. Bank, 95 Va. 480, where it appears to have been assumed by the court that in a suit by a citizen against an alien nonresident and a citizen of a state other than that of the plaintiff or

both sides are aliens, is not removable.¹ But the citizenship or alienage of formal, nominal, or unnecessary parties is immaterial.²

17. Removal for Prejudice or Local Influence — *a. WHAT CAUSES ARE REMOVABLE FOR PREJUDICE, ETC.* — (1) *In Respect of Subject-matter.* — Section 2 of the Act of 1887-1888 provides for the removal on the ground of prejudice or local influence of "a suit," and undoubtedly means, so far as the character of the suit and the subject-matter of the controversy are concerned, a suit of a civil nature at law or in equity of which the Circuit Courts of the United States are given original jurisdiction by section 1 of the same act and jurisdiction by removal for diverse citizenship under another clause of section 2.³

in which the suit was brought, the defendants could remove the suit on their joint petition.

Alien Not Served with Process. — If an alien defendant is joined with citizen defendants, but has not been served with process, he is not a party so as to prevent removal by his codefendants. *Poppenhauser v. India Rubber Comb Co.*, 14 Fed. Rep. 708. See also *Cudahy v. McGeoch*, 37 Fed. Rep. 1.

Voluntary Appearance. — But where a citizen defendant was joined with an alien, the presence of the former prevented a removal though he was not served with process where he voluntarily appeared. *Ex p. Girard*, 3 Wall. Jr. (C. C.) 265.

1. *Merchants' Cotton Press, etc., Co. v. Insurance Co. of North America*, 151 U. S. 386.

A Suit by an Alien Against an Alien cannot be removed on the ground of alienage of a party. *Barrowcliffe v. La Caisse General*, 58 How. Pr. (N. Y. Marine Ct.) 131; *Johnson v. Accident Ins. Co.*, 35 Fed. Rep. 376; *Lacroix v. Lyons*, 27 Fed. Rep. 403; *Orosco v. Gagliardo*, 22 Cal. 83.

Removal for Federal Question. — If the case is one arising under a treaty of the United States it is no objection to the federal jurisdiction that both parties are aliens. *Lacroix v. Lyons*, 27 Fed. Rep. 404, where the court refers to *New Orleans, etc., R. Co. v. Mississippi*, 102 U. S. 135.

2. Thus merely nominal or formal parties joined as defendants with an alien cannot prevent the latter from removing the case. *Shattuck v. North British, etc., Ins. Co.*, 58 Fed. Rep. 609.

3. 24 U. S. Stat. at L. 553, c. 373, § 2; 25 U. S. Stat. at L. 435, c. 866, § 2.

Such was the construction in respect of the amount in controversy, necessary to jurisdiction, that was placed upon the act in *In re Pennsylvania Co.*, 137 U. S. 451, and is applicable to the other jurisdictional requisites. As to what constitutes a suit of a civil nature, etc., see generally *supra*, p. 166; and for cases which arose under "local prejudice" acts, see *Du Vivier v. Hopkins*, 116 Mass. 125; *In re Cilley*, 58 Fed. Rep. 977; *Upshur County v. Rich*, 135 U. S. 467.

History and Constitutionality of Prejudice or Local Influence Acts — *Original Occasion for Act.* — Soon after the close of the civil war, and when Northern creditors began to press heavily for payment upon their ante-bellum debtors, *Hobby v. Allison*, 13 Fed. Rep. 403, Congress passed the original act for the removal of causes from a state to a federal court upon the ground of prejudice or local influence. Act of 1867, 14 U. S. Stat. at L. 558, c. 196. "About the time of the late civil war in this country it became the policy of Congress to enable parties, citizens of different states, for reasons readily imagined, to remove a class of cases not included in the original act, and to remove them at times and under circumstances which could not be done under that act." *Per Justice Miller*, in *Arapahoe County v. Kansas Pac. R. Co.*, 4 Dill. (U. S.) 281. "It became the law at a period of angry sectional feeling and great prejudice in certain localities against citizens of other portions of the country," *Hone v. Dillon*, 29 Fed. Rep. 467. To the same effect see *Cook v. Whitney*, 3 Woods (U. S.) 717; *Gaines v. Fuentes*, 92 U. S. 19.

The original occasion for the act

(2) *In Respect of Citizenship of Parties* — (a) *Time of Citizenship*. — The necessary diversity of citizenship as expounded in the rest of this division must exist not only at the time of the application for removal, but also at the commencement of the suit.¹

(b) *Citizenship of Plaintiffs*. — In suits removable for prejudice or local influence under the Act of 1887-1888, the plaintiff must be a citizen of the state where the suit is brought, and if there are several plaintiffs all must be citizens of that state,² at least if

probably no longer exists, and the act is now resorted to chiefly by corporation defendants.

Subsequent Provisions. — The act was subsequently embodied in section 639 of the United States Revised Statutes, but removals for prejudice or local influence are now governed entirely by the Act of 1887-1888, cited at the head of this note.

Constitutionality. — The Act of 1867 above mentioned, although it provided for a removal by a plaintiff as well as by a defendant, was declared constitutional in numerous cases. *Goodman v. Oshkosh*, 45 Wis. 356; *Meadow Valley Min. Co. v. Dodds*, 7 Nev. 143; *Burson v. National Bank*, 40 Ind. 173; *Galpin v. Critchlow*, 112 Mass. 339; *Mahone v. Manchester Corp.*, 111 Mass. 72; *Railroad Co. v. Whitton*, 13 Wall. (U. S.) 270; *Johnson v. Monell*, 1 Wollw. (U. S.) 390.

1. *Bradley v. Ohio River, etc.*, R. Co., 78 Fed. Rep. 388, 119 N. Car. 744; *Jackson, etc., Co. v. Pearson*, 60 Fed. Rep. 121.

As to New Defendant. — But where the suit as originally instituted is between citizens of the state in which it is brought, and a citizen of another state who would not have been bound by a judgment between the original parties alone is brought in as a defendant by amended complaint, he may remove the suit. *Jackson, etc., Co. v. Pearson*, 60 Fed. Rep. 113, *distinguishing* *Richmond, etc.*, R. Co. *v. Findley*, 32 Fed. Rep. 641.

Under the Prior Acts for Removal on the ground of local prejudice, it was held that the diverse citizenship must exist at the time when the suit was brought as well as when the petition for removal was filed. *Young v. Parker*, 132 U. S. 267; *Grand Trunk R. Co. v. Twitchell*, 59 Fed. Rep. 727; *Schnadig v. Flescher*, 29 Fed. Rep. 465; *Frelinghuysen v. Baldwin*, 19 Fed. Rep. 49; *Northern Pac. Terminal Co. v. Lowenberg*, 18 Fed. Rep. 342; *Goodnow v. Grayson*, 15 Fed. Rep. 1;

Ex p. Jones, 66 Ala. 202; *Weed Sewing Mach. Co. v. Smith*, 71 Ill. 204; *Laird v. Connecticut, etc.*, R. Co., 55 N. H. 375; *Dart v. Walker*, (C. Pl. Gen. T.) 43 How. Pr. (N. Y.) 29. Before the point was settled by the Supreme Court some of the cases held that it was only necessary for the diverse citizenship to exist at the time of removal. *Hone v. Dillon*, 29 Fed. Rep. 467; *Cook v. Whitney*, 3 Woods (U. S.) 715; *Johnson v. Monell*, Wollw. (U. S.) 390; *Miller v. Chicago, etc.*, R. Co., 17 Fed. Rep. 97; *Hammond v. Buchanan*, 68 Ga. 729; *Nye v. Northern Cent. R. Co.*, 24 Hun (N. Y.) 556. The point was left undecided in *Phoenix Ins. Co. v. Pechner*, 95 U. S. 185.

2. Act of 1887-1888, 24 U. S. Stat. at L. 553, c. 373, § 2; 25 U. S. Stat. at L. 435, c. 866, § 2, providing for removal of a suit "in which there is a controversy between a citizen of the state in which the suit is brought and a citizen of another state;" *Rike v. Floyd*, 42 Fed. Rep. 247; *Thouron v. East Tennessee, etc.*, R. Co., 38 Fed. Rep. 673; *Wilder v. Virginia, etc.*, Steel, etc., Co., 46 Fed. Rep. 676; *Lawson v. Richmond, etc.*, R. Co., 112 N. Car. 390. See also *Case v. Douglas*, 1 Dill. (U. S.) 299.

Alien Plaintiffs. — If the plaintiff, or one of several plaintiffs, is an alien, the cause is not removable for prejudice or local influence. *Cohn v. Louisville, etc.*, R. Co., 39 Fed. Rep. 227. See also *Thouron v. East Tennessee, etc.*, R. Co., 38 Fed. Rep. 673.

Rearrangement of Parties to Determine Real Plaintiffs. — Parties named as defendants whose interests are really adverse to other defendants petitioning for removal will be regarded as plaintiffs, and if after the parties are thus arranged it is found that some of the plaintiffs are aliens or citizens of other states than that in which the suit is brought, it cannot be removed. *Adelbert College v. Toledo, etc.*, R. Co., 47 Fed. Rep. 836.

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they are all jointly concerned in the cause of action against the defendant who applies for removal.¹

(c) **Citizenship of Defendants.** — The removal act of 1867² and its substantial re-enactment in clause 3 of section 639 of the United States Revised Statutes³ were uniformly held to require that all the necessary parties on one side of the suit should be citizens of different states from those on the other,⁴ and not to permit a removal for prejudice or local influence because of a separable controversy between one of the defendants and the plaintiff; all the defendants were required to unite in the petition for removal.⁵ The Act of 1875⁶ contained nothing concerning removal on the specific ground of prejudice or local influence, and did not repeal clause 3 of section 639 of the Revised Statutes.⁷

Suit. — Where the original plaintiffs in an equity case suing on behalf of themselves and all others similarly situated are not citizens of the state in which the suit is brought, it does not become removable by the intervention as coplaintiff on his own application of one having the same class interest who is a citizen of that state. *Thouron v. East Tennessee, etc., R. Co.*, 38 Fed. Rep. 673.

Under Prior Removal Acts. — Under the Act of 1867, 14 U. S. Stat. at L. 558, c. 196, and Rev. Stat. U. S., § 639, which allowed a removal by either the plaintiff or the defendant, it was necessary that the party adverse to the one who sought a removal should be a citizen of the state where the suit was brought. *American Bible Soc. v. Grove*, 101 U. S. 610; *Amory v. Amory*, 95 U. S. 187; *Knickerbocker L. Ins. Co. v. Gorbach*, 70 Pa. St. 150.

1. *Gann v. Northeastern R. Co.*, 57 Fed. Rep. 417.

2. 14 U. S. Stat. at L. 558, c. 196, which authorized a removal by either the plaintiff or the defendant if he was a citizen of a state other than that in which the suit was brought.

3. Which, however, like the Act of 1789, described the case to be removed as "a suit" between a citizen of the state in which it is brought and a citizen of another state, instead of describing it as in the Act of 1867, 14 U. S. Stat. at L. 558, c. 196, as "a suit * * * in which there is controversy between" such parties.

4. *Myers v. Swann*, 107 U. S. 546; *American Bible Soc. v. Price*, 110 U. S. 61; *Hancock v. Holbrook*, 119 U. S. 586; *Rosenthal v. Coates*, 148 U. S. 142; *Ex p. Andrews*, 40 Ala. 639; *Burch v. Davenport, etc., R. Co.*, 46

Iowa 449; *Howland Coal, etc., Works v. Brown*, 13 Bush (Ky.) 681; *Stafford v. Twitchell*, 33 La. Ann. 520; *Martin v. Coons*, 24 La. Ann. 169; *Crane v. Seitz*, 30 Mich. 453; *Miller v. Finn*, 1 Neb. 254; *Weeks v. Billings*, 55 N. H. 371; *Bryant v. Scott*, 67 N. Car. 391; *Hazard v. Durant*, 9 R. I. 602; *Beery v. Irick*, 22 Gratt. (Va.) 484. See also the cases cited in the next note.

5. *Sewing Mach. Co.'s Case*, 18 Wall. (U. S.) 553; *Vannevar v. Bryant*, 21 Wall. (U. S.) 41; *American Bible Soc. v. Price*, 110 U. S. 61; *Cambria Iron Co. v. Ashburn*, 118 U. S. 54; *Myers v. Swann*, 107 U. S. 546; *American Bible Soc. v. Grove*, 101 U. S. 611; *Jefferson v. Driver*, 117 U. S. 272; *Hancock v. Holbrook*, 119 U. S. 586; *Young v. Parker*, 132 U. S. 267. See also *Hanrick v. Hanrick*, 153 U. S. 196; *Blake v. McKim*, 103 U. S. 339; *Bixby v. Couse*, 8 Blatchf. (U. S.) 73; *Case v. Douglas*, 1 Dill. (U. S.) 299; *Bliss v. Rawson*, 43 Ga. 181; *Bryant v. Rich*, 106 Mass. 180; *Merwin v. Wexel*, (C. Pl. Spec. T.) 49 How. Pr. (N. Y.) 115; *George v. Pilcher*, 28 Gratt. (Va.) 299. Compare *Cooke v. State Nat. Bank*, 52 N. Y. 96.

6. Act of March 3, 1875, 18 U. S. Stat. at L. 470, c. 137.

7. *Fisk v. Henarie*, 142 U. S. 459; *Hanrick v. Hanrick*, 153 U. S. 197; *American Bible Soc. v. Grove*, 101 U. S. 610; *Hess v. Reynolds*, 113 U. S. 73; *Baltimore, etc., R. Co. v. Bates*, 119 U. S. 464; *Field v. Williams*, 24 Fed. Rep. 513; *Melendy v. Currier*, 22 Fed. Rep. 129; *Hobby v. Allison*, 13 Fed. Rep. 401; *Johnson v. Johnson*, 13 Fed. Rep. 193; *Farmers' L. & T. Co. v. Chicago, etc., R. Co.*, 9 Biss. (U. S.) 133; *Sims v. Sims*, 17 Blatchf. (U. S.) 369; *Cooke v. Ford*, 2 Flipp. (U. S.)

The Act of 1887-1888¹ allows none but defendants to remove any cause whatever,² and by new regulations of removals for prejudice or local influence supersedes and repeals the earlier statutes upon that subject.³ Whether this act permits one of two or more defendants to remove any case which he could not have removed under earlier statutes is a question upon which there has been no definite expression of opinion by the Supreme Court.⁴ One of the Circuit Courts holds that all of the defendants must be citizens of states other than that of the plaintiff, and in which the suit is brought.⁵ But according to the weight of authority, any one defendant, being a citizen of another state than that in which the suit is brought, who is jointly sued with

22; *Dennis v. Alachua County*, 3 Woods (U. S.) 683; *Hammond v. Buchanan*, 68 Ga. 728; *Sharp v. Gutcher*, 74 Ind. 357; *Barber v. St. Louis*, etc., R. Co., 43 Iowa 223; *Stone v. Sargent*, 129 Mass. 503; *Lang v. Lynch*, 63 N. H. 243; *Nye v. Northern Cent. R. Co.*, 24 Hun (N. Y.) 556; *Wickham v. Wickham*, 20 Hun (N. Y.) 239; *Bates v. Baltimore*, etc., R. Co., 39 Ohio St. 157.

1. 24 U. S. Stat. at L. 552, c. 373; 25 U. S. Stat. at L. 433, c. 866.

2. See on that point, as to removals for prejudice or local influence, *infra*, I. 17. *d. Who May Remove Suit.*

3. *Hanrick v. Hanrick*, 153 U. S. 197; *Fisk v. Henarie*, 142 U. S. 459; *Hobart v. Illinois Cent. R. Co.*, 81 Fed. Rep. 5; *Minnick v. Union Ins. Co.*, 40 Fed. Rep. 369; *Southworth v. Reid*, 36 Fed. Rep. 451; *Whelan v. New York*, etc., R. Co., 35 Fed. Rep. 849; *Short v. Chicago*, etc., R. Co., 34 Fed. Rep. 226; *Mason v. Interstate Consol. St. R. Co.*, 170 Mass. 382. *Contra*, *Stix v. Keith*, 90 Ala. 121.

The Language of the Act is that "where a suit is now pending, or may be hereafter brought, in any state court, in which there is a controversy between a citizen of the state in which the suit is brought and a citizen of another state, any defendant, being such citizen of another state, may remove such suit," etc. 24 Stat. at L. 553, c. 373, § 2; 25 Stat. at L. 435, c. 866, § 2.

4. *Hanrick v. Hanrick*, 153 U. S. 197, where the court refrained from deciding whether one of several defendants could remove a case on the ground of prejudice and local influence and a separable controversy, there being other sufficient reasons in that case for remanding the cause. In *Fisk v. Henarie*, 142 U. S. 459, the federal Circuit Court had allowed a removal

by defendants who were nonresidents of the state where the suit was brought, although other defendants were residents and citizens of the same state as the plaintiff (see *Fisk v. Henarie*, 32 Fed. Rep. 417). On writ of error the Supreme Court ordered the cause to be remanded to the state court, but on another ground. See the comments on this case in *Jackson*, etc., Co. v. Pearson, 60 Fed. Rep. 125. See also *Wilder v. Virginia*, etc., Steel, etc., Co., 46 Fed. Rep. 682, where the opinion was written by Chief Justice Fuller.

5. *Eighth Circuit*.—*Anderson v. Bowers*, 43 Fed. Rep. 321; *Durkee v. Illinois Cent. R. Co.*, 81 Fed. Rep. 1.

Defendant Fraudulently Joined.—In *Durkee v. Illinois Cent. R. Co.*, 81 Fed. Rep. 1, above cited, it was held that where the petition and affidavit allege that a codefendant who is a citizen of the same state as the plaintiff has no real interest in the controversy and is made a party for the sole purpose of preventing a removal to the federal court, his presence will not defeat the jurisdiction of the federal court unless issue be joined upon the allegations and they be disproved. See upon that subject *supra*, p. 203.

Under Prior Removal Act.—In *Howland Coal*, etc., Works v. Brown, 13 Bush (Ky.) 681, the court declined to construe Rev. Stat. U. S., § 639, as authorizing the removal of a suit on the petition of one defendant who was not a citizen of the state where the suit was brought, where there were other necessary defendants who were citizens of that state as well as the plaintiff. The court said that such a construction would render that provision of the Act of Congress unconstitutional. See also *Stephens v. Howe*, (N. Y. Super. Ct. Spec. T.) 43 How. Pr. (N. Y.) 134.

other defendants, citizens of the same state as the plaintiffs, may remove the suit for prejudice or local influence, even though there is no separable controversy between the plaintiff or plaintiffs and the removing defendant.¹ The real party defendant may have the cause removed without regard to the citizenship of other defendants whose interests are nominal or adverse to the party seeking a removal.²

1. *Fourth Circuit.* — See *Wilder v. Virginia, etc., Steel, etc., Co.*, 46 Fed. Rep. 679, *per* Chief Justice Fuller, generally considered as impliedly sustaining this view.

Fifth Circuit. — *Haire v. Rome R. Co.*, 57 Fed. Rep. 321, *per* Newman, J., holding that one defendant may thus remove the case whether there is a separable controversy or not; *Gann v. Northeastern R. Co.*, 57 Fed. Rep. 420, *per* Justice Lamar.

Sixth Circuit. — *Whelan v. New York, etc., R. Co.*, 35 Fed. Rep. 849, *per* Jackson, J., the leading case on this point; *Jackson, etc., Co. v. Pearson*, 60 Fed. Rep. 113; *Hall v. Chattanooga Agricultural Works*, 48 Fed. Rep. 599; *Olds Wagon Works v. Benedict*, 67 Fed. Rep. 1; *Tod v. Cleveland, etc., R. Co.*, 65 Fed. Rep. 147; *Huskings v. Cincinnati, etc., R. Co.*, 37 Fed. Rep. 507; *Thouron v. East Tennessee, etc., R. Co.*, 38 Fed. Rep. 676; *Detroit v. Detroit City R. Co.*, 54 Fed. Rep. 1.

Seventh Circuit. — See *Bane v. Keefer*, 66 Fed. Rep. 610.

Ninth Circuit. — *Fisk v. Henarie*, 32 Fed. Rep. 417; *Bonner v. Meikle*, 77 Fed. Rep. 489; *Tacoma v. Wright*, 84 Fed. Rep. 836.

North Carolina. — *Daird v. Richmond, etc., R. Co.*, 113 N. Car. 610.

One of the Defendants an Alien. — Section 639 of the United States Revised Statutes provided for removal on the ground of local prejudice "when a suit is between a citizen of the state in which it is brought and a citizen of another state," and it was quite clear, though never expressly decided, that the presence of an alien party on either side of the suit would prevent a removal. See *Grand Trunk R. Co. v. Twitchell*, 59 Fed. Rep. 727; *Burlington, etc., R. Co. v. Dunn*, 122 U. S. 513; *Young v. Parker*, 132 U. S. 267. The Act of 1887-1888 provides for removal of a suit "in which there is a controversy between," etc. 24 U. S. Stat. at L. 553, c. 373, § 2; 25 U. S. Stat. at L. 435, c. 866, § 2. This was also the

language of the Act of 1867, 14 U. S. Stat. at L. 558, c. 196. But it was never decided under the Act of 1867 that the presence of an alien in the suit was fatal to a removal for any other reason than was the presence of a codefendant who was a citizen of the state in which the suit was brought. Now, since the cases cited at the head of this note remove the last objection, it would seem that the presence of an alien defendant should not prevent a removal by a codefendant citizen of a state other than that in which the suit is brought. In *Thouron v. East Tennessee, etc., R. Co.*, 38 Fed. Rep. 673, one of the plaintiffs was an alien and the other was not a citizen of the state where the suit was brought. The suit was held not to be removable, but the ground of the decision was that the plaintiffs were not both citizens of the state where the suit was brought. The fact that one of them was an alien was no further noticed in the opinion. In *Cohn v. Louisville, etc., R. Co.*, 39 Fed. Rep. 227, the plaintiff was an alien, and of course the suit was not removable. See *supra*, p. 240, note 2. And the cases cited *infra*, p. 249, note 2, simply hold that an alien cannot remove the cause, which is aside from the point here considered.

2. *Reeves v. Corning*, 51 Fed. Rep. 778, *per* Baker, J., where it appeared that the codefendant, who was a citizen of the same state as the plaintiff, was either a mere stakeholder or interested adversely to the defendant; *Calloway v. Ore Knob Copper Co.*, 74 N. Car. 200. See also *supra*, p. 197.

Under the Prior "Local Prejudice" Acts the presence on the same side with the party seeking removal, of parties whose citizenship was the same as that of the opposite party, did not prevent a removal if such parties were unnecessary, or merely formal, *Calloway v. Ore Knob Copper Co.*, 74 N. Car. 200; or if their interests were adverse to the party seeking removal, *Swann v. Myers*, 79 N. Car. 101.

(3) *Amount in Dispute.* — The clause in the Act of 1887-1888 allowing a removal for prejudice or local influence does not name any amount as requisite,¹ but it is settled by the Supreme Court that the matter in dispute must exceed, exclusive of interest and costs, the sum or value of two thousand dollars.²

b. NATURE OF PREJUDICE, ETC., REQUIRED — (1) *In General.* — "Prejudice or local influence" authorizing the removal of the cause must be such that the defendant "will not be able to obtain justice" in the state courts.³ It may relate to the person of the litigant or to the subject-matter of the litigation, but in either case there must exist improper bias, partiality, unreasonable predilection, or hostility in the local community or courts.⁴

1. 24 U. S. Stat. at L. 553, c. 373, § 2; 25 U. S. Stat. at L. 435, c. 866, § 2.

2. *In re Pennsylvania Co.*, 137 U. S. 451, where the court arrived at this conclusion upon careful consideration of the several sections of the Act of 1887-1888 in connection with the prior acts on the subject of removal for local prejudice. Followed in *Tod v. Cleveland, etc.*, R. Co., 65 Fed. Rep. 145, where the case was remanded because the amount in controversy did not appear in the petition or affidavit or elsewhere in the record. For other cases in the federal Circuit Courts and in the state courts holding the same way, see *Roraback v. Pennsylvania Co.*, 42 Fed. Rep. 420; *Carson, etc., Lumber Co. v. Holtzclaw*, 39 Fed. Rep. 579; *Malone v. Richmond, etc., R. Co.*, 35 Fed. Rep. 625; *Bierbower v. Miller*, 30 Neb. 161; *Tucker v. Inter-States L. Assoc.*, 112 N. Car. 797. *Contra*, now overruled, *Fales v. Chicago, etc., R. Co.*, 32 Fed. Rep. 673; *McDermott v. Chicago, etc., R. Co.*, 38 Fed. Rep. 529, holding that the amount in dispute was not material; *Frishman v. Insurance Companies*, 41 Fed. Rep. 449.

3. Act of 1887-1888, 24 U. S. Stat. at L. 553, c. 373, § 2; 25 U. S. Stat. at L. 435, c. 866, § 2, requiring that it shall be made to appear to the Circuit Court "that from prejudice or local influence he will not be able to obtain justice in such state court" — which was the language of the earlier local prejudice acts — "or in any other state court to which the said defendant may, under the laws of the state, have the right, on account of such prejudice or local influence, to remove said cause." The part last quoted was not in the earlier acts.

Moral Certainty of Injustice Not Nec-

sary. — The evidence necessary to support the federal jurisdiction does not have to prove morally that the defendant cannot obtain a just decision in the state court. The existence of local influence and its natural tendency to operate upon the court being shown, the tribunal may be deemed to be one in which, in the sense of the removal statute, justice cannot be obtained. *Tacoma v. Wright*, 84 Fed. Rep. 836; *Detroit v. Detroit City R. Co.*, 54 Fed. Rep. 1.

4. *Per Jackson, J.*, in *Adelbert College v. Toledo, etc., R. Co.*, 47 Fed. Rep. 843, where it was also said that "the term 'local influence,' if not synonymous with 'prejudice,' manifestly refers to an improper influence exerted by or existing in favor of one side, or against the other, which will prevent the latter from obtaining justice in the state courts."

"There may be a prejudice in favor of his adversary that would be as much in his way of obtaining justice as a prejudice against himself. The prejudice and local influence mentioned in the statute is not merely a prejudice or influence primarily existing against the party seeking a removal. It includes as well that prejudice in favor of his adversary which may arise from the fact that he is long resident and favorably known in the community." *Per Deady, J.*, in *Neale v. Foster*, 31 Fed. Rep. 53, quoted and applied as "exactly in point" in *Smith v. Crosby Lumber Co.*, 46 Fed. Rep. 819, and also quoted with approval in *Parks v. Southern R. Co.*, 90 Fed. Rep. 3.

Instances of Cases Held Removable. — In *Smith v. Crosby Lumber Co.*, 46 Fed. Rep. 819, an application for removal was granted by Reed, J., upon affidavits averring substantially the

In one case the court associated "local influence" with the plaintiff, and "prejudice" with the defendant.¹ However that may be, the existence of either will suffice as a ground for removal, since the terms are connected by the disjunctive.²

(2) *Prejudice of Judges.*—The prejudice or local influence most frequently urged as a ground for removal is that which would operate upon a jury; but the clause of the removal act relates

existence of a widespread prejudice among the citizens of the county against the defendant, a general sympathy for the plaintiff, and particularly for his father, both of whom had many friends throughout the county, and had been well-known business men, and were generally supposed to have been ruined financially through their relations with the defendant corporation, the affidavits showing that opinions hostile to the defendant were frequently expressed, etc.

In *Hall v. Chattanooga Agricultural Works*, 48 Fed. Rep. 599, which was an equity case, the defendant's affidavit alleged that the plaintiffs intended to demand a jury trial in order to appeal to the prejudice of the jurors against the defendant corporation and its nonresident stockholders. It contained further averments of facts tending to show prejudice, and the court found averments in the plaintiff's bill which lent support to the averments of the affidavit. The application for removal was granted by Key, J.

In *Herndon v. Southern R. Co.*, 76 Fed. Rep. 398, a removal was ordered by Seymour, J., upon conflicting affidavits epitomized in the opinion of the court, which were held sufficient to show a local hostility to the defendant railroad company, though the prejudice was perhaps "unknown to very many of the good citizens" of the county. The court's reluctance to order a removal was lessened by "the fact that no serious delay, expense, or inconvenience" could result, as the federal court would sit not far from the place where the state court would have been held.

In *Tacoma v. Wright*, 84 Fed. Rep. 836, a suit in equity, the court granted a removal upon affidavits "made by reputable persons, who are well informed, and in whom this court has confidence," tending to prove that in the city of Tacoma during several years preceding the commencement of the suit there had been public denun-

ciation of the defendant and his associates, on account of the transactions out of which the lawsuit arose, and that there was in the minds of a great number of the citizens a strong belief that the people of the city had been defrauded in those transactions, and a disposition to hold the defendant responsible therefor. It was also argued that the amount at stake in the litigation was so large in proportion to the amount of taxes annually collected in the city that every taxpayer of the city and county had a direct pecuniary interest sufficient in amount to create a presumption of bias.

Instances of Cases Held Not Removable.—In *Dennison v. Brown*, 38 Fed. Rep. 535, where the affidavit alleged that the defendant was a stranger in the county and that the plaintiff was well known there as a lawyer, politician, and ex-candidate for the office of attorney-general, Wallace, J., held that there was clearly no ground for removal.

In *Carson, etc., Lumber Co. v. Holtzclaw*, 39 Fed. Rep. 885, Thayer, J., denied an application for removal on conflicting affidavits in a case which was not calculated to excite or affect any special or local interest.

1. In *Herndon v. Southern R. Co.*, 76 Fed. Rep. 398, Seymour, J., said: "Upon reading the affidavits in this case I have not been convinced that the local influence of plaintiff is such as constitutes a sufficient cause for removal. I am, however, of the opinion that the action should be removed on the ground of local prejudice" against the defendant.

2. "If there be local prejudice the cause may be removed, or if no local prejudice exists, and there be local influence so powerful and operative as to prevent the defendant from obtaining justice, he may remove. If there be prejudice against the defendant, or if the influence and power of the plaintiff or any other local influence dominate the public mind at the place

to suits both at law and in equity,¹ and authorizes the removal of a suit upon a proper showing of the prejudice of judges,² even where the issue to be decided in the state court is one of pure law.³ However, to warrant removal of cases triable by the court

where the suit is instituted, so that he cannot have justice, the cause may be removed." *Per* Key, J., in *Huskins v. Cincinnati, etc., R. Co.*, 37 Fed. Rep. 507.

1. Act of 1887-1888, 24 U. S. Stat. at L. 553, c. 373, § 2; 25 U. S. Stat. at L. 435, c. 866, § 2, so construed in *Detroit v. Detroit City R. Co.*, 54 Fed. Rep. 5. *Tacoma v. Wright*, 84 Fed. Rep. 836, is also an instance of removal of an equity case.

An Approved Precedent of a Verified Petition for removal in an equity case will be found in *Bonner v. Meikle*, 77 Fed. Rep. 485, where a removal was ordered.

2. *Bonner v. Meikle*, 77 Fed. Rep. 485, was an action by code complaint praying for a decree quieting title and also for a judgment for damages. It does not appear whether the case was to be tried by the court or by a jury, but prejudice of the state judges was alleged. A removal was granted by Hawley, J., on averments substantially set forth in the statement of the case, showing inflammatory public speeches, inimical discussions of the defendants' rights "by stage drivers, public carriers, bar and saloon keepers, and others throughout said county," etc.

Where the State Judge Disregards an Order or Removal duly made and served upon him, and proceeds to trial and judgment in the cause, it is very strong proof of his prejudice. *Walcott v. Watson*, 46 Fed. Rep. 529.

3. *Detroit v. Detroit City R. Co.*, 54 Fed. Rep. 1, was a bill in equity by the city of Detroit to obtain a decree that the franchise of the defendant railroad company had expired by virtue of a limitation in the state constitution, and to enjoin the defendant from further occupation of the streets of the city. Taft, J., said: "We do not see why a judge, if influenced improperly against a party, may not yield to such influence as well in his decisions of legal questions as in his conclusions of fact." And replying to the contention that inasmuch as the defendant could carry the case to the Supreme Court of the state in the event of an adverse decree, and therefore that no showing could be

sufficient which did not tend to prove that the decision of the Supreme Court would also be affected by prejudice and local influence, he said: "We do not agree in this view. It rests on the false premise that no injury is done to a party litigant when a court of original jurisdiction, swayed by prejudice or local influence, decides a case against him, if the case involves only an appealable question of law. He is entitled on general principles to have his rights justly determined in every tribunal whose aid or protection the law gives him, no matter whether the judgment is to depend on disputed facts or law. It is an injustice to him to be compelled to appeal to a higher court to right a wrong done him by the prejudice of the trial judge." *Compare* *Duncan v. Gegan*, 101 U. S. 810, a foreclosure case which had proceeded to a decree before the petition for removal was filed under the former removal act, where the court said: "We confess it is not easy to see how a party could swear to his belief that from prejudice or local influence he could not obtain justice in the state court, when all that court had to do was to divide the proceeds of a sale by paying them out in a certain way, and as to which there was apparently no possible chance of dispute." See also *Duff v. Duff*, 31 Fed. Rep. 773. In *Miller v. Finn*, 1 Neb. 257, the court pronounced absurd the proposition that prejudice or local influence could be predicated of a court of final appellate jurisdiction.

Refusal to Follow Federal Decisions.—The refusal of the Supreme Court of a state to recognize or follow the adjudication of the Supreme Court of the United States on the question of the lien of certain railroad equipment bonds does not show prejudice or local influence which will justify the removal of another suit in the state court involving the same question. *Adelbert College v. Toledo, etc., R. Co.*, 47 Fed. Rep. 844, where Jackson, J., said: "If in any case a state court's decision can be made the ground of removal, it must be alleged and shown that such decision proceeded not from

the inflammatory state of public opinion or other indicia of prejudice must be extraordinary.¹ In states having an elective judiciary, the fact that local prejudice may affect the electoral constituency is not alone a sufficient ground for removal;² but the fact is of great importance where the infected community is the plaintiff in the suit.³

(3) *Prejudice Avoidable by Change of Venue or Judge* — *Change of Venue*. — The obnoxious prejudice or local influence must affect every state court to which the defendant has a right to remove the cause on that ground.⁴ It is held in some of the circuits

error or mistake of law, but from that improper bias or unreasonable predilection which constitutes the 'prejudice' or 'local influence' contemplated by the law." See also *In re Breckinridge*, 31 Neb. 489.

1. In *Turnbull Wagon Co. v. Linthicum Carriage Co.*, 80 Fed. Rep. 4, an equity case, a removal was denied on affidavits showing a remark by the judge, possibly indiscreet, but evincing no real bias, and affidavits about newspaper publications in the county, denouncing the defendants for alleged fraudulent transactions. "It has not come to this," said the court, "that the federal courts will remove cases merely because of newspaper articles denunciatory of individuals." See also *Rike v. Floyd*, 42 Fed. Rep. 247, where removal of a chancery case to be tried by the court was denied.

2. *Turnbull Wagon Co. v. Linthicum Carriage Co.*, 80 Fed. Rep. 4, where Hammond, J., said that the case of *Detroit v. Detroit City R. Co.*, 54 Fed. Rep. 1, "does not decide any such doctrine."

3. In *Detroit v. Detroit City R. Co.*, 54 Fed. Rep. 1, described *supra*, p. 246, note 3, the removal was sustained upon an affidavit convincing the court that the citizens of the city where the cause was to be tried were prejudiced against the defendants, and had prejudged the case against them, and that a decision by the court in favor of the defendants would cause many electors to vote at the approaching judicial election against the re-election of the judge rendering such decision, although it does not appear in the report of the case that any particular judge was a candidate for re-election. The pith of the case seems to be in the last clause of the following quotation from the opinion of the court, *per* Taft, J., holding that "under extraordinary circum-

stances, judges elected by a community must be presumed to be affected by a prejudice shown to pervade that entire community, so as to make it unjust to compel a nonresident to try his controversy with the community before its own judges."

4. See the language of the statute quoted *supra*, p. 244, note 3.

In *Rike v. Floyd*, 42 Fed. Rep. 247, the affidavit was held insufficient because it made no showing as to prejudice or local influence in counties to which the cause might be removed, although the state law left the removal to the discretion of the court.

In *Robison v. Hardy*, 38 Fed. Rep. 49, Blodgett, J., denied an application for removal because the showing of prejudice, etc., in other counties was insufficient, although the state statute authorizing a change of venue apparently left it to the discretion of the court. See also *Amy v. Manning*, 38 Fed. Rep. 537.

If the state law gives to the defendant an absolute right to a change of venue, the showing of prejudice in the other state courts must be made. In *Southworth v. Reid*, 36 Fed. Rep. 454, where Bunn, J., said that in view of the law of *Wisconsin* it would rarely happen that a proper case for removal of a cause from that state could be made. In *Maher v. Tower Hotel Co.*, 94 Fed. Rep. 225, the court remarked that there was no proper showing as to prejudice, etc., in other courts of the state (Illinois).

Prejudice Sufficiently Shown. — In *Walcott v. Watson*, 46 Fed. Rep. 529, the case had been effectually removed by an order duly made and served upon the judge of the state court. Nevertheless the state judge proceeded to try the case, and rendered judgment against the party who had petitioned for removal. By the state law each judge

that this condition is inoperative where a change of venue is merely discretionary with the state court.¹

Change of Judge. — When the defendant cannot demand a change of judge as a matter of right, the fact that the state judge has a discretionary power to invite a judge of another circuit or county to hear the case will not affect the question of removal.²

c. BETWEEN WHOM PREJUDICE, ETC., MUST EXIST. — The prejudice or local influence contemplated by the statute is only that between adverse parties to the suit.³

d. WHO MAY REMOVE SUIT. — **A Plaintiff Cannot Remove the Cause for prejudice or local influence.**⁴ It can be removed only by a

had power to hold court in any county of the state. Hawley, J., in denying a motion to remand, said: "The fact that the same judge who tried this case after the order of removal was made to this court was authorized to hold court in any county of the state, and might have presided at the trial if this cause had been removed to any other county in the state, is, under the facts presented in this case, of itself sufficient upon this point to justify the order of removal;" as against an objection that justice might be obtained in some "other state court."

1. *Tacoma v. Wright*, 84 Fed. Rep. 836 [*criticising Rike v. Floyd*, 42 Fed. Rep. 248], where the court said: "State laws which merely authorize a change of venue without giving to a defendant the right to remove a cause are not to be considered as affecting in any way a defendant's right to remove a cause into a United States Circuit Court;" *Smith v. Crosby Lumber Co.*, 46 Fed. Rep. 824; *Herndon v. Southern R. Co.*, 73 Fed. Rep. 308; *Bonner v. Meikle*, 77 Fed. Rep. 485.

2. *Detroit v. Detroit City R. Co.*, 54 Fed. Rep. 1. Whether a statutory provision that another judge may be designated when an objection is tenable against the one before whom the case is pending can be regarded as materially affecting the right of removal was left undecided in *Turnbull Wagon Co. v. Linthicum Carriage Co.*, 80 Fed. Rep. 4.

3. "Beyond doubt the existing act [of 1887-1888], like every act which preceded it, does not authorize one defendant to remove a suit into the Circuit Court of the United States from a state court upon the ground of prejudice or local influence between himself and other defendants." *Hanrick v. Hanrick*, 153 U. S. 197.

4. *Campbell v. Collins*, 62 Fed. Rep. 849 [*following Fisk v. Henarie*, 32 Fed. Rep. 417], where the petition for removal was filed upon the mistaken theory that the words in the removal act of 1887-1888, "at any time before the trial of any suit which is now pending in any Circuit Court or may hereafter be entered therein, and which has been removed to said court from a state court on the affidavit of any party plaintiff," etc., amounted to a grant by implication to the plaintiff of a right to remove a cause in the same way as a defendant may remove under the provisions of the next preceding paragraph of the same act; *Meyer Bros. Drug Co. v. Malm*, 47 Kan. 762, holding that the plaintiff could not remove the cause though he was a nonresident and a citizen of another state. See the Act of 1887-1888, quoted in the following note.

Defendant Filing Cross-bill in Federal Court. — Where the cause is removed by a defendant in a suit in equity wherein the bill seeks affirmative relief against him, and he files a cross-bill in the federal court seeking affirmative relief, the cause will not be remanded on the theory that he has thus become a plaintiff instead of a defendant. *Jackson, etc., Co. v. Pearson*, 60 Fed. Rep. 113.

A Claimant Against a County, where a taxpayer appeals from an allowance of the claim by county supervisors under the provisions of the Nebraska statute, is a plaintiff in the appeal, though appellee by the express terms of the statute, and cannot remove the case. *Tullock v. Webster County*, 40 Fed. Rep. 706.

Prior Removal Acts. — Under the Act of 1867, 14 U. S. Stat. at L. 558, c. 196, and under Rev. Stat. U. S., § 639, removal could be had by the plaintiff as well as by the defendant, if he was not

defendant.¹ He must also be a citizen — an alien, whether a natural person or a corporation, cannot remove the cause on this ground² — and a citizen of a state³ other than that in which the suit is brought.⁴

A Corporation Defendant has the same privilege of removing the suit as a natural person.⁵

a citizen of the state in which the suit was brought. *Neale v. Foster*, 31 Fed. Rep. 53; *Delaware County v. Diebold Safe, etc., Co.*, 133 U. S. 473; *Akerly v. Villas*, 1 Abb. (U. S.) 284; *Sands v. Smith*, 1 Abb. (U. S.) 368; *Meadow Valley Min. Co. v. Dodds*, 7 Nev. 143. But a plaintiff who was a citizen of the state where the suit was brought could not remove it. *Hurst v. Western, etc., R. Co.*, 93 U. S. 71.

1. Act of March 3, 1887, 24 U. S. Stat. at L. 553, c. 373, § 2; Act of Aug. 13, 1888, 25 U. S. Stat. at L. 435, c. 866, § 2, which provides for removal only by "any defendant, being such citizen of another state."

Counterclaim Converting Plaintiff into Defendant. — In *Carson, etc., Lumber Co. v. Holtzclaw*, 39 Fed. Rep. 578, it was held that a nonresident plaintiff suing in the state court against whom a counterclaim is brought is a "defendant" within the provisions of the act and entitled to a removal so far as his attitude to the case is concerned. The same ruling was made in *Walcott v. Watson*, 46 Fed. Rep. 529, where the defendant in his answer set up a counterclaim upon which he might have sued the plaintiff and obtained affirmative relief. *Distinguishing West v. Aurora City*, 6 Wall. (U. S.) 141, on the ground that in the latter case the defendant's pleading was wholly in the nature of a defensive plea. See also *Clarkson v. Manson*, 4 Fed. Rep. 260. Compare cases cited *infra*, I. 18. c. (3) *Amount in Counterclaim or Set-off*.

Amendment in State Court Dismissing Defendant. — The state court may, before petition for removal filed in the federal court, allow the plaintiff to strike out the name of the only nonresident defendant, and thus prevent any removal. *Rome, etc., Constr. Co. v. Smith*, 84 Ga. 238.

Removal by Intervener. — Under the Act of 1867 it was held that a removal could not be had by one who was neither plaintiff nor defendant, but only an intervener voluntarily making himself a party in a suit between citizens of the same state, the result of

which could in no wise have affected his rights had he kept aloof from the controversy. *Williams v. Williams*, 24 La. Ann. 55. See also *Martin v. Coons*, 24 La. Ann. 169.

2. *New Orleans, etc., R. Co. v. Rabasse*, 44 La. Ann. 178; *Dahlonga Co. v. Frank W. Hall Merchandise Co.*, 88 Ga. 339. See the language of the statute quoted in the preceding note.

An Unnaturalized Indian residing with his tribe within the limits of the United States is not a citizen and cannot remove a suit on the ground of prejudice or local influences. *Paul v. Chilsoquie*, 70 Fed. Rep. 401.

Prior Removal Acts. — Under the Act of 1867, 14 U. S. Stat. at L. 559, c. 196, which provided for removal by "such citizen of another state," it was self-evident that an alien could not remove it. *King v. Cornell*, 106 U. S. 395; *Crane v. Reeder*, 28 Mich. 527, 30 Mich. 460; *Stinson v. St. Paul, etc., R. Co.*, 20 Minn. 492. Likewise under Rev. Stat. U. S., § 639, subd. 3, which provided that "when a suit is between a citizen of the state in which it is brought and a citizen of another state, it may be so removed on the petition of the latter." *Grand Trunk R. Co. v. Twitchell*, 59 Fed. Rep. 727; *Burlington, etc., R. Co. v. Dunn*, 122 U. S. 514.

3. "The word 'state' as used in this act [Act of 1887-1888] means a state of the United States. A citizen of a territory is not a citizen of a state, nor is a citizen of the District of Columbia." *Dahlonga Co. v. Frank W. Hall Merchandise Co.*, 88 Ga. 339. And a citizen of a territory could not remove a suit under the local prejudice clause of Rev. Stat. U. S., § 639. *Darst v. Peoria*, 13 Fed. Rep. 561.

4. *Paul v. Baltimore, etc., R. Co.*, 44 Fed. Rep. 513. See also *Rome, etc., Constr. Co. v. Smith*, 84 Ga. 238; *Gavin v. Vance*, 33 Fed. Rep. 85.

5. It is unnecessary to cite the numerous cases of removals by corporations. *Detroit v. Detroit City R. Co.*, 54 Fed. Rep. 1, is one. And see

Joinder in Application for Removal. — Under the former removal acts all the defendants had to unite in the petition for removal.¹ Now any defendant having the requisite qualification in respect to citizenship may remove the cause if the other necessary conditions exist.²

e. TIME FOR MAKING APPLICATION — Before Trial. — The Act of 1867 relating to removal on the ground of prejudice or local influence required the petition for removal to be filed "at any time before the final hearing or trial of the suit;"³ the third subdivision of section 639 of the United States Revised Statutes,⁴ "at any time before the trial or final hearing of the suit."⁵ Under both of those acts it was often ruled that if the trial court had set aside a verdict and granted a new trial, or if the appellate court had reversed the judgment and remanded the case for trial *de novo*, it was not too late to remove the case.⁶ Now,

under the prior local prejudice acts, *Farmers' L. & T. Co. v. Maquillan*, 3 Dill. (U. S.) 379; *Mix v. Andes Ins. Co.*, 74 N. Y. 53, *overruling Cooke v. State Nat. Bank*, 52 N. Y. 96.

1. See *supra*, p. 241.

2. *Jackson, etc., Co. v. Pearson*, 60 Fed. Rep. 126. See *supra*, p. 242.

3. 14 U. S. Stat. at L. 556, c. 196.

4. The third subdivision was a substantial re-enactment of the Act of 1867.

5. It was essentially the language of the Act of 1866, 14 U. S. Stat. at L. 307, c. 288, providing for the removal of separable controversies, and was not repealed by the Act of 1875, 18 U. S. Stat. at L. 470, c. 137, which said nothing about removal for prejudice or local influence. In *Delaware County v. Diebold Safe, etc., Co.*, 133 U. S. 473, a claim against a county in Indiana was heard before county commissioners and disallowed. The plaintiff appealed to the Circuit Court of the county, and immediately after the entry of the appeal in that court and before further proceedings there filed a petition for removal under Rev. Stat. U. S., § 639, on the ground of prejudice and local influence. It was held that the petition was in time. For a somewhat similar case under the same act see *Hess v. Reynolds*, 113 U. S. 73. Compare *Stevenson v. Williams*, 19 Wall. (U. S.) 572. But every trial was final until vacated in some form. Hence the application could not be made after judgment and while a motion for a new trial was pending and undisposed of. *Vannevar v. Bryant*, 21 Wall. (U. S.) 41. For other cases where the application was held to be

in time under the Act of 1867 and Rev. Stat. U. S., § 639, see *Field v. Williams*, 24 Fed. Rep. 513; *Sutherland v. Jersey City, etc., R. Co.*, 22 Fed. Rep. 356; *Melendy v. Currier*, 22 Fed. Rep. 129; *Osborn v. Osborn*, 5 Fed. Rep. 389; *Akerly v. Vilas*, 1 Abb. (U. S.) 284; *Sims v. Sims*, 17 Blatchf. (U. S.) 369; *Kellogg v. Hughes*, 3 Dill. (U. S.) 357; *Minnett v. Milwaukee, etc., R. Co.*, 3 Dill. (U. S.) 460; *Whitehouse v. Continental F. Ins. Co.*, 2 Fed. Rep. 498, 14 Phila. (Pa.) 431; *Elliott v. Stocks*, 67 Ala. 290; *Sharp v. Gutcher*, 74 Ind. 357; *Burson v. National Park Bank*, 40 Ind. 173; *Nye v. Northern Cent. R. Co.*, 24 Hun (N. Y.) 556; *Douglas v. Caldwell*, 65 N. Car. 248; *Clark v. Delaware, etc., Canal Co.*, 11 R. I. 36; *Rathbone Oil Tract Co. v. Rauch*, 5 W. Va. 79. For cases holding that it was too late, see *Darsy v. Peoria*, 13 Fed. Rep. 561; *Boggs v. Willard*, 3 Biss. (U. S.) 256; *Farmers' L. & T. Co. v. Chicago, etc., R. Co.*, 9 Biss. (U. S.) 133; *Fleming v. Philadelphia F. Assoc.*, 76 Ga. 678; *Hall v. Ricketts*, 9 Bush (Ky.) 366; *Williams v. Williams*, 24 La. Ann. 55; *Adams' Express Co. v. Trego*, 35 Md. 47; *Miller v. Finn*, 1 Neb. 254; *Whittier v. Hartford F. Ins. Co.*, 55 N. H. 141; *Washington, etc., R. Co. v. Alexandria, etc., R. Co.*, 19 Gratt. (Va.) 592; *Jones v. Foster*, 61 Wis. 25.

6. *Fiske v. Henarie*, 142 U. S. 459 [citing *Vannevar v. Bryant*, 21 Wall. (U. S.) 41; *Jifkins v. Sweetzer*, 102 U. S. 177; *Baltimore, etc., R. Co. v. Bates*, 119 U. S. 467, and cases cited]; *Kellogg v. Hughes*, 3 Dill. (U. S.) 357; *Hewitt v. Phelps*, 105 U. S. 393;

however, by the Act of 1887-1888, the petition is to be filed "at any time before the trial" of the suit, and these words receive the same construction as the recognized interpretation of the same words in the Act of 1875,¹ providing for removal on the ground of diverse citizenship, namely, that the petition must be filed before the first trial of the cause.² But up to the time of a first trial in any form on the merits,³ whether it occurs at one term or another,⁴ the right of removal remains, and the

Schraeder Min., etc., Co. v. Packer, 129 U. S. 688; Dart v. McKinney, 9 Blatchf. (U. S.) 359; Akerly v. Vilas, 2 Biss. (U. S.) 110; Brayley v. Hedges, 53 Iowa 582; Dart v. Walker, (C. Pl. Gen. T.) 43 How. Pr. (N. Y.) 29, 4 Daly (N. Y.) 188; Rosenfield v. Condict, 44 Tex. 464. See also Metropolitan L. Ins. Co. v. Ethier, 44 Mich. 144. *Contra*, Continental Ins. Co. v. Kasey, 27 Gratt. (Va.) 216. And see Galpin v. Critchlow, 112 Mass. 339.

But the petition could not be granted where it was filed before the right to a new trial had been perfected absolutely, Chicago, etc., R. Co. v. McKinley, 99 U. S. 148; nor where the reversal on appeal was accompanied with a specific direction to the court below to dismiss the suit, Boggs v. Willard, 70 Ill. 315.

1. See the case of Fisk v. Henarie, 142 U. S. 459, where the court, speaking of the Act of 1887-1888, said: "In view of the repeated decisions of this court in exposition of the Acts of 1866, 1867, and 1875, it is not to be doubted that Congress, recognizing the interpretation placed on the word 'final' in the connection in which it was used in the prior Acts, and the settled construction of the Act of 1875, deliberately changed the language 'at any time before the final hearing or trial of the suit' or 'at any time before the trial or final hearing of the cause' to read 'at any time before the trial thereof,' as in the Act of 1875, which required the petition to be filed before or at the term at which the cause could first be tried and before the trial thereof." This case was *followed* in Durkee v. Illinois Cent. R. Co., 81 Fed. Rep. 1; Hobart v. Illinois Cent. R. Co., 81 Fed. Rep. 5.

2. Fisk v. Henarie, 142 U. S. 459 [*reversing* 32 Fed. Rep. 417, and *overruling* in effect Brodhead v. Shoemaker, 44 Fed. Rep. 518], where the case had been tried three times before a jury in the state court, and had been heard in

various phases three times in the Supreme Court of the state, prior to the application for removal, and it was held that the application was too late. Field and Harlan, JJ., dissented. This case was *followed* in Farmers', etc., Nat. Bank v. Schuster, 86 Fed. Rep. 161, where the petition was filed after the cause had been tried and a mistrial entered, and was held too late. See also Whelan v. New York, etc., R. Co., 35 Fed. Rep. 849; Davis v. Chicago, etc., R. Co., 46 Fed. Rep. 307; Hakes v. Burns, 40 Fed. Rep. 33; Continental Ins. Co. v. Kasey, 27 Gratt. (Va.) 216.

3. Durkee v. Illinois Cent. R. Co., 81 Fed. Rep. 2; Huskins v. Cincinnati, etc., R. Co., 37 Fed. Rep. 504.

After Removal and Remand on Another Ground. — It seems that where a case is removed for diverse citizenship and remanded, it is no impediment to a seasonable application to the federal court for removal on the ground of prejudice or local influence. See *In re Cilley*, 58 Fed. Rep. 977.

4. Detroit v. Detroit City R. Co., 54 Fed. Rep. 10, where Taft, J., showed very clearly that the language of Fuller, C. J., in Fisk v. Henarie, 142 U. S. 459, was not to be construed as an expression of opinion that the application must be made before or at the term at which the cause could first be tried. See also Cox v. East Tennessee, etc., R. Co., 62 Ga. 163. On the other hand Caldwell, J., in Thurber v. Miller, 67 Fed. Rep. 378, made the following statement, which, however, was purely *obiter*: "As to the time when the application for removal must be filed, the same clause of the act in express terms declares it may be done 'at any time before the trial thereof,' but the Supreme Court, taking into consideration all the provisions of the act, and the previous legislation on the subject, and the judicial expositions thereof, held that this language of the act ought not to receive a literal interpretation, but

cause must be actually on trial in some form in the orderly course of proceeding, all parties acting in good faith, before the right of removal is gone.¹

Before Trial Has Begun.—The words "before the trial" mean before the trial has begun.² If a jury has been called, though

that it should be construed as requiring the petition 'to be filed before or at the term at which the cause could first be tried, and before the trial thereof.' *Fisk v. Henarie*, 142 U. S. 459." A pertinent quotation from the opinion of the Supreme Court in the case last cited will be found *supra*, p. 251, note 1.

1. Removal Cases, 100 U. S. 473, where the court said: "No mere attempt of one party to get himself on the record as having begun the trial will be enough." Accordingly it was there held that a petition for removal was seasonably filed by the defendant in an equity suit on the hearing of a merely interlocutory application although the plaintiff offered evidence on the merits—"did not keep himself inside the orderly course of proceedings"—which, however, had not been accepted when the petition for removal was filed. See also *Jifkins v. Sweetzer*, 102 U. S. 179.

2. The Act of 1867 provided for the filing of the petition for removal "before the final hearing or trial." In *Adams' Express Co. v. Trego*, 35 Md. 47, the trial had actually commenced, and several questions in its progress had been decided before the petition for removal was filed, and it was held that the application was too late. The court said: "The application should have been made before the hearing or trial commenced; for otherwise it would be impossible to determine at what stage of the trial the application would be proper. Could it be made at the last stage of the trial, after all the legal questions had been decided by the court, and the facts submitted to the jury, but before the verdict found? We can hardly suppose that any one would seriously attempt to maintain such a proposition. And if not in such a case, at what prior stage of the trial would the application be admissible? We think it clear that it is not at any time before the conclusion, but at any time before the commencement of the trial, that the application to remove must be made." *Lewis v. Smythe*, 2 Woods (U. S.) 117; *De-*

ware R. Constr. Co. v. Davenport, etc., R. Co., 46 Iowa 406; *Galpin v. Critchlow*, 112 Mass. 341. See also *St. Anthony Falls Water-Power Co. v. King Wrought-iron Bridge Co.*, 23 Minn. 186.

"Whenever the investigation of the facts of a case simply, or the facts in connection with the law, is entered upon by the court alone, or by the court and jury, the trial may be said to have begun." *Lewis v. Smythe*, 2 Woods (U. S.) 119, holding that it was too late to file a petition and bond for removal after the pleadings had been read and the evidence submitted to the court.

In *Watt v. White*, 46 Tex. 340, the petition for removal, under the Act of 1875, was held too late where it was not filed until after the cause had been regularly reached upon the docket, and called by the court for trial, and after the plaintiffs had announced ready, and while the court was awaiting the presentation of an application for continuance by the defendant for the preparation of which time had, at his request, been given by the court. The court said: "It would give an unfair advantage to the defendant if he could first ascertain whether the plaintiff was ready, and if not, could force him into trial, while he would be neither bound to try or continue the case. Parties should not be allowed to speculate in this way with the court or their adversaries."

In *Maloy v. Duden*, 25 Fed. Rep. 673, when the cause was called for trial in the state court on the day calendar the defendant objected that the cause was not in a condition for trial because the time for serving an amended answer had not expired under an order obtained from one of the judges of the court granting further time for that purpose. Thereupon, a motion to vacate that order, notice of which motion had been given by the plaintiff prior to the calling of the cause, was directed by the trial judge to be tried in another part of the court before the judge engaged in hearing motions, and further proceedings were suspended to

not yet sworn, the trial has begun;¹ and where the application is made after the filing of an amended declaration upon the trial, whereby a new issue is made, and before pleading thereto, it is still too late.²

What Constitutes Trial. — A default stands in the place of a trial in a litigated action.³ A hearing upon a demurrer to the plaintiff's pleading on the ground that it does not state facts sufficient to show a cause of action is a trial, and precludes a removal subsequent to the ruling either sustaining or overruling such demurrer;⁴ but it is otherwise where the demurrer is special and addressed to merely formal defects.⁵ The filing of an answer is

await the decision on the motion; it was held that a petition for removal filed at that stage of the cause was before trial actually begun and therefore in time.

Reference After Final Hearing. — Where the main issue has been decided upon a final hearing a petition for removal is too late although for the convenience of the court a reference is made to a master to take accounts and settle the details of the final decree. Such reference is not the beginning of a new hearing. *Jifkins v. Sweetzer*, 102 U. S. 177.

1. See *St. Anthony Falls Water-Power Co. v. King Wrought-iron Bridge Co.*, 23 Minn. 186.

After Jury Sworn. — It is too late to file a petition for removal after the jurors have been examined on *voir dire* and accepted. *Anglo-American Provision Co. v. Evans*, 34 Neb. 44.

Yulee v. Vose, 99 U. S. 539 [reversing *Vose v. Yulee*, 64 N. Y. 449, which affirmed 4 Hun (N. Y.) 628], is sometimes cited in text books on removal of causes to the proposition that a trial has not begun though the jury has been sworn; but it lends no support to that statement. In that case the petition and bond for removal were duly filed, and when the trial came on four days later and the jury was sworn, counsel simply directed the attention of the trial court to the fact that proceedings for removal had already been taken, and the federal Supreme Court, in its discussion of the case, clearly declares that the case was effectually removed by the original filing of the petition and bond.

2. *Adams' Express Co. v. Trego*, 35 Md. 47.

3. *McCallon v. Waterman*, 1 Flipp. (U. S.) 651; holding that the cause could not be removed under the Act of 1875

after the entry of a default and before the default was vacated.

4. *Maier v. Tower Hotel Co.*, 94 Fed. Rep. 225; *Hobart v. Illinois Cent. R. Co.*, 81 Fed. Rep. 5, following *Alley v. Nott*, 111 U. S. 472, and *Laidly v. Huntington*, 121 U. S. 179, which latter cases were decided under the Act of 1875; *Scharff v. Levy*, 112 U. S. 711; *Gregory v. Hartley*, 113 U. S. 742; *Boyd v. Gill*, 19 Fed. Rep. 145; *Langdon v. Fogg*, 18 Fed. Rep. 5; *Lookout Mountain R. Co. v. Houston*, 32 Fed. Rep. 711; *Wilson v. Rock Island Paper Co.*, 20 Fed. Rep. 705, where the court said: "He [the defendant] had thus tried an experiment with the court, and had found it against him on the merits of his case;" *St. Louis, etc., R. Co. v. Weaver*, 35 Kan. 412; *Miller v. Kent*, (Supm. Ct.) 60 How. Pr. (N. Y.) 451. *Contra*, *Miller v. Tobin*, 18 Fed. Rep. 609; *Hone v. Dillon*, 29 Fed. Rep. 465.

A judgment sustaining a demurrer to the defendant's answer and dismissing his cross-petition was held to constitute a trial. *Meyer v. Norton*, 9 Fed. Rep. 433.

If the Plaintiff Amends His Pleading, by leave of court, after an order sustaining the defendant's demurrer on the ground stated in the text, the time for removal is not extended, though the amendment introduces a technically new cause of action. *Hobart v. Illinois Cent. R. Co.*, 81 Fed. Rep. 5, *distinguishing* *Union Pac. R. Co. v. Wyler*, 158 U. S. 285.

Demurrant Defaulted. — Where the issue raised by a demurrer was noticed for a hearing and the demurrant defaulted on the demurrer, it was held to constitute a trial. *Bright v. Milwaukee, etc., R. Co.*, (Supm. Ct. Spec. T.) 1 Abb. N. Cas. (N. Y.) 14.

5. *Richards v. Rock Rapids*, 31 Fed.

not a trial within the meaning of the statute;¹ nor is the entry of *ex parte* orders of an interlocutory nature² or a proceeding merely preliminary or ancillary to the main cause of action and not involving a decision on the merits³ a trial; and a hearing before auditors or commissioners who determine nothing finally, but whose report is by statute only *prima facie* evidence upon a subsequent trial before the court or jury, is not a trial.⁴

No Duty to Delay Trial. — Under the prior removal acts it was held that the state court was under no legal obligation to delay a trial to enable a party to prepare a petition for removal.⁵

Waiver of Objection to Delay. — Objection that the application for removal was not made in time may be waived by delay in moving to remand.⁶

f. APPLICATION TO BE MADE TO FEDERAL COURT. — Under the Act of 1887-1888 the application must be made to the federal Circuit Court for the district in which the suit is

Rep. 507. See also *Boyd v. Gill*, 19 Fed. Rep. 150.

1. *Durkee v. Illinois Cent. R. Co.*, 81 Fed. Rep. 2.

2. *McHenry v. New York, etc., R. Co.*, 25 Fed. Rep. 67.

3. "No argument or decision of questions merely preliminary, or questions of pleading, except such as settle and end the case (as where the facts are admitted and the case turns upon the law as applied to the facts), is meant by the word 'trial.'" *Lewis v. Smythe*, 2 Woods (U. S.) 119.

The Appointment of a Temporary Receiver to maintain the *status quo*, the issuance of a temporary injunction, and a subsequent discharge of the receiver on motion of the defendant, the latter giving a bond, were held not to constitute a trial. *Franklin v. Wolf*, 78 Ga. 446.

4. *Stone v. Sargent*, 129 Mass. 503, decided under Rev. Stat. U. S., § 639. Accordingly it was there held that where an auditor appointed by consent of the parties had heard the cause, made his report, and returned it into court, but no note of its filing had been made, a petition for removal before any trial by the court or the jury was not too late.

In *Hess v. Reynolds*, 113 U. S. 73, it was held that a trial before commissioners to whom the cause had been referred, their report being subject to confirmation or rejection by the court, was not a trial.

Where by consent of the parties the case was sent to a master, not for trial,

but "to take testimony and report the same," it was held that the trial had not begun and a petition for removal was in time. *Carson v. Hyatt*, 118 U. S. 289, where the court said: "In its effect this was nothing more than an agreement for the appointment of an examiner before whom the testimony in the suit, which was in its nature a suit in equity, could be taken. The master had no authority to find either the facts or the law. His duty was to take and write out the testimony to be reported to the court for use on the trial when it should be begun." See also *Ketchum v. Black River Lumber Co.*, 4 Fed. Rep. 143.

Compulsory Arbitration. — In *Thorne v. Towanda Tanning Co.*, 15 Fed. Rep. 289, it was held that a trial before arbitrators on a compulsory rule of reference under the *Pennsylvania* statute was not a trial within the meaning of the removal act, since the award was conclusive only by the mutual acquiescence of the parties, and it made no difference that the rule of reference was made by the petitioner for removal.

5. *U. S. Savings Inst. v. Brockschmidt*, 72 Ill. 370, where the court said: "The most that could be said is, it was a matter purely of discretion." See also *Mabley v. Judge*, 41 Mich. 34; *Wyly v. Richmond, etc., R. Co.*, 63 Fed. Rep. 487; *Knight v. International, etc., R. Co.*, 61 Fed. Rep. 90.

6. See *infra*, I. 40. b. (3) *For Delay in Filing Petition for Removal.*

pending,¹ and it usually is made only to that court. But the practice has been suggested as more respectful to the state court to present the petition and affidavit first in that court and then file a certified copy thereof in the federal court and apply for removal thereon.²

g. PETITION FOR REMOVAL. — *Necessity of Petition.* — The "prejudice or local influence" Act of 1867,³ embodied in section 639 of the United States Revised Statutes, expressly required a petition for removal.⁴ The Act of 1887-1888 does not in equally plain terms require one,⁵ but "perspicuity is not a characteristic of the act."⁶ The application is invariably made by petition, and probably an oral motion would not be entertained.⁷

1. 24 U. S. Stat. at L. 553, c. 373, § 2;
25 U. S. Stat. at L. 434, c. 866, § 2;
Bellaire v. Baltimore, etc., R. Co., 146
U. S. 117; Fisk v. Henarie, 142 U. S.
459; Bonner v. Meikle, 77 Fed. Rep.
485; Schwenk v. Strang, 59 Fed. Rep.
209; Kaitel v. Wylie, 38 Fed. Rep. 865;
Southworth v. Reid, 36 Fed. Rep. 451;
Lookout Mountain R. Co. v. Houston,
32 Fed. Rep. 712; Rome, etc., Constr.
Co. v. Smith, 84 Ga. 238; Mason v. Inter-
state Consol. St. R. Co., 170 Mass.
382; Blackwell v. Lynchburg, etc., R.
Co., 107 N. Car. 217; Williams v. South-
ern Bell Telephone, etc., Co., 116 N.
Car. 558; Beyer v. Soper Lumber Co.,
76 Wis. 145.

2. *Per* Brewer, J., in Short v. Chi-
cago, etc., R. Co., 33 Fed. Rep. 114,
34 Fed. Rep. 227.

The application was first made to
the state court in the following cases,
but respect for the state court was per-
haps not always the ruling motive:
Maher v. Tower Hotel Co., 94 Fed.
Rep. 225; Tacoma v. Wright, 84 Fed.
Rep. 836; Bonner v. Meikle, 77 Fed.
Rep. 485; Tod v. Cleveland, etc., R.
Co., 65 Fed. Rep. 146; Smith v. Crosby
Lumber Co., 46 Fed. Rep. 819; Hall v.
Chattanooga Agricultural Works, 48
Fed. Rep. 599; Carson, etc., Lumber
Co. v. Holtzclaw, 44 Fed. Rep. 785;
Hakes v. Burns, 40 Fed. Rep. 33; Hills
v. Richmond, etc., R. Co., 33 Fed.
Rep. 81; Stix v. Keith, 90 Ala. 121;
Rome, etc., Constr. Co. v. Smith, 84
Ga. 238; Pennsylvania Co. v. Versten,
140 Ill. 637; Meyer Bros. Drug Co. v.
Malm, 47 Kan. 762; Mason v. Inter-
state Consol. St. R. Co., 170 Mass. 382;
Blackwell v. Lynchburg, etc., R. Co.,
107 N. Car. 217; Williams v. Southern
Bell Telephone Co., 116 N. Car. 558;
Beyer v. Soper Lumber Co., 76 Wis.
145.

But it may be that the state court
will decline to pass upon the applica-
tion. See Mason v. Interstate Consol.
St. R. Co., 170 Mass. 382; Beyer v.
Soper Lumber Co., 76 Wis. 145; Wil-
liams v. Southern Bell Telephone Co.,
116 N. Car. 558, where the court said:
"The state court had no right to enter-
tain or consider a motion for removal
based upon this ground."

3. 14 U. S. Stat. at L. 558, c. 196.

4. In Best v. New York L. Ins. Co.,
2 Cinc. Super. Ct. 329, it was held
necessary that the petition be signed
by the applicant *in propria persona*, but
that a defect in that particular might
be waived.

5. 24 U. S. Stat. at L. 553, c. 373, §
2; 25 U. S. Stat. at L. 435, c. 866, § 2.
The last clause of the second section of
the act provides for removal on the
ground of prejudice or local influence,
but makes no mention of a petition or
bond. The next section relates to re-
movals on other grounds, and requires
a petition and bond, but by its terms
"such cases as are provided for in the
last clause" of the preceding section
are not included in its operation. But
the excepting clause just quoted is
probably broader than it was meant
to be.

6. *Per* Key, J., in Lookout Mountain
R. Co. v. Houston, 32 Fed. Rep. 711.

"A very unskilful and slovenly piece
of legislation." *Per* Deady, J., in Fisk
v. Henarie, 32 Fed. Rep. 420.

"A slovenly piece of patchwork."
Per Wallace, J., in Vinal v. Continental
Constr., etc., Co., 34 Fed. Rep. 228.

"The act is undoubtedly perplexing
in its structural arrangement and very
obscure on that account." *Per* Ham-
mond, J., in Gavin v. Vance, 32 Fed.
Rep. 85.

7. Still, in Short v. Chicago, etc., R.

Averments of Petition. — In respect of the formal parts of the petition, and its allegations as to the amount in controversy, citizenship of the parties, etc.,¹ the petition should be framed like a petition for removal upon the ground of diverse citizenship,² except that it must be averred that the plaintiff is a citizen of the state where the suit is brought, where the fact does not otherwise appear in the record.³ The petition should aver positively the existence of prejudice or local influence.⁴

Verification of Petition. — It should be sworn to by at least one of the petitioners, or by some agent or attorney authorized to act for him or them other than the person who makes the supporting affidavit.⁵

h. BOND FOR REMOVAL. — The Act of 1887-1888 does not in unmistakable terms require a bond for removal on the ground of prejudice or local influence.⁶ But the bond required to

Co., 34 Fed. Rep. 227, Judge Brewer casually remarked that "no petition need be filed."

1. As to Averments of Citizenship see *Bradley v. Ohio River, etc.*, R. Co., 78 Fed. Rep. 388, holding that if the petition is defective in its averments the court will allow a new and correct petition to be filed; *Grand Trunk R. Co. v. Twitchell*, 59 Fed. Rep. 727; *Bradley v. Ohio River, etc.*, R. Co., 119 N. Car. 744. And under the earlier "local prejudice" acts, see *Liverpool, etc., Ins. Co. v. McGuire*, 52 Miss. 227; *Elliott v. Stocks*, 67 Ala. 290; *Adams' Express Co. v. Trego*, 35 Md. 47; *Amory v. Amory*, 95 U. S. 187.

If the diverse citizenship of the parties appears nowhere in the petition for removal or elsewhere in the record at the time of removal, the fact that it appears in the bond filed with a petition for a writ of error to a judgment of the Circuit Court, and in a bill of exceptions, will not prevent the Circuit Court of Appeals from reversing the judgment and remanding the cause to the state court. *Grand Trunk R. Co. v. Twitchell*, 59 Fed. Rep. 727.

Under the Earlier "Local Prejudice" Acts it was held that if the petition did not contain any allegations as to the citizenship of the parties, the federal jurisdiction would be sustained by proper averments of citizenship in the affidavit, since the latter must be considered as a part of the record. *Bixby v. Blair*, 56 Iowa 416.

2. See *infra*, I. 23. c. *Allegations of Petition*.

3. *Harrison v. Shorter*, 59 Ga. 512, decided under section 639 of the Re-

vised Statutes, but applicable now so far as this point is concerned.

4. *Goldworthy v. Chicago, etc.*, R. Co., 38 Fed. Rep. 769, holding that a petition which merely averred that the petitioner could not obtain justice in the state court was insufficient and was not aided by affidavits drawn in the language of the statute.

"The petition as well as the affidavit should state the facts upon which the removal is sought." *Hall v. Chattanooga Agricultural Works*, 48 Fed. Rep. 604, holding, however, that if the petition fails to state the facts constituting prejudice or local influence, but is supported by a sufficient affidavit, the court will allow it to be amended on the hearing of the application.

The allegation should be made in the language of the statute, namely "that from prejudice or local influence" he will not be able to obtain justice in such state court, or in any other state court to which the said defendant may, under the laws of the state, have the right, on account of such prejudice or local influence, to remove said cause." See the form of the petitions in *Campbell v. Collins*, 62 Fed. Rep. 849; *Collins v. Campbell*, 62 Fed. Rep. 851; *Tod v. Cleveland, etc.*, R. Co., 65 Fed. Rep. 146.

5. *Per Key, J.*, in *Hall v. Chattanooga Agricultural Works*, 48 Fed. Rep. 604.

An Approved Precedent of a Verified Petition will be found in *Bonner v. Meikle*, 77 Fed. Rep. 486.

6. 24 U. S. Stat. at L. 553, c. 373, §§ 2, 3; 25 U. S. Stat. at L. 435, c. 866, §§ 2, 3. See comments on the act *supra*, p. 255, note 6.

accompany a petition for removal on other grounds¹ should be executed and filed, and would doubtless be deemed indispensable.² The bond should be actually presented before the time limited for removal has expired.³

i. AFFIDAVIT FOR REMOVAL—(1) *Necessity and Sufficiency of Affidavit*—*Necessity and Sufficiency in General*.—Both the Act of 1867 and section 639' of the United States Revised Statutes required the petitioner for removal to make a prescribed affidavit.⁴ An affidavit following the words of the statute was sufficient; it was not necessary to state the facts and circumstances.⁵ The Act of 1887-1888 provides for removal when prejudice or local influence "shall be made to appear" to the

1. See *infra*, I. 30. *Bond for Removal*.

2. See New Orleans, etc., R. Co. v. Rabasse, 44 La. Ann. 178.

Under Prior Local Prejudice Acts.—The Act of 1867 did not require a bond, but only "good and sufficient surety;" but a bond was generally used. *Tunstall v. Madison*, 30 La. Ann. 476; *Best v. New York L. Ins. Co.*, 2 Cinc. Super. Ct. 329. In *Nye v. Northern Cent. R. Co.*, 24 Hun (N. Y.) 556, an application for removal under Rev. Stat. U. S., § 639, it was held not necessary that the bond be signed by the petitioner, but that it was a compliance with the law if the bond was executed by "good and sufficient surety." But see *Weed Sewing Mach. Co. v. Smith*, 71 Ill. 205; *Best v. New York L. Ins. Co.*, 2 Cinc. Super. Ct. 329. The provisions of section 639 of the United States Revised Statutes in regard to the security to be given on removal remained in force after the enactment of the Act of 1875, 18 U. S. Stat. at L. 470, c. 137, which made new provision for security in cases removed under that act. *Baltimore, etc., R. Co. v. Bates*, 119 U. S. 464. And it was still necessary for the bond to conform to the provisions of the first-mentioned act. *Gutwillig v. Zuberbier*, 28 Fed. Rep. 721; *Sutherland v. Jersey City, etc., R. Co.*, 22 Fed. Rep. 356; *Bates v. Baltimore, etc., R. Co.*, 39 Ohio St. 157. *Contra*, *Farmers' L. & T. Co. v. Chicago, etc., R. Co.*, 9 Biss. (U. S.) 133; *Torrey v. Grant Locomotive Works*, 14 Blatchf. (U. S.) 269; *McMundy v. Connecticut Gen. L. Ins. Co.*, 9 Chicago Leg. N. 324.

3. *St. Anthony Falls Water-Power Co. v. King Wrought-iron Bridge Co.*, 23 Minn. 186 (where the application for removal was made under section 639

of the United States Revised Statutes), holding that although the petition for removal was filed before trial, no removal was effected as the bond was not presented until the trial had begun.

4. Act of 1867, 14 U. S. Stat. at L. 559, c. 196; Rev. Stat. U. S., § 639, subdiv. 3, which required an affidavit stating that he "has reason to believe and does believe that, from prejudice or local influence, he will not be able to obtain justice in such state court."

An Allegation in an Unverified Petition would not alone be sufficient to effect a removal. *Thatcher v. Rankin*, (Supm. Ct. Spec. T.) 2 How. Fr. N. S. (N. Y.) 459.

Joint Affidavit.—In applications for removal under Rev. Stat. U. S., § 639, all the defendants were required to unite in the petition, and if a joint affidavit was filed it was necessary to make it appear therein that the prejudice, etc., applied to all the affiants. *Gutwillig v. Zuberbier*, 28 Fed. Rep. 721, where, however, the affidavit was held sufficient in that respect.

5. *Fisk v. Henarie*, 32 Fed. Rep. 421; *Hakes v. Burns*, 40 Fed. Rep. 34; *Hart v. New Orleans*, 14 Fed. Rep. 180; *Jones v. Foreman*, 66 Ga. 371; *Stewart v. Mordecai*, 40 Ga. 1; *Meadow Valley Min. Co. v. Dodds*, 7 Nev. 143; *Geiger v. Union Mut. L. Ins. Co.*, (Marine Ct. Spec. T.) 1 City Ct. (N. Y.) 237. But as the acts required an affidavit of the petitioner that "he has reason to believe and does believe," etc., an affidavit merely declaring that he "has reason to believe" was held insufficient. *Baltimore, etc., R. Co. v. New Albany, etc., R. Co.*, 53 Ind. 597. It was not necessary for the affidavit to allege the citizenship of the parties. *Tunstall v. Madison*, 30 La. Ann. 471.

federal Circuit Court.¹ The court must be legally (not merely morally) satisfied of the truth of the allegation that from prejudice or local influence the defendant will not be able to obtain justice in the state court.² But the amount and manner of proof required in each case are left to the discretion of the court.³ It may receive evidence upon the point by affidavits or by depositions or by oral examination of witnesses.⁴ It is the uniform practice to file one or more affidavits or to state the facts in a verified petition.⁵ It is clear that a general affidavit merely stating the affiant's belief will not suffice.⁶ The preponderance of authority in the federal Circuit Court is that a positive affirmation of the existence of such prejudice or local influence, without stating the facts and circumstances, will not be sufficient.⁷

1. 24 U. S. Stat. at L. 553, c. 373, § 2; 25 U. S. Stat. at L. 435, c. 866, § 2.

2. *Per* Bradley, J., in *In re Pennsylvania Co.*, 137 U. S. 451; *Fisk v. Henarie*, 142 U. S. 459; *Crotts v. Southern R. Co.*, 90 Fed. Rep. 2.

3. *In re Pennsylvania Co.*, 137 U. S. 451; *Crotts v. Southern R. Co.*, 90 Fed. Rep. 1; *Parks v. Southern R. Co.*, 90 Fed. Rep. 3; *Bonner v. Meikle*, 77 Fed. Rep. 487.

In *In re Pennsylvania Co.*, 137 U. S. 451, the only proof offered was contained in the affidavit of the general manager of the defendant corporation to the effect that from prejudice and local influence the company would not be able to obtain justice in the state courts. The Supreme Court, *per* Justice Bradley, said: "We do not say that, as a matter of law, this affidavit was not sufficient, but only that the court was not bound to regard it so, and might well have regarded it as not sufficient."

4. *Schwenk v. Strang*, 59 Fed. Rep. 211; *Malone v. Richmond, etc.*, R. Co., 35 Fed. Rep. 628.

5. "A duly verified petition is so far an affidavit that if it contains the necessary averments a removal may be had thereon." *Per* Deady, J., in *Fisk v. Henarie*, 35 Fed. Rep. 233.

In *Bonner v. Meikle*, 77 Fed. Rep. 489, it seems that the removal was had upon a verified petition alleging the facts constituting prejudice or local influence, but without a separate affidavit.

The Act of 1867 did not require the petition itself to be verified by affidavit. *Bowen v. Chase*, 7 Blatchf. (U. S.) 255. See *Sweeney v. Coffin*, 1 Dill. (U. S.) 73.

6. *In re Pennsylvania Co.*, 137 U. S. 451; *Crotts v. Southern R. Co.*, 90 Fed. Rep. 2; *Collins v. Campbell*, 62 Fed. Rep. 850; *Minnick v. Union Ins. Co.*, 40 Fed. Rep. 369; *Hakes v. Burns*, 40 Fed. Rep. 33; *Short v. Chicago, etc.*, R. Co., 33 Fed. Rep. 114, 34 Fed. Rep. 225; *Goldworthy v. Chicago, etc.*, R. Co., 38 Fed. Rep. 769; *Amy v. Manning*, 38 Fed. Rep. 536; *Southworth v. Reid*, 36 Fed. Rep. 454; *Meyer Bros. Drug Co. v. Malm*, 47 Kan. 764. See also *County Ct. v. Baltimore, etc.*, R. Co., 35 Fed. Rep. 166. Compare *Hills v. Richmond, etc.*, R. Co., 33 Fed. Rep. 81.

7. *Second Circuit.* — *Amy v. Manning*, 38 Fed. Rep. 536, 868.

Fourth Circuit. — *Malone v. Richmond, etc.*, R. Co., 35 Fed. Rep. 625; *Crotts v. Southern R. Co.*, 90 Fed. Rep. 2.

Seventh Circuit. — *Paul v. Baltimore, etc.*, R. Co., 44 Fed. Rep. 514; *Niblock v. Alexander*, 44 Fed. Rep. 306; *Southworth v. Reid*, 36 Fed. Rep. 451.

Eighth Circuit. — *Schwenk v. Strang*, 19 U. S. App. 300, 59 Fed. Rep. 209. But see *Franz v. Wahl*, 81 Fed. Rep. 9; *Short v. Chicago, etc.*, R. Co., 33 Fed. Rep. 115, 34 Fed. Rep. 227.

Contra, holding such affidavit *prima facie* sufficient:

First Circuit. — *Collins v. Campbell*, 62 Fed. Rep. 851.

Fifth Circuit. — *Cooper v. Richmond, etc.*, R. Co., 42 Fed. Rep. 697; *Brodhead v. Shoemaker*, 44 Fed. Rep. 518.

Sixth Circuit. — *Whelan v. New York, etc.*, R. Co., 35 Fed. Rep. 849; *Minnick v. Union Ins. Co.*, 40 Fed. Rep. 369; *Huskings v. Cincinnati, etc.*, R. Co., 37 Fed. Rep. 504. But see *Hall*

Such is evidently the opinion of the Supreme Court,¹ and emphatically that of the Circuit Court of Appeals for the Eighth Circuit.²

v. Chattanooga Agricultural Works, 48 Fed. Rep. 599.

Affidavit in the Alternative.— In *Pennsylvania Co. v. Versten*, 140 Ill. 637, the court held that an affidavit alleging prejudice or local influence was wholly insufficient because in the alternative, but no case in the federal courts has held an affidavit defective on that particular ground.

Facts on Information and Belief.— In *Detroit v. Detroit City R. Co.*, 54 Fed. Rep. 1, it was held that an affidavit positively alleging prejudice and local influence and setting forth the facts constituting the same was not insufficient to authorize a removal merely because the facts alleged were sworn to on information and belief.

1. Thus in *In re Pennsylvania Co.*, 137 U. S. 451, Justice Bradley said: "Legal satisfaction requires some proof suitable to the nature of the case; at least, an affidavit of a credible person; and a statement of facts in such affidavit which sufficiently evinces the truth of the allegation. * * * A perfunctory showing by a formal affidavit of mere belief will not be sufficient."

2. In *Schwenk v. Strang*, 59 Fed. Rep. 209, the Circuit Court of Appeals reversed a judgment of the Circuit Court for the District of Nebraska and ordered the cause to be remanded where the cause had been removed by the Circuit Court without notice on an *ex parte* affidavit alleging positively the existence of prejudice and local influence, without further proof, and the Circuit Court had afterwards denied a motion to remand upon affidavits denying the prejudice, etc. Caldwell, J., said: "It not unfrequently occurs, as every judge who has had much experience on the circuit knows, that affidavits like the one under consideration are filed when it is perfectly obvious that the only prejudice that has any existence in fact is the prejudice of the affiant against the people of the county, of whom he knows nothing, and whose impartiality and fairness he impeaches without the slightest foundation of fact. Instances are not wanting where such affidavits had no better foundation than an earnest desire on the part of the defendant to harass and delay the plaintiff in his suit. It was the knowl-

edge of these facts that induced Congress to change the law on this subject.

* * * Under the Act of 1887 the application for the removal on the ground of prejudice or local influence must be addressed to the Circuit Court; and the language of the act is that 'when it shall be made to appear to the said Circuit Court that from prejudice or local influence he will not be able to obtain justice in such state court,' etc.

* * * Nothing at all is said about an affidavit. * * * How must this fact be made to appear? Obviously, in some of the recognized modes by which facts are proved in courts of justice. It is not made to appear by the simple declaration in an *ex parte* affidavit that it does exist.¹ That declaration proves nothing, and is evidence of nothing but the opinion of the affiant, and the issue is not one to be determined by the opinion of an expert. * * *

The statute contemplates a judicial inquiry into the alleged fact. The court must take the responsibility of determining and adjudging judicially that prejudice exists, before it can order the removal. Its judgment on this question must be reached by the customary and approved judicial methods. * * * The question should be determined by the court as it would determine any other issue of fact arising in the progress of the case affecting the rights of the parties to the suit." See also *Olds Wagon Works v. Benedict*, 67 Fed. Rep. 1, another case decided by the same Circuit Court of Appeals, wherein it appears to have been held that actual proof of the alleged prejudice or local influence is a jurisdictional requisite to removal on that ground.

In *Tod v. Cleveland, etc., R. Co.*, 65 Fed. Rep. 145 (Sixth Circuit), it appears that the removal was allowed upon a petition and affidavit asserting the existence of prejudice and local influence. It was held that by omitting to move to remand the defendant was precluded from urging in the Circuit Court of Appeals that the evidence of prejudice and local influence was not sufficient. Severens, J., delivering the opinion of the court, said: "By omitting to do that, he waived all objections which he was competent to waive, and there remains not the question whether there was

(2) *Who May Make Affidavit.* — The affidavit to the petition for removal may be made by the petitioner, or by his attorney in fact, or by any other person or persons having knowledge of all the facts.¹

sufficient fulness in the showing of prejudice and local influence in the petition and affidavit, but the question whether they constituted any evidence at all of the fact stated. Mere defects in the form and mode of procedure may be waived, though the essentials of jurisdiction cannot be."

1. *Bonner v. Meikle*, 77 Fed. Rep. 489, where Hawley, J., said: "It is claimed that the affidavit to the petition for removal must be made by the petitioner, and cannot be made by his attorney in fact. This position cannot be sustained. *Duff v. Duff*, 31 Fed. Rep. 772, cited in its support, refers solely to the provisions of the Act of 1867, and has no application whatever to the provisions of the Act of 1887-88, which in many respects is essentially different from the prior acts. An examination of that decision clearly shows that Judge Sawyer based his opinion entirely upon the language of the statute that the case might be removed on the petition of the defendant, provided 'he makes and files in said state court an affidavit stating that he has reason to believe and does believe that from prejudice or local influence he will not be able to obtain justice in such state court.' Under such a provision the law requires the affidavit to be made by the petitioner. But there is no such requirement in the Act of 1887-88. Under this act it can 'be made to appear' to the satisfaction of the court by the petition and affidavit of the petitioner, or by the affidavit of any other person or persons having knowledge of all the facts. *Detroit v. Detroit City R. Co.*, 54 Fed. Rep. 12."

In *Detroit v. Detroit City R. Co.*, 54 Fed. Rep. 13, the cause was removed on the affidavit of the secretary of the defendant corporation petitioning for removal.

The Prior "Local Prejudice" Act of 1867, and section 639 of the United States Revised Statutes were usually construed to require an affidavit by the petitioner himself. *Tunstall v. Madison*, 30 La. Ann. 471; *Mahone v. Manchester*, etc., R. Corp., 111 Mass. 72. And it was held that the affidavit could not be made by his attorney in fact.

Duff v. Duff, 31 Fed. Rep. 772. But it was held in *Hart v. New Orleans*, 14 Fed. Rep. 180, that it might be made by his attorney of record. *Contra*, *Miller v. Finn*, 1 Neb. 254. See also *Tunstall v. Madison*, 30 La. Ann. 471.

In *Cooper v. Condon*, 15 Kan. 572, an affidavit by "the attorney and agent" of the plaintiff, alleging the affiant's belief and without stating why the plaintiff did not make the affidavit, was held insufficient.

Verification and Certification. — As to sufficiency of verification of the affidavit, see *Gutwillig v. Zuberbieber*, 28 Fed. Rep. 721; *Sutherland v. Jersey City*, etc., R. Co., 22 Fed. Rep. 356. As to the jurat, see *Tunstall v. Madison*, 30 La. Ann. 471. And as to certification of an affidavit taken in another state, see *Bowen v. Chase*, 7 Blatchf. (U. S.) 255; *Ex p. Jones*, 66 Ala. 202.

In *Mix v. Andes Ins. Co.*, 74 N. Y. 53, it was held that an objection to the affidavit taken in another state, on the ground that it is not properly certified, must be taken at the time when the affidavit is read, and cannot be raised for the first time on appeal.

Affidavit for Corporation. — An affidavit by an officer of a corporation in behalf of the corporation was not efficacious unless the act of the officer was within the scope of his express or implied authority. Thus in *Mahone v. Manchester*, etc., R. Corp., 111 Mass. 72, a petition for removal under the Act of 1867, the application was denied where the affidavit on behalf of the defendant railroad corporation was made by its acting superintendent, who had no authority to make the affidavit except what was incident to his office. The court said: "When, as in this case, the petitioner for removal is a corporation, the petition may doubtless be signed and the affidavit made by some person authorized to represent the corporation. But the authority of any person assuming to represent it must appear. No officer of a corporation, unless specially authorized, has power to bind the corporation, except in the discharge of his ordinary duties. * * * There can be no doubt that it is no part of the ordinary duties of the

(3) *Time of Making Affidavit.* — An affidavit otherwise sufficient is not objectionable because it was made immediately before the suit was brought.¹ But the showing of cause and motion upon it should be substantially contemporaneous.²

j. NOTICE OF APPLICATION — Not Necessary. — The removal may be granted *ex parte*, without any notice whatever to the plaintiff.³

Better Practice to Give Notice. — But it is deemed the better practice to give notice,⁴ and some of the Circuit Courts decline to hear

superintendent of a railroad to represent the corporation in any judicial proceeding." In *Dodge v. Northwestern Union Packet Co.*, 13 Minn. 458, it was held that the secretary of a corporation had no implied authority to make the affidavit. In *Cooke v. State Nat. Bank*, 1 Lans. (N. Y.) 494, it was doubted if an affidavit made in behalf of a corporation by one or more of its directors would be sufficient. In *Mix v. Andes Ins. Co.*, 74 N. Y. 53, removal was granted on petition and affidavit of the president of the defendant insurance company. See further as to what officers of corporations were regarded as competent to make the affidavit in behalf of a corporation, *Minnett v. Milwaukee, etc., R. Co.*, 3 Dill. (U. S.) 460; *Duff v. Duff*, 31 Fed. Rep. 773.

1. *Canal, etc., Streets R. Co. v. Hart*, 114 U. S. 654, where the case was removed under Rev. Stat. U. S., § 639, then in force, and the affidavit, made ten days before the suit was brought, but sufficiently identifying the suit, was held sufficient.

2. *Metropolitan L. Ins. Co. v. Ethier*, 44 Mich. 144, an application for removal under the Act of 1867, the court holding that a petition and affidavit made more than a year before the action of the court was invoked had become stale and could not constitute a basis for removal.

3. In *Reeves v. Corning*, 51 Fed. Rep. 777, *Baker, J.*, said: "The cases which hold, either directly or by necessary implication, that the plaintiff has no constitutional right to notice of the application for removal on the ground of prejudice or local influence are numerous," and cited the following as either directly deciding the question or at least bearing strongly upon it: *Fisk v. Henarie*, 32 Fed. Rep. 417; *Hills v. Richmond, etc., R. Co.*, 23 Fed. Rep. 81; *Dennison v. Brown*, 38 Fed. Rep. 535; *Amy v. Manning*, 38 Fed.

Rep. 536, 868; *Short v. Chicago, etc., R. Co.*, 34 Fed. Rep. 225; *Malone v. Richmond, etc., R. Co.*, 35 Fed. Rep. 625; *Whelan v. New York, etc., R. Co.*, 35 Fed. Rep. 849; *Huskins v. Cincinnati, etc., R. Co.*, 37 Fed. Rep. 504; *Carson, etc., Lumber Co. v. Holtzclaw*, 39 Fed. Rep. 578; *Hakes v. Burns*, 40 Fed. Rep. 33; *Minnick v. Union Ins. Co.*, 40 Fed. Rep. 369; *Cooper v. Richmond, etc., R. Co.*, 42 Fed. Rep. 697; *Brodhead v. Shoemaker*, 44 Fed. Rep. 518; *Walcott v. Watson*, 46 Fed. Rep. 529; *Smith v. Crosby Lumber Co.*, 46 Fed. Rep. 819; *Carpenter v. Chicago, etc., R. Co.*, 47 Fed. Rep. 535; *Adelbert College v. Toledo, etc., R. Co.*, 47 Fed. Rep. 836. To the same point see also *Crotts v. Southern R. Co.*, 90 Fed. Rep. 1; *Herndon v. Southern R. Co.*, 73 Fed. Rep. 307.

Under the Prior Removal Acts, Act of 1867, 14 U. S. Stat. at L. 558, c. 196, and Rev. Stat. U. S., § 639, no notice of the application made to the state court was necessary.

4. *Bonner v. Meikle*, 77 Fed. Rep. 485, where *Hawley, J.*, expressed "the opinion that all applications for a removal upon this ground should be made upon notice to the opposite party, clearly specifying upon what proofs the petitioner would rely — whether solely upon the facts set out in a verified petition, or upon affidavits, copies of which should be served and reasonable time given to the opposite party to file counter-affidavits if so desired." See also *Adelbert College v. Toledo, etc., R. Co.*, 47 Fed. Rep. 843; *Reeves v. Corning*, 51 Fed. Rep. 774; *Southworth v. Reid*, 36 Fed. Rep. 454; *Malone v. Richmond, etc., R. Co.*, 35 Fed. Rep. 629; and the cases cited in the next note.

"The parties to be affected by the action of the court should have reasonable notice of the application for removal, and an opportunity to contest

the application until proper notice of the hearing has been given.¹

k. HEARING OF APPLICATION — COUNTER-AFFIDAVITS. — According to the prevailing practice counter-affidavits may be read in contradiction of the allegations of prejudice and local influence in the affidavit for removal.²

l. ORDER DISMISSING APPLICATION. — Where the petition or other proceedings for removal are held insufficient, the petition is simply dismissed,³ and no remanding order is necessary, since the cause remains in the state court during the pendency of the petition in the federal court.⁴

m. ORDER OF REMOVAL, NOTIFICATION, AND EFFECT THEREOF — (1) *Entry and Form of Order.* — The jurisdiction of the state court is not ousted and the cause removed to the federal court until the latter has made an order of removal.⁵ The

it. When notice to the party adversely interested is practicable the court should not, in any case, rest its judgment on a mere *ex parte* showing. Such hearings are often deceptive and misleading, and for this reason are not favored." *Per* Caldwell, J., in *Schwenk v. Strang*, 59 Fed. Rep. 211.

1. *Herndon v. Southern R. Co.*, 73 Fed. Rep. 307 (Fourth Circuit), where the decision on an *ex parte* application was postponed by Seymour, J., "that ten days' notice of the motion may be given to defendant;" *Carson, etc., Lumber Co. v. Holtzclaw*, 39 Fed. Rep. 580 (Eighth Circuit), holding that three days' notice was hardly sufficient and ordering two weeks' notice. Upon filing the petition a citation to show cause was issued and served in *Campbell v. Collins*, 62 Fed. Rep. 849, and *Collins v. Campbell*, 62 Fed. Rep. 851, both cases in the First Circuit. Notice was given in *Smith v. Crosby Lumber Co.*, 46 Fed. Rep. 820, in the Third Circuit.

2. *Fourth Circuit.* — *Herndon v. Southern R. Co.*, 73 Fed. Rep. 307. See also *Malone v. Richmond, etc., R. Co.*, 35 Fed. Rep. 629.

Seventh Circuit. — *Maher v. Tower Hotel Co.*, 94 Fed. Rep. 225.

Eighth Circuit. — *Carson, etc., Lumber Co. v. Holtzclaw*, 39 Fed. Rep. 580, 885; *Short v. Chicago, etc., R. Co.*, 33 Fed. Rep. 114.

Ninth Circuit. — *Tacoma v. Wright*, 84 Fed. Rep. 836.

Contra — *Sixth Circuit.* — *Huskins v. Cincinnati, etc., R. Co.*, 37 Fed. Rep. 504. But see *Turnbull Wagon Co. v. Linthicum Carriage Co.*, 80 Fed. Rep. 7.

Under the Prior Removal Acts which required the application to be made to the state court, the removal was effected by filing the petition supported by an affidavit in the language of the statute, and accompanied by the necessary security. If these proceedings were in compliance with the statute, the state court was *ipso facto* divested of jurisdiction, whether it ordered or whether it refused a removal, and no inquiry into the truth of the affidavit was permissible. *Burlington, etc., R. Co. v. Dunn*, 122 U. S. 513; *Baltimore, etc., R. Co. v. Bates*, 119 U. S. 464; *Short v. Chicago, etc., R. Co.*, 34 Fed. Rep. 226; *Southworth v. Reid*, 36 Fed. Rep. 453; *Malone v. Richmond, etc., R. Co.*, 35 Fed. Rep. 628; *Amy v. Manning*, 38 Fed. Rep. 869; *Hart v. New Orleans*, 14 Fed. Rep. 180; *Minnett v. Milwaukee, etc., R. Co.*, 3 Dill. (U. S.) 460; *Clippinger v. Missouri Valley L. Ins. Co.*, 1 Flipp. (U. S.) 456; *Stix v. Keith*, 90 Ala. 121; *Jones v. Foreman*, 66 Ga. 371; *Stewart v. Mordecai*, 40 Ga. 1; *Sharp v. Gutcher*, 74 Ind. 357; *Tunstall v. Madison*, 30 La. Ann. 474; *Stoue v. Sargent*, 129 Mass. 503; *Geiger v. Union Mut. L. Ins. Co.*, (Marine Ct. Spec. T.) 1 City Ct. (N. Y.) 237; *Durham v. Southern L. Ins. Co.*, 46 Tex. 182.

3. *Bradley v. Ohio River, etc., R. Co.*, 78 Fed. Rep. 393.

4. *In re Cilley*, 58 Fed. Rep. 999; *Bradley v. Ohio River, etc., R. Co.*, 78 Fed. Rep. 393.

5. *Pennsylvania Co. v. Bender*, 148 U. S. 255.

An Approved Precedent of an Order of Removal — one that was respected by the state court, though slightly criti-

entry in the federal court of its finding that the application for removal is sufficient does not alone operate to remove the cause.¹ The better practice is to state in the order of removal all the jurisdictional facts.²

cised — is set forth in *Howard v. Stewart*, 34 Neb. 769. Other precedents of orders of removal will be found in *Crotts v. Southern R. Co.*, 90 Fed. Rep. 2; *Parks v. Southern R. Co.*, 90 Fed. Rep. 4.

Recitals in Order. — In the interests of the parties it would be prudent to state in the order of removal the fact that prejudice or local influence is the ground of removal; otherwise, as in *Anglo-American Provision Co. v. Evans*, 34 Neb. 44, the state court may see fit to proceed with the cause, regardless of the order, unless a copy of the petition accompanies the order. And to avoid the objection regarded as fatal in *Bradley v. Ohio River, etc., R. Co.*, 119 N. Car. 744, it would be advisable to have the order show by proper recitals that the citizenship of the parties was such as to authorize the removal.

Under the Earlier Removal Acts, Act of 1867, 14 U. S. Stat. at L. 558, c. 196, and Rev. Stat. U. S., § 639, no order of removal was necessary, and upon filing a sufficient petition, affidavit, and bond in the state court its rightful jurisdiction ceased *eo instanti*. See cases cited *supra*, p. 262, note 2.

1. *Pennsylvania Co. v. Bender*, 148 U. S. 255, where the journal entry is set forth in full and was commented upon as follows: "No order of removal was made by the federal court. The journal entry, which is certified by the clerk to be the entire entry, is simply a finding that the application for removal is sufficient, and such as entitles the defendant to remove the cause to the federal court. But such finding does not remove the case any more than an order overruling a demurrer to a petition makes a judgment." And after quoting the removal act of 1887, the court continued: "There is no specific declaration when proceedings in the state court shall stop. The right to a removal is determined by the federal court, and determined upon evidence satisfactory to it. When it is satisfied that the conditions exist the defendant may remove; how? The proper way is for him to obtain an order from the federal court for the re-

moval, file that order in the state court, and take from it a transcript and file it in the federal court. It may be said that these steps are not in terms prescribed by the statute. That is true; and also true that no specific procedure is named. The language simply is that the defendant may remove, when he has satisfied the federal court of the existence of sufficient prejudice. The statute being silent, the general rules in respect to the transfer of cases from one court to another must obtain. If the order of one court is to stay the action of another, the latter is entitled to notice. If a case is to pass from one court to another, this is done by filing a transcript of the record of the one in the other. *Virginia v. Paul*, 148 U. S. 107. * * * At any rate, if these exact steps are not requisite, something equivalent thereto is. If there had been more attention paid to these matters in removal proceedings there would have been less irritation prevailing in state tribunals at removals." It was accordingly held in that case that the judgment rendered in the cause after such ineffective attempt at removal was not reviewable by the federal Supreme Court for want of jurisdiction to render it. A similar entry approving the petition, affidavit, and bond, and declaring that the defendant had shown that he was entitled to remove the cause, was held insufficient to effect a removal in *Tod v. Cleveland, etc., R. Co.*, 65 Fed. Rep. 145. But the case was decided on another ground, and *Severens, J.*, said: "Whether, in view of the facts that the proceeding which had taken place in the United States court was brought to the attention of the state court, that the latter suffered the case to be removed, and that the plaintiff followed it into the United States court, and proceeded to trial without raising objection to the removal, the infirmity of the removal proceedings ought not to be treated as a matter of irregularity only, such as a party may waive, and not as of the essence of jurisdiction, is a question which we have not found it necessary to decide."

2. See the cases cited in the last note

(2) *Filing Copy of Order in State Court.*—The order of removal obtained in the federal court should be filed in the state court¹ and may well be accompanied by a certified copy of the entire record.²

(3) *Duty and Practice of State Court in Premises.*—Generally speaking, it is the duty of the state court, upon the filing of the order of removal, to refrain from further proceeding in the case,³ and it is the usual practice to enter a formal order to that effect, so that parties and witnesses may understand that they will not be required to attend unless upon notice that the cause has been remanded.⁴ In ordinary course the clerk of the state court will, upon request, and without any motion or order therefor, furnish a certified copy of the record for transmission to the federal court.⁵ But if the order of removal is deemed to be void for want of jurisdiction, the state court will probably disregard it;⁶

but one, and *State v. Sullivan*, 110 N. Car. 521.

1. See *Pennsylvania Co. v. Bender*, 148 U. S. 255, quoted in next to the last note.

2. See *Baird v. Richmond, etc.*, R. Co., 112 N. Car. 394; *Baird v. Richmond, etc.*, R. Co., 113 N. Car. 605.

3. *Walcott v. Watson*, 46 Fed. Rep. 529.

4. *Baird v. Richmond, etc.*, R. Co., 113 N. Car. 603, pronouncing erroneous an order of the trial court declining to permit the removal and to sign an order offered by the defendant which recited the fact of removal and "considered and adjudged that the court will proceed no further in this cause." The proposed order is set forth in full in the statement of the case.

5. *Baird v. Richmond, etc.*, R. Co., 113 N. Car. 603, intimating that the act of the federal court in that case in issuing a writ of certiorari without first demanding a copy of the record was not in excellent taste. See *Brodhead v. Shoemaker*, 85 Ga. 728, where the state court ordered its clerk to furnish to counsel, upon payment of the costs thereof, a complete transcript of the record. See also *Douglass v. Caldwell*, 65 N. Car. 250, for the full text of an order in a cause removed under the Act of 1867.

6. *Plaintiff Not Citizen of State.*—In *Lawson v. Richmond, etc.*, R. Co., 112 N. Car. 390, the order of removal was treated as void because the record did not show that the plaintiff was a citizen of the state where the suit was brought, although the petition for removal alleged that the plaintiff and the de-

fendant were citizens of different states. See *Baird v. Richmond, etc.*, R. Co., 113 N. Car. 607.

Petitioner an Alien.—If a copy of the order of removal is duly filed in the state court that court will disregard it and proceed with the case where it is conceded that the petition for removal set forth that the petitioner was an alien. *Dahlonga Co. v. Frank W. Hall Merchandise Co.*, 88 Ga. 339, upon the ground that the order of removal was void, since an alien cannot remove the case. See *supra*, p. 249.

Diverse Citizenship Not Apparent.—In *Bradley v. Ohio River, etc.*, R. Co., 119 N. Car. 744 [*approved* 78 Fed. Rep. 388], the state court declined to recognize the order of removal, because it did not appear anywhere in the record that the diverse citizenship of the parties existed at the time of the commencement of the suit.

Amount in Controversy Insufficient.—In *Bierbower v. Miller*, 30 Neb. 161, the Supreme Court affirmed the validity of a judgment of the state court rendered after the case had been ordered removed by the federal court, it appearing to the state court that the order of removal was void because the amount in controversy was less than two thousand dollars. To the same effect see *Tucker v. Inter-States L. Assoc.*, 112 N. Car. 797.

Removal Not in Time.—In *Anglo-American Provision Co. v. Evans*, 34 Neb. 44, the state court proceeded with the cause on the ground that the application for removal was too late, and also because the order of removal, a copy of which had been filed in the

otherwise, if the validity of the order is merely doubtful.¹

n. FILING TRANSCRIPT IN FEDERAL COURT. — A transcript of the record in the state court should be filed in the federal court.²

o. APPLICATION TO REMAND AND HEARING THEREON. — If it appears that any element of jurisdiction is lacking, the cause will, of course, be remanded, as in cases removed on other grounds,³ and the statute provides for remand to the state court in a certain contingency so far as relates to defendants other than the petitioner for removal.⁴ So if the affidavit for removal is insufficient on its face the cause will be remanded.⁵ But where the purpose is to have the court retry the question of fact already determined in granting the order of removal, the practice is not prescribed by statute and is unsettled. It seems that a written application denying the allegations of prejudice and local influence is a proper method of proceeding, and that a plea in abate-

state court, did not specify the ground upon which the removal was ordered.

1. If the order of removal is not deemed a plain usurpation of jurisdiction the state court will abstain from further proceedings, even though the question of federal jurisdiction may be regarded as doubtful. *Brodhead v. Shoemaker*, 85 Ga. 728; *Dahlonga Co. v. Frank W. Hall Merchandise Co.*, 88 Ga. 339.

2. *Pennsylvania Co. v. Bender*, 148 U. S. 255.

3. See *Carpenter v. Chicago, etc., R. Co.*, 47 Fed. Rep. 535; *Whelan v. New York, etc., R. Co.*, 35 Fed. Rep. 865. And see *infra*, I. 40. *Remand of Cause to State Court.*

If the cause has been improperly removed on the petition of one alone of several defendants, the other defendant may move to remand. *Hanrick v. Hanrick*, 153 U. S. 192.

Discontinuance as to Removing Defendant. — If there are several defendants, and the cause is removed by the only defendant who is entitled to removal, and the plaintiff then discontinues his suit as to that defendant, the cause must be remanded. *Bane v. Keefer*, 66 Fed. Rep. 610, applying the rule announced in *Texas Transp. Co. v. Seelgison*, 122 U. S. 519.

4. The Act of 1887-1888, 24 U. S. Stat. at L. 553, c. 373, § 2; 25 U. S. Stat. at L. 435, c. 866, § 2, provides that: "If it further appear that said suit can be fully and justly determined as to the other defendants in the state court, without being affected by such prejudice or local influence, and that no

party to the suit will be prejudiced by a separation of the parties, said Circuit Court may direct the suit to be remanded, so far as relates to such other defendants, to the state court, to be proceeded with therein." It seems that the cause will not be remanded as to such other defendants on motion of the plaintiff, unless there is as to them a separable controversy within the meaning of that term as expounded in the cases treating of removals on that ground. *Haire v. Rome R. Co.*, 57 Fed. Rep. 321, an action of tort against three defendants which had been removed for local prejudice on the petition of one of them, and the court refused to remand it as to the other.

Pending Causes. — The Act of 1887-1888 above cited also contained an independent temporary provision intended to apply to suits then pending in the federal Circuit Court which had been removed by a plaintiff under earlier acts. See *Fisk v. Henarie*, 32 Fed. Rep. 420. The provision was held to be constitutional in *Birdseye v. Shaeffer*, 37 Fed. Rep. 821. In *Neale v. Foster*, 31 Fed. Rep. 54, a motion to remand a case which had been removed under Rev. Stat. U. S., § 639, and had been referred to and heard by a master, was held to be too late, the statute requiring the application to be made "before the trial."

5. See, for instance, *Niblock v. Alexander*, 44 Fed. Rep. 306; *Amy v. Manning*, 38 Fed. Rep. 868; *Short v. Chicago, etc., R. Co.*, 33 Fed. Rep. 114, 34 Fed. Rep. 225; *Minnick v. Union Ins. Co.*, 40 Fed. Rep. 369.

ment is not essential.¹ Upon an application to remand the plaintiff has no absolute right to file counter-affidavits even though the removal was made *ex parte* and without notice; whether he shall be allowed to file them is a matter for the sound discretion of the court.² It is said that such leave ought not to be granted unless it is clearly made to appear that the court has been imposed upon or misled.³ However, there is a diversity of practice in the various circuits, and in some of them counter-affidavits are allowed on a motion to remand, as a matter of course,⁴ and also additional affidavits in support of

1. See *Whelan v. New York, etc., R. Co.*, 35 Fed. Rep. 852; *Walcott v. Watson*, 46 Fed. Rep. 529; *Fisk v. Henarie*, 32 Fed. Rep. 418.

"There being no form, no procedure, prescribed, I think the court in any particular case may prescribe a mode of procedure, or might lay down a general rule applicable to all cases." *Per* Brewer, J., in *Short v. Chicago, etc., R. Co.*, 33 Fed. Rep. 117, 34 Fed. Rep. 227, in connection with other remarks indicating an opinion that a plea in abatement is not indispensable.

Remand at Next Term.—If the removal is ordered upon an affidavit which makes a *prima facie* case, though without notice, it cannot be remanded at a subsequent term, even by the judge who allowed the removal, on the ground of the insufficiency of the proof. *Crotts v. Southern R. Co.*, 90 Fed. Rep. 1, where the court said: "Were this cause now to be remanded, the court could do so only because of error in the former order of this court. It has no such supervising power." Nor, where the order of removal was granted upon an affidavit stating the facts in support of its general averments, can the cause be remanded at a subsequent term on the ground that the facts stated were insufficient. *Parks v. Southern R. Co.*, 90 Fed. Rep. 3. In *Bradley v. Ohio River, etc., R. Co.*, 78 Fed. Rep. 387, the order of removal was allowed with leave to file a motion to remand at the next term.

2. *Reeves v. Corning*, 51 Fed. Rep. 778, *per* Baker, J.; *Carpenter v. Chicago, etc., R. Co.*, 47 Fed. Rep. 535.

3. *Reeves v. Corning*, 51 Fed. Rep. 778, where Baker, J., said: "Such leave never should be granted unless a very strong case is shown for asking the court to reverse its judgment awarding a removal. A motion for leave to file counter-affidavits is, in

effect, an application to the court for a rehearing without showing cause." Accordingly, leave to file counter-affidavits was there refused, as also in *Adelbert College v. Toledo, etc., R. Co.*, 47 Fed. Rep. 836, *per* Jackson, J.; *Carpenter v. Chicago, etc., R. Co.*, 47 Fed. Rep. 535, where Shiras, J., said that "ordinarily the one hearing and determination, although *ex parte*, will be held final"; *Whelan v. New York, etc., R. Co.*, 35 Fed. Rep. 866; *Brodhead v. Shoemaker*, 44 Fed. Rep. 518; *Cooper v. Richmond, etc., R. Co.*, 42 Fed. Rep. 697; *Fisk v. Henarie*, 32 Fed. Rep. 417.

Where Removal Was upon Notice and Hearing.—Where a notice and hearing by filing counter-affidavits are had upon the application, the matter should not be reheard on a motion to remand. *Bonner v. Meikle*, 77 Fed. Rep. 488, where the court said that "the right of removal ought not to be subjected to hearings by 'piecemeal.'"

4. See *Smith v. Crosby Lumber Co.*, 46 Fed. Rep. 819; *Dennison v. Brown*, 38 Fed. Rep. 535; *Walcott v. Watson*, 46 Fed. Rep. 529; *Amy v. Manning*, 38 Fed. Rep. 868; *Paul v. Baltimore, etc., R. Co.*, 44 Fed. Rep. 513. In *Detroit v. Detroit City R. Co.*, 54 Fed. Rep. 17, Taft, J., without deciding the point, intimated that possibly the language of the Supreme Court in *In re Pennsylvania Co.*, 137 U. S. 451, would require the admission of counter-affidavits on motions to remand.

As to Power of Court.—In *Amy v. Manning*, 38 Fed. Rep. 868, Wallace, J., said that the question of removal "may be reconsidered upon a motion to remand, and if such a motion is made, and the court is satisfied, by further argument or by controverting affidavits, that the petition ought not to have been allowed, it has the same power to vacate the allowance that it

the petition for removal.¹

p. COSTS ON DISMISSAL OF APPLICATION. — Upon dismissal of the petition the costs of the proceedings are taxed against the petitioner.²

q. COSTS UPON REMAND TO STATE COURT. — Where the cause is removed and afterwards remanded to the state court, the petitioner must pay the costs of all the proceedings in the federal courts.³

r. APPELLATE REVIEW OF ORDER OF REMAND. — The order of remand is not reviewable on appeal or error.⁴

18. Amount in Dispute — a. AMOUNT PRESCRIBED BY STATUTE. — In cases removed to the federal court where the amount in dispute is a jurisdictional element it must exceed, exclusive of interest and costs, the sum or value of two thousand dollars.⁵ If the amount is exactly two thousand dollars,⁶ with or without interest,⁷ the suit is not removable. Where the matter alleged by the plaintiff is admitted by the defendant there is no controversy and therefore no case for removal.⁸

has to vacate any interlocutory order made *ex parte* which has been improvidently or improperly granted."

1. Smith v. Crosby Lumber Co., 46 Fed. Rep. 821.

2. Bradley v. Ohio River, etc., R. Co., 78 Fed. Rep. 387; Paul v. Chilsoque, 70 Fed. Rep. 403; Carson, etc., Lumber Co. v. Holtzclaw, 39 Fed. Rep. 887.

3. Hanrick v. Hanrick, 153 U. S. 192; Davis v. Chicago, etc., R. Co., 46 Fed. Rep. 309. See generally *infra*, I. 40. j. Costs on Remand or Dismissal.

Costs of the Motion to Remand were not awarded where the cause was remanded by the judge who had inadvertently ordered the removal for prejudice and local influence on an insufficient affidavit. Minnick v. Union Ins. Co., 40 Fed. Rep. 371.

4. *In re Pennsylvania Co.*, 137 U. S. 451. See generally *infra*, I. 46. u. Appealability of Orders and Review of Final Judgment.

5. Act of 1887-1888, 24 U. S. Stat. at L. 552, c. 373, §§ 1, 2; 25 U. S. Stat. at L. 433, c. 866, §§ 1, 2.

6. Withers v. Hopkins Place Sav. Bank, 104 Ga. 89; Western Union Tel. Co. v. Levi, 47 Ind. 553; Louisville Southern R. Co. v. Tucker, (Ky. 1899) 49 S. W. Rep. 314.

An action of tort wherein the plaintiff demands "two thousand dollars and all other proper relief" is not removable, as no other relief than a money judgment is obtainable. Balti-

more, etc., R. Co. v. Worman, 12 Ind. App. 494.

An Action of Trespass to Try Title where the plaintiff demanded the recovery of the land and also damages for the exact jurisdictional amount was held removable since the court would not assume that the land was worth nothing at all. Ayers v. Watson, 113 U. S. 597.

7. Lazensky v. Supreme Lodge, etc., 32 Fed. Rep. 417, where the suit was to recover two thousand dollars with interest.

8. Keith v. Levi, 1 McCrary (U. S.) 343, 2 Fed. Rep. 743. In that case the defendant, by written stipulation, had admitted the debt sued for, so that the cause was not removable unless the controversy arising on his plea in abatement to an attachment showed a sufficient amount in dispute. In considering this question it was held that the value of the goods attached was not the measure of the amount in controversy. The state statute provided that if the issue upon the plea in abatement were found against the plaintiff he and his sureties should "be liable on their bond for all damages and costs occasioned by the attachment, or any subsequent proceedings connected therewith." The court said: "The most that can be said is that the amount in controversy in the question raised upon the validity of the attachment is the sum which the defendant may recover as damages resulting from

b. IN WHAT CASES JURISDICTIONAL. — The requisite amount must be in dispute in all cases where alienage of a party or diversity of citizenship (either alone or in connection with a separable controversy or prejudice or local influence) is an element of federal jurisdiction,¹ where removal is sought on the ground of a federal question involved,² and in suits between citizens of the same state claiming lands under grants of different states.³ Suits in which the United States are plaintiffs,⁴ and suits against a receiver appointed by a federal court for matters affecting his trust,⁵ may be removed irrespective of the amount in dispute. Proceedings against federal revenue officers or others under section 643 of the United States Revised Statutes are also removable without reference to the amount in dispute.⁶

c. TIME WHEN JURISDICTIONAL AMOUNT MUST BE IN DISPUTE. — The requisite amount must be in dispute at the time of the commencement of the suit⁷ and also at the time of removal.⁸

d. MATTER IN DISPUTE NOT SUSCEPTIBLE OF PECUNIARY ESTIMATION. — No case can be removed where the right or claim of neither party is capable of being valued in money.⁹

the wrongful issuing of the writ; " and inasmuch as there was no claim for damages in the petition for removal or anywhere in the record the cause was remanded to the state court.

1. See Act of 1887-1888, 24 U. S. Stat. at L. 554; 25 U. S. Stat. at L. 435. *Suits Between Citizens and Aliens or Foreign States.* — See U. S. v. Sayward, 160 U. S. 497.

Removal for Prejudice or Local Influence. — See *supra*, p. 244.

2. *Hallam v. Tillinghast*, 75 Fed. Rep. 849; *Pitkin v. Cowen*, 91 Fed. Rep. 602; *Johnson v. Wells*, 91 Fed. Rep. 1, a case arising under the internal-revenue laws; *Follett v. Tillinghast*, 82 Fed. Rep. 241, a case against a receiver of an insolvent national bank, appointed by the comptroller of the currency; *Hunt v. Hardin*, 14 Tex. Civ. App. 285. See also *Hoover, etc., Co. v. Columbia Straw Paper Co.*, 68 Fed. Rep. 945; *Central Trust Co. v. East Tennessee, etc., R. Co.*, 59 Fed. Rep. 523; *U. S. v. Sayward*, 160 U. S. 493.

3. See the language of the statute quoted *supra*, p. 186, note 6.

4. *U. S. v. Sayward*, 160 U. S. 493; *U. S. v. Kentucky River Mills*, 45 Fed. Rep. 273; *U. S. v. Flournoy Live-Stock, etc., Co.*, 71 Fed. Rep. 576.

5. *Washington v. Northern Pac. R. Co.*, 75 Fed. Rep. 333; *Carpenter v. Northern Pac. R. Co.*, 75 Fed. Rep. 850, holding, however, that if the suit

against the receiver had been entirely independent and disconnected from the cause in which he was appointed it could not have been removed unless the jurisdictional amount was involved.

6. *Venable v. Richards*, 105 U. S. 637; *Wood v. Matthews*, 2 Blatchf. (U. S.) 370.

7. *Carrick v. Landman*, 20 Fed. Rep. 209, a petition for removal under the Act of 1867, which required a jurisdictional amount of five hundred dollars "exclusive of costs," the case holding that interest accruing during the pendency of the suit and before the filing of the petition for removal could not be added so as to make up the requisite amount. Compare *infra*, I. 18. *c.*

(3) *Amount in Counterclaim or Set-off.*

8. *Sturgeon River Boom Co. v. W. H. Sawyer Lumber Co.*, 89 Fed. Rep. 113, holding that if the requisite amount is not in dispute at the time of removal, the jurisdiction of the federal court cannot be sustained by an amendment of the pleadings after removal so as to show the necessary amount.

9. *Kurtz v. Moffitt*, 115 U. S. 498; *Chappell v. Chappell*, 86 Md. 544.

Suit for Removal of Trustee. — As to whether a suit to remove the defendant from his office of trustee and to have a suitable person appointed in his place is a subject-matter of money value, see *Baxter v. Proctor*, 139 Mass. 151.

Mandamus Proceedings. — Although

For this reason habeas corpus proceedings¹ and suits for divorce² or to set aside decrees of divorce³ are not removable.

e. HOW ASCERTAINED—(1) *In General*.—The jurisdiction by removal, so far as it depends on the amount in dispute, is not governed by an independent provision in the statute, but rests on the section of the statute prescribing the original jurisdiction of the federal Circuit Courts.⁴ Therefore, in addition to what is herein said upon the subject, it may be useful to consult the article AMOUNT IN CONTROVERSY, vol. 1, p. 702.

In Actions for Unliquidated Damages the amount stated in the plaintiff's *ad damnum* must be taken as the true measure of the value of the matter in dispute.⁵

there is no way of appraising with exactness the value in money of a right to appeal from the probate of a will, yet a mandamus proceeding to compel the allowance of an appeal is removable so far as the amount in controversy is concerned if it sufficiently appears that the plaintiff's interest in the estate directly involved in the question of the validity of the will exceeds in value the amount necessary for jurisdiction. *Erwin v. Walsh*, 27 Fed. Rep. 579. But see as to removability of mandamus proceedings, *supra*, p. 171.

In *Rosenbaum v. Board of Supervisors*, 28 Fed. Rep. 225, it was doubted whether a mandamus proceeding to compel the performance of a public duty by the defendant, the latter not being liable on any money demand, could be said to involve in dispute any matter of a money value.

Where Money Judgment Is Discretionary.—Where the rendition of a judgment having a money value will rest entirely in the discretion of the court, it is doubtful whether the jurisdictional amount can be claimed to be in dispute. *Bowman v. Bowman*, 30 Fed. Rep. 849, a suit for divorce, the bill alleging the husband's income to be not less than ten thousand dollars a year and praying for an award of alimony according to the equities of the case.

1. *Kurtz v. Moffitt*, 115 U. S. 498. See also *Barry v. Mercein*, 5 How. (U. S.) 103; *Pratt v. Fitzhugh*, 1 Black (U. S.) 271.

2. *Chappell v. Chappell*, 86 Md. 532, although there were auxiliary proceedings respecting alimony and counsel fees. See also *Bowman v. Bowman*, 30 Fed. Rep. 849.

3. *Caswell v. Caswell*, 120 Ill. 377, where "there was not the money in-

terest even of costs involved in the divorce decree, that decree ordering that the complainant should pay the costs."

4. See Act of 1887-1888, 24 U. S. Stat. at L. 552, c. 373, §§ 1, 2; 25 U. S. Stat. at L. 434, c. 866, §§ 1, 2.

5. *Barry v. Edmunds*, 116 U. S. 550; *Western Union Tel. Co. v. Levi*, 47 Ind. 552; *Louisville, etc., R. Co. v. Roehling*, 11 Ill. App. 266; *Yarde v. Baltimore, etc., R. Co.*, 57 Fed. Rep. 913, an action for death by wrongful act, where the plaintiff's complaint, after stating in detail the facts constituting the cause of action, concluded as follows: "By reason of the premises said plaintiff widow and children have been damaged in the sum of — thousand dollars; wherefore plaintiff demands judgment for — thousand dollars." It was held that for the purposes of removal the amount in dispute was one thousand dollars and that the cause could not be removed on a petition alleging that the matter is dispute exceeded two thousand dollars, etc.

Tort for Destruction of Property.—In *Smith v. Northern Pac. R. Co.*, 3 N. Dak. 17, the plaintiff sued in tort for the destruction of property, laying his damages at exactly two thousand dollars, and the trial court denied a petition for removal. On appeal, *Corliss, C. J.*, said: "We are satisfied we must sustain the action of the trial court in this behalf. While it is true that it is stated in the complaint that the value of the property destroyed by the fire was over two thousand dollars, the plaintiff expressly limited his demand to that sum. This demand governs in actions of this character. Of course it might not control when in excess of the alleged value of the property destroyed. But the injured party may, if he sees fit, waive his right to

Action for Specific Sum of Money. — Where the body of the declaration shows that the action is brought to recover a specific sum of money, that is the amount in controversy without regard to the *ad damnum*.¹

Claims Concerning Specific Property Rights. — Where a bill in equity is filed to abate a nuisance, or to set aside a deed, or for a decree giving other mandatory or preventive relief, it is the value of the property of which the defendant may be deprived by the decree sought which is the test of jurisdiction, and not the claim of the complainant.²

(2) *By Rearrangement of Parties.* — In determining the amount in controversy the parties to the controversy may be arranged

recover full damages, and in that case the litigation involves only the amount which he seeks to recover." See also *Lake Erie, etc., R. Co. v. Juday*, 19 Ind. App. 436.

Quantum Meruit. — Where the plaintiff's summons claimed five thousand dollars, and a special count in his declaration claimed an agreed compensation of less than two thousand dollars, for services rendered, but there was a count on the *quantum meruit*, it was held that the jurisdictional amount was in dispute. *Hayward v. Nordberg Mfg. Co.*, 85 Fed. Rep. 4.

1. *Baltimore v. Postal Tel. Cable Co.*, 62 Fed. Rep. 500.

Contingent Losses. — In actions at law where the plaintiff's claim is for money, the amount in controversy is determined by that particular demand for which the plaintiff sues, and not by any contingent loss which either party may sustain through the indirect or probative effect of the judgment, however certain it may be that such loss will occur. *Baltimore v. Postal Tel. Cable Co.*, 62 Fed. Rep. 502 [citing *New England Mortg. Security Co. v. Gay*, 145 U. S. 123; *Elgin v. Marshall*, 106 U. S. 578; *Gibson v. Shufeldt*, 122 U. S. 27; *Clay Center v. Farmers' L. & T. Co.*, 145 U. S. 225; *Washington, etc., R. Co. v. District of Columbia*, 146 U. S. 227].

2. *Baltimore v. Postal Tel. Cable Co.*, 62 Fed. Rep. 502 [citing *Mississippi, etc., R. Co. v. Ward*, 2 Black (U. S.) 485; *Washington Market Co. v. Hoffman*, 101 U. S. 112; *Estes v. Gunter*, 121 U. S. 183]. See also *Dickinson v. Union Mortg., etc., Co.*, 64 Fed. Rep. 895.

If the Title to a Tract of Land Is in Controversy, and the plaintiff's pleading

alleges the value to be less than two thousand dollars, but the petition for removal alleges its value to be much greater than that amount, the fact can be determined only in the federal court in connection with a motion to remand. *Withers v. Hopkins Place Sav. Bank*, 104 Ga. 89.

Claim to Attached Property. — Where a receiver was made a codefendant in an attachment suit, and claimed the right to the exclusive possession and control of the attached property, which was more than two thousand dollars in value, it was held that the suit was removable on his petition, although the plaintiff's claim was less than two thousand dollars. *Hoover v. Columbia Straw Paper Co.*, 68 Fed. Rep. 945.

Bill to Annul Several Judgments. — Where a bill in equity sought to annul several judgments against the plaintiff, all of which were held by one of the defendants, and were rendered as a result of one trial, the aggregate amount of the judgments was deemed to be the value of the matter in dispute for the purpose of removal. *Marshall v. Holmes*, 141 U. S. 595.

In an Action for Specific Performance of a contract to convey land, the value of the land is the amount in dispute. *Weber v. Travelers' Ins. Co.*, 45 Fed. Rep. 657.

Suit to Enjoin Tax. — In a suit brought by several taxpayers in behalf of themselves and all other taxpayers of a county to restrain the levy of a tax for a particular year to pay the interest on a series of bonds the validity of which was the main question at issue, it was held that the amount in dispute was the value of the bonds, and not the amount of the particular tax to be levied. *Brown v. Trousedale*, 138 U. S. 389.

according to their interest in the subject-matter, and not as they appear in the record.¹

(3) *Amount in Counterclaim or Set-off.* — Whether the amount demanded in a counterclaim or set-off filed by the defendant can be considered as constituting a part of the matter in dispute on an application for removal has been the subject of conflicting decisions.² The conclusion that it may be so considered is said to be strongly fortified where the state statute requires the defendant to file his counterclaim or be forever barred of recovery therefor.³

(4) *Petition for Removal in Connection with Pleadings.* — In determining the amount in controversy the petition for removal and the plaintiff's declaration or complaint may be read together.⁴ If the allegation of the amount in dispute is properly stated in the petition for removal, it is sufficient though it does not appear in the plaintiff's pleading.⁵ Where the amount in controversy positively stated in the petition for removal exceeds the jurisdictional limit, it is sufficient if not legally inconsistent with the allegations in the plaintiff's pleading.⁶ If the averments in the plaintiff's pleading touching the amount in

1. Thus in a foreclosure suit against a mortgagor and another incumbrancer where the latter files a cross-bill against the plaintiff and codefendant to foreclose a prior mortgage and removes the case, the amount in controversy is the amount of the mortgage debt alleged in the cross-bill, the plaintiff and the codefendant being arrayed against the removing defendant. *Wolcott v. Sprague*, 55 Fed. Rep. 545. See generally *supra*, p. 205.

2. The following cases hold that it cannot be considered: *Bennett v. Devine*, 45 Fed. Rep. 705; *La Montagne v. F. W. Harvey Lumber Co.*, 44 Fed. Rep. 645. See also *Falls Wire Mfg. Co. v. Broderick*, 6 Fed. Rep. 654, 2 McCrary (U. S.) 489; *Carrick v. Landman*, 20 Fed. Rep. 209; *West v. Aurora City*, 6 Wall. (U. S.) 139.

Contra. — *Clarkson v. Manson*, 4 Fed. Rep. 257, 18 Blatchf. (U. S.) 443, 60 How. Pr. (N. Y.) 45. See also *Sturgeon River Boom Co. v. W. H. Sawyer Lumber Co.*, 89 Fed. Rep. 113. And compare *Block v. Darling*, 140 U. S. 234; *Lovell v. Cragin*, 136 U. S. 130; *Lee v. Continental Ins. Co.*, 74 Fed. Rep. 424.

As Affected by Jurisdiction of State Court. — If the amount recoverable under a set-off in the state court in which the suit is pending is less than the amount requisite to federal jurisdiction, the set-off cannot be considered.

New York I. & P. Co. v. Milburn Gin, etc., Co., 35 Fed. Rep. 225; *Hummel v. Moore*, 25 Fed. Rep. 380.

Averment of Intention to File Set-off. — A mere averment in the petition for removal that the defendant intends to plead a set-off large enough to bring up the amount in controversy to a sum more than two thousand dollars is not sufficient. *Sturgeon River Boom Co. v. W. H. Sawyer Lumber Co.*, 89 Fed. Rep. 113.

3. *Lee v. Continental Ins. Co.*, 74 Fed. Rep. 424.

4. *Weber v. Travelers' Ins. Co.*, 45 Fed. Rep. 657.

"The entire record may be looked to in order to ascertain what the value of the subject of controversy is." *Building, etc., Assoc. v. Cunningham*, 92 Tex. 155. To the same effect is *Reed v. Hardeman County*, 77 Tex. 167.

5. *Banigan v. Worcester*, 30 Fed. Rep. 392.

6. Thus in *Roberts v. Nelson*, 8 Blatchf. (U. S.) 77, where the petition contained such an averment, the cause was held properly removed, although the action was commenced by summons claiming a certain sum and interest thereon, which together might or might not be sufficient in amount, the rate of interest not being alleged, and no declaration having been filed.

Questions of Fact as to the amount in

controversy conflict with the averments thereof in the petition for removal, the latter will control the former on a motion to remand where the question is disputable as one of fact¹ and there is no reason to believe that the claim made in the petition for removal has no *bona fide* existence and is made only to secure jurisdiction.²

f. EFFECT OF AMENDMENTS. — Before a petition and bond for removal are filed, the plaintiff may, by leave of court, amend so as to reduce the amount of his claim below the jurisdictional limit and thus prevent a removal.³ But where the record at the time of filing the petition and bond for removal shows a dispute or controversy within the jurisdiction of the federal court in respect to amount, the plaintiff cannot defeat the jurisdiction by any subsequent amendment in the state court⁴ or in the federal court⁵ reducing the amount of his claim,⁶ nor by reducing the amount in dispute by filing a bill of particulars in the federal court⁷ or by other form of concession as to any part of his demand.⁸

dispute cannot be tried in the state court. See *infra*, I. 31. *d. Determination of Questions of Fact.*

Averments Legally Inconsistent. — A petition for removal of an action to contest a probated will alleging the amount in controversy as exceeding three thousand dollars, etc., was properly denied where the order probating the will specified that the will was valid only to the amount of three hundred dollars. *Middleton v. Middleton*, 87 Iowa 292.

The averment of the amount in controversy in a petition for removal of an action in tort cannot control the amount as stated in the *ad damnum* of the plaintiff's declaration or complaint. *Lake Erie, etc., R. Co. v. Juday*, 19 Ind. App. 436.

1. Thus in *Postal Tel. Cable Co. v. Southern R. Co.*, 88 Fed. Rep. 804, the telegraph company instituted proceedings to condemn the right to erect its poles and stretch its wires over and along the right of way of the railroad company, declaring in its petition an intent in no way to interfere with the public use to which the right of way was already dedicated, and thereupon contended that the compensation to the railroad company must be only nominal. The petition for removal directly averred that the compensation should greatly exceed two thousand dollars. A motion to remand was denied.

2. *Postal Tel. Cable Co. v. Southern R. Co.*, 88 Fed. Rep. 806.

3. *Maine v. Gilman*, 11 Fed. Rep. 214.

4. See *infra*, I. 37. *b. Inhibition of Further Proceedings.*

5. *Roberts v. Nelson*, 8 Blatchf. (U. S.) 74, where the cause was removed after service of summons which in connection with the petition for removal showed the jurisdictional amount, and subsequently the plaintiff filed his declaration in the federal court, claiming less than that amount. His motion to remand was overruled. See also *Wright v. Wells, Pet.* (C. C.) 220.

Estoppel. — In *Henderson v. Cabell*, 43 Fed. Rep. 257, it was held that the plaintiff, having sued the defendant for the sum of three thousand five hundred dollars, was estopped to contend on a motion to remand that the amount involved was not sufficient to give jurisdiction to the federal court.

6. "If the right of removal has once become perfect, it cannot be taken away by subsequent amendment in the state court or federal court, or by a release of part of the debt or damages claimed, or otherwise." *Western Union Tel. Co. v. Horack*, 9 Ill. App. 311.

7. *Hayward v. Nordberg Mfg. Co.*, 85 Fed. Rep. 9.

8. *Riggs v. Clark*, 71 Fed. Rep. 560, where it was sought to defeat the jurisdiction of the federal court in a removal case, as a consequence of a stipulation by the parties, after the removal, as to the facts of the case for

19. Who May Remove Suit — a. FOR DIVERSE CITIZENSHIP — (1) *Only a Defendant.* — None but a defendant can remove a suit on the ground of diverse citizenship.¹

(2) *Who Is Deemed a Defendant — (a) In General — Definition.* — A defendant has been defined as one who is called upon to answer either at law or in equity.² Within the meaning of the removal act he is one who is named as a defendant and appears in the record as such at the time when the right of removal exists.³

A Defendant Who Voluntarily Appears without the service of process has the same right of removal as if he were regularly served.⁴

the purpose of a hearing, from which it appeared that the amount in dispute was really less than two thousand dollars. See also *Fuller v. Metropolitan L. Ins. Co.*, 37 Fed. Rep. 163; *Peeler v. Lathrop*, 48 Fed. Rep. 780; *Henderson v. Cabell*, 43 Fed. Rep. 257.

1. Act of 1887-1888, 24 U. S. Stat. at L. 553, c. 373, § 2; 25 U. S. Stat. at L. 435, c. 866, § 2; *Hanrick v. Hanrick*, 153 U. S. 197. See also *Pitkin County Min. Co. v. Markell*, 33 Fed. Rep. 391; *Chappell v. Chappell*, 86 Md. 544; and the cases cited in the next two subdivisions of this section.

Under the Act of 1875 either a plaintiff or a defendant could remove the suit. The following cases were removed by a plaintiff: *Phelps v. Oaks*, 117 U. S. 236; *Schraeder Min., etc., Co. v. Packer*, 129 U. S. 688; *Fidelity Trust Co. v. Gill Car Co.*, 25 Fed. Rep. 737; *Mosher v. St. Louis, etc., R. Co.*, 19 Fed. Rep. 849; *Carswell v. Schley*, 59 Ga. 17; *Cuyler v. Smith*, 78 Ga. 662.

2. *White v. Philadelphia*, 8 Phila. (Pa.) 244.

In *Hill v. Graham*, 11 Colo. App. 536, it was held that one who had presented his claim to an assignee for the benefit of creditors and replied to exceptions filed by the assignee in accordance with the state practice was a plaintiff and could not remove the proceeding.

Landowner in Condemnation Proceedings. — Where a landowner takes an appeal from the commissioner's award of damages in condemnation proceedings, he will be regarded as a defendant for the purpose of removal although the state statute gives to him the right to open and close on the trial of the appeal. *Hudson River R., etc., Co. v. Day*, 54 Fed. Rep. 545, a case arising in *New Jersey*. Compare *Mt. Washington R. Co. v. Coe*, 50 Fed. Rep. 637, where the court inclined to the opinion

that under the *New Hampshire* practice the appellant landowner is a plaintiff and therefore not entitled to a removal, although the contrary view was deemed to be more logical.

In *White v. Philadelphia*, 8 Phila. (Pa.) 241, the title to certain land was taken by an act of the legislature and vested in the city for public use. The park commissioners then filed a petition for the appointment of a jury to award damages for the land taken. It was held that an owner who appeared was a plaintiff and not a defendant and therefore could not remove the proceeding.

Garnishee. — Where a party is called by process of garnishment into a proceeding by attachment he is not entitled to remove the case. *Lackawanna Coal, etc., Co. v. Bates*, 56 Fed. Rep. 739. See also *Concord Coal Co. v. Haley*, 76 Fed. Rep. 882, where the court said that it was a serious question under the *New Hampshire* procedure whether the claimant of funds held by the New Hampshire trustee process, so called, who intervenes and asserts that the fund belongs to him, stands as a plaintiff or defendant, when looking at the question in the sense of its bearing on the right of removal.

3. *Walker v. Richards*, 55 Fed. Rep. 129.

4. *Stevens v. Richardson*, 9 Fed. Rep. 195; *Wilson v. Western Union Tel. Co.*, 34 Fed. Rep. 563. See also *La Mothe Mfg. Co. v. National Tube Works Co.*, 15 Blatchf. (U. S.) 432.

Special Appearance. — A defendant not served with process may remove the cause though his appearance was not general, but entered only for the purpose of removal. *Hutton v. Bancroft*, 77 Fed. Rep. 481.

No Attempt to Serve Process. — In *Smith v. Baltimore, etc., R. Co.*, 7 Ohio Dec.

An Infant Defendant cannot remove the suit until proper steps have been taken by the service of process, either directly or by substitution, to bring him into court according to the requirements of the state law as applicable to the case, or until there is an appearance for him by some representative authorized by the state law to appear for him without process.¹

A Defendant Who Files a Cross-bill does not lose his status as a defendant.²

One Who Is Merely a Formal Party Without Interest, or one whose interest has terminated, has no right of removal.³

(b) Cross-bill or Counterclaim Against Plaintiff. — A plaintiff's relation to the suit is not changed so as to enable him to remove it as a "defendant" by the fact that the defendant has filed a cross-bill⁴ or an answer praying for affirmative relief⁵ or a counterclaim or demand in reconvention under a state statute.⁶

(3) *Nonresident Defendant* — (a) *In General*. — The statute provides for removal of a suit on the ground of diverse citizenship⁷ by "the defendant or defendants therein, being nonresidents" of the state where the suit is brought.⁸ Although there is a legal difference between "residence" and "citizenship,"⁹ nonresidence within the state is probably meant by the statute to be synonymous with noncitizenship in the state.¹⁰ If the terms

542, it was held that one who was named as a defendant, but upon whom there had been no attempt to serve process, was not a party, and therefore was not entitled to remove the case.

1. *Woolridge v. McKenna*, 8 Fed. Rep. 675.

2. *Meissner v. Buek*, 28 Fed. Rep. 161. See also *Jackson, etc., Co. v. Pearson*, 60 Fed. Rep. 113.

3. *Adelbert College v. Toledo, etc., R. Co.*, 47 Fed. Rep. 836.

4. *Chappell v. Chappell*, 86 Md. 544, a suit for divorce.

5. *West v. Aurora City*, 6 Wall. (U. S.) 141.

6. *Waco Hardware Co. v. Michigan Stove Co.*, 91 Fed. Rep. 289. See also *La Montagne v. T. W. Harvey Lumber Co.*, 44 Fed. Rep. 645; *Jackson, etc., Co. v. Pearson*, 60 Fed. Rep. 113; *Donohoe v. Mariposa Land, etc., Co.*, 5 Sawy. (U. S.) 163; *Bennett v. Devine*, 45 Fed. Rep. 705.

Contra. — *Carson, etc., Lumber Co. v. Holtzclaw*, 39 Fed. Rep. 578; *Walcott v. Watson*, 46 Fed. Rep. 529.

7. *Removal for Separable Controversy*. — See *infra*, I. 19. *e. For Diverse Citizenship and Separable Controversy*.

8. Act of 1887-1888, 24 U. S. Stat. at L. 553, c. 373, § 2; 25 U. S. Stat. at L. 434, c. 866, § 2; *Wichita Nat. Bank v.*

Smith, 72 Fed. Rep. 568; *Western Union Tel. Co. v. Brown*, 32 Fed. Rep. 337; *Anderson v. Appleton*, 32 Fed. Rep. 855; *Weller v. J. B. Pace Tobacco Co.*, 32 Fed. Rep. 860; *Mills v. Newell*, 41 Fed. Rep. 529; *Frisbie v. Chesapeake, etc., R. Co.*, 57 Fed. Rep. 1; *Purcell v. British Land, etc., Co.*, 42 Fed. Rep. 465; *Bryan v. Richardson*, 153 Mass. 157.

9. See *Overman Wheel Co. v. Pope Mfg. Co.*, 46 Fed. Rep. 578; *Parker v. Overman*, 18 How. (U. S.) 137; *Fales v. Chicago, etc., R. Co.*, 32 Fed. Rep. 678.

10. In *Martin v. Baltimore, etc., R. Co.*, 151 U. S. 676, the court said: "In order to be a 'nonresident of that state' within the meaning of this statute, the defendant must be a citizen of another state, or a corporation created by the laws of another state." But the question still remains whether the converse of that proposition is true, namely that a citizen of another state must be a nonresident.

In *Purcell v. British Land, etc., Co.*, 42 Fed. Rep. 466, *Foster, J.*, said: "The use of the word 'nonresident' in the Act of Congress is somewhat perplexing. * * * It is very doubtful whether the term 'nonresident' is used in the removal act in any different

are not synonymous, it may at least be said that in no reported case has a nonresident individual citizen of a state, when sued in the state of which he is a citizen by a citizen of another state, removed the case to the federal court on the ground of diverse citizenship;¹ nor has an individual citizen of a state other than that in which the suit was brought been denied the right of removal by reason of his residence in the latter state.²

All Must Be Nonresidents. — It has been held that unless all the

sense than that of 'noncitizenship.' In that sense it would be in harmony with antecedent legislation on this subject. In that sense the single compound word 'nonresident' would include the right of removal to defendants, whether citizens of another state or citizens or subjects of a foreign state."

In *Myers v. Murray*, 43 Fed. Rep. 695, Shiras, J., declared that an individual "cannot be a citizen of any state other than the one in which he resides."

A person "cannot be a citizen of the state when he has abandoned his domicile there." *Poppenhauser v. India Rubber Comb Co.*, 14 Fed. Rep. 708.

In *Baughman v. National Water Works Co.*, 46 Fed. Rep. 7, Philips, J., said: "A controversy has sprung up as to the meaning of the terms 'citizens' and 'residents.' It seems to me that these terms in the act, as evidenced by the last clause, are interchangeably used and are employed as synonymous."

Compare Overman Wheel Co. v. Pope Mfg. Co., 46 Fed. Rep. 578, where Shipman, J., said: "I shall not discuss at length the meaning of the term 'nonresident' as used in the clause of the Act of August 13, 1888, which provides that causes removable upon the ground of diverse citizenship may be removed into the Circuit Court for the proper district by the defendant or defendants 'being nonresidents of that state.' * * * It does not seem probable that Congress used the term as synonymous with the expression 'not being citizens.'"

1. In *Purcell v. British Land, etc., Co.*, 42 Fed. Rep. 467, Foster, J., said that "no one would seriously contend" that a removal could be had by such a defendant, and characterized the supposition as an "absurdity."

In *Martin v. Snyder*, 148 U. S. 663, it was held that a removal could not be had by a defendant who was a citizen of

the state where the suit was brought, since he was not a nonresident thereof. But the petition for removal did not allege that he was a nonresident, although it did allege that he was a citizen of the state.

2. In *Rivers v. Bradley*, 53 Fed. Rep. 305, it was conceded that the requisite diversity of citizenship existed, but it was contended on a motion to remand that the defendant was a resident of the state in which the suit was brought. But upon a consideration of the facts in evidence the court held otherwise and sustained the removal.

In *Brisenden v. Chamberlain*, 53 Fed. Rep. 307, it was held that the defendant, who was the receiver of a railway company in South Carolina, and was sued in that state, but was a citizen of New York, could remove the cause as a nonresident of South Carolina under the following circumstances quoted from the opinion of the court: He "has a home in the state of New York, in which he and his family reside. His voting precinct is in that state. He comes into South Carolina at intervals more or less irregular, puts up at an hotel, makes the examination into the conduct of the railway company which he desires, and gives such instructions and directions as he sees fit. He then returns to New York. He does this at frequent intervals during the year. He always stops at an hotel. He has no fixed abode, and has not around him in this state the semblance of a home. His business is that of a practicing lawyer. His office is in New York city. The office and duties as receiver are aside of his regular employment, necessarily temporary in character, and subject to terminate at the will of the court."

Chiatovich v. Hanchett, 78 Fed. Rep. 193, also holds that merely temporary residence in the state where the suit is brought does not debar a defendant citizen of another state from removing the suit.

defendants are nonresidents of the state in which the suit is brought, it is not removable by any of them although all are citizens of different states from the plaintiff.¹

Time of Nonresidence. — The defendant must be a nonresident at the commencement of the suit,² and also at the time of filing his petition for removal.³

(b) **Residence of Corporation.** — The place of residence of a corporation is the state by which it was incorporated,⁴ unless it be incorporated in another state, in which case it may have an additional residence and citizenship in the latter.⁵

1. *Arkansas Valley Smelting Co. v. Cowenhoven*, 41 Fed. Rep. 450. See also *supra*, p. 193.

Contra. — If nonresidence and non-citizenship are the same, the cases cited *infra*, p. 279, in the Second and First Circuits, are opposed to the view stated in the text.

2. *Campreille v. Balbach*, 46 Fed. Rep. 81, where the court said: "The act [of 1887-1888] does not expressly state whether a defendant, in order to be entitled to removal, must show nonresidence from the beginning of the action, or need show only nonresidence at the time of filing the petition. Which construction shall be given to the language used in the act is the question presented on this motion. The precise point seems never to have been decided. In *Freeman v. Butler*, 39 Fed. Rep. 1, it was referred to but not disposed of, the petition in that case not showing nonresidence even at the time of removal. Inasmuch as the removal act of 1887 manifestly shows that it was the purpose of Congress to restrict the jurisdiction of the Circuit Courts [see *supra*, p. 161], * * * the interpretation apparently most in accord with the intention of Congress is that which holds that the status of parties, so far as the right to removal is concerned, is to be settled by their condition at the time of the beginning of the action. If, when the summons was served, the state court had jurisdiction, and there was no right of removal to the federal court because the defendant was a resident of the state in the court of which he was sued, it can hardly be held that it was the intention of Congress to allow such defendant to escape from the jurisdiction of the state court by changing his residence after the commencement of the action."

In *Freeman v. Butler*, 39 Fed. Rep.

2, Judge Barr remarked that the statute "may not require a defendant who is a citizen of another state, and who is sued in a state court, to be a nonresident of the state in which he is sued at the commencement of the action," but refrained from deciding the point.

3. *Freeman v. Butler*, 39 Fed. Rep. 2.

4. *Myers v. Murray*, 43 Fed. Rep. 695; *Fales v. Chicago*, etc., R. Co., 32 Fed. Rep. 673; *Booth v. St. Louis Fire-Engine Mfg. Co.*, 40 Fed. Rep. 1; *Baughman v. National Water-Works Co.*, 46 Fed. Rep. 4; *Henning v. Western Union Tel. Co.*, 43 Fed. Rep. 97; *Amsden v. Norwich Union F. Ins. Soc.*, 44 Fed. Rep. 517; *Overman Wheel Co. v. Pope Mfg. Co.*, 46 Fed. Rep. 578, where the court said: "To enable a corporation to have a residence in another state than the one by which it was originally incorporated, there must be a positive and affirmative act of creation or adoption by the new state which must be more than the permission to own property or do business therein, and more than the grant of privileges to it as an existing corporation;" *Germania F. Ins. Co. v. Francis*, 11 Wall. (U. S.) 216; *Ex p. Schollenberger*, 96 U. S. 377; *Baltimore*, etc., R. Co. v. *Koontz*, 104 U. S. 11; *Memphis*, etc., R. Co. v. *Alabama*, 107 U. S. 581; *Pennsylvania R. Co. v. St. Louis*, etc., R. Co., 118 U. S. 290. See also *Purcell v. British Land*, etc., Co., 42 Fed. Rep. 465; *Shaw v. Quincy Min. Co.*, 145 U. S. 444; *Southern Pac. Co. v. Denton*, 146 U. S. 202; *Frisbie v. Chesapeake*, etc., R. Co., 57 Fed. Rep. 3; *Guinault v. Louisville*, etc., R. Co., 42 La. Ann. 52.

5. *Memphis*, etc., R. Co. v. *Alabama*, 107 U. S. 581; *Overman Wheel Co. v. Pope Mfg. Co.*, 46 Fed. Rep. 579; *Fitzgerald v. Missouri Pac. R. Co.*, 45 Fed. Rep. 812.

(4) *Substituted or Intervening Parties* — **Substituted Parties.** — Parties who come into the case as substitutes for one or the other of the original parties thereto cannot exercise the right of removal if such right did not exist in favor of the party in whose stead they are substituted.¹ But a party who is substituted as a defendant in the place of a merely nominal defendant may remove the suit regardless of the citizenship of the party whose place he takes.²

Interveners. — The general rule is that an intervener has no right of removal if the original parties carrying on the litigation have none.³

Party Must Apply for Leave to Intervene. — The statute contemplates removal only by a defendant or defendants who are actual parties to the record.⁴ Hence one who alleges that he is solely interested in the defense cannot remove the case, even with the consent of the defendant on the record, unless he first intervenes and is regularly admitted as a party.⁵ But one who is entitled to be made a party defendant and to whom is denied a hearing on his application to become a party will have the same right to remove the cause upon filing a sufficient petition and bond therefor as if he were a party.⁶

1. *Burnham v. Leoti First Nat. Bank*, 53 Fed. Rep. 166; *Cable v. Ellis*, 110 U. S. 389; *Houston, etc., R. Co. v. Shirley*, 111 U. S. 358; *Wichita Nat. Bank v. Smith*, 72 Fed. Rep. 568; *Ohlquist v. Farwell*, 4 McCrary (U. S.) 401, 13 Fed. Rep. 305; *Goodnow v. Dolliver*, 26 Fed. Rep. 470. *Compare* *Beecher v. Gillett*, 1 Dill. (U. S.) 308; *Howard v. Stewart*, 34 Neb. 765.

In *Replevin* against a sheriff for goods seized on a writ of attachment, the plaintiff in the attachment who by order of court is substituted in his stead cannot, though a citizen of another state, remove the cause if the sheriff is a citizen of the same state with the plaintiff. *Burnham v. Leoti First Nat. Bank*, 53 Fed. Rep. 163.

The substitution of an administrator in the place of a deceased plaintiff does not make the suit removable on the ground of diversity of citizenship between the administrator and the defendant if there was community of citizenship between the latter and the original plaintiff. *Grand Trunk R. Co. v. Twitchell*, 59 Fed. Rep. 727.

A Defendant Who Purchases the Interests of His Codefendants and is substituted as a sole defendant is subject to their disabilities in respect of community of citizenship with the plaintiff. *Temple v. Smith*, 4 Fed. Rep. 392.

2. *Texas v. Lewis*, 12 Fed. Rep. 1.

3. *Hakes v. Burns*, 40 Fed. Rep. 33. See also *Concord Coal Co. v. Haley*, 76 Fed. Rep. 882. *Compare* *Relfe v. Rundle*, 103 U. S. 222; *Burdick v. Peterson*, 6 Fed. Rep. 840, 2 McCrary (U. S.) 135.

"An intervener who introduces himself into a pending action in a state court solely to assist in its defense and to protect himself against a liability for indemnifying the original defendant can confer no jurisdiction on the federal court that the original defendant could not confer." *Olds Wagon Works v. Benedict*, 67 Fed. Rep. 4.

Purchasers from a Party to a Suit pending the litigation who intervene are subject to his disabilities in respect to citizenship. *Farmers', etc., Nat. Bank v. Schuster*, 86 Fed. Rep. 161.

4. *Bertha Zinc, etc., Co. v. Carico*, 61 Fed. Rep. 136.

5. *Bertha Zinc, etc., Co. v. Carico*, 61 Fed. Rep. 132, in which case the party seeking removal had expressly declined the plaintiff's invitation to enter himself as a party on the record. In *State v. Barnes*, 5 N. Dak. 350, it was held that an intervener has no right to petition for removal until he has applied to the court for leave to intervene where the statute requires leave for that purpose.

6. *Hack v. Chicago, etc., R. Co.*, 23 Fed. Rep. 356.

(5) *Joinder of All Defendants.* — It has already been shown that a cause is not removable on the ground of diverse citizenship unless each of the necessary defendants is a citizen of a different state from each of the necessary plaintiffs, even if all the defendants join in the petition for removal.¹ But it was also the undoubted rule under the removal acts prior to that of 1875, and it has been declared to be the rule in numerous cases subsequent to that act, that where such diversity of citizenship does exist, and it is sought to remove the cause upon that ground alone,² all the defendants who have been brought before the court by service of process in any manner³ must unite in the petition for removal.⁴ It has been expressly held in the United States Circuit Court for the Eighth Circuit, and apparently in the Ninth Circuit, that the same necessity of joinder in the petition for removal obtains under the Act of 1887-1888.⁵ On the other

Absolute Right of Intervention. — Where the state statute gives to a party an absolute right to intervene, his petition for removal, filed without first being formally admitted as a party, must be entertained as if he were an original party. *Snow v. Texas Trunk R. Co.*, 16 Fed. Rep. 2, 4 Woods (U. S.) 394.

1. See *supra*, pp. 193, 195.

2. In **Removals for Separable Controversy** all need not join in the petition. See *infra*, I. 19. *c.* For *Diverse Citizenship and Separable Controversy*.

In **Removals for Prejudice or Local Influence** all need not join in the petition. See *supra*, I. 17. *d.* *Who May Remove Suit*.

In **Removals on the Ground of a Federal Question** it is probably unnecessary for all to join in the petition. See *infra*, I. 19. *d.* *On Ground of Federal Question*.

3. *Bryan v. Ponder*, 23 Ga. 483, holding that one defendant could not remove the cause, though his codefendant who had been served by publication had not appeared.

Successive Removals by Different Defendants. — See *infra*, I. 20. *k.* *Successive Applications by Different Defendants*.

4. *Hanrick v. Hanrick*, 153 U. S. 195; *Wilson v. Oswego Tp.*, 151 U. S. 63; *Stone v. South Carolina*, 117 U. S. 433; *Rogers v. Van Nortwick*, 45 Fed. Rep. 514; *Delbanco v. Singletary*, 40 Fed. Rep. 179; *New York v. Independent Steam-Boat Co.*, 21 Fed. Rep. 593; *Connell v. Utica, etc.*, R. Co., 13 Fed. Rep. 241; *Maine v. Gilman*, 11 Fed. Rep. 215; *Smith v. McKay*, 4 Fed. Rep. 253; *Ruckman v. Palisade Land Co.*, 1 Fed. Rep. 367; *Fields v. Lamb, Deady*

(U. S.) 431; *In re Frazer*, 6 Rep. 357, 9 Fed. Cas. No. 5,068; *Dover Bank v. Dodge*, 25 Int. Rev. Rec. 304; *Chicago, etc., R. Co. v. McComb*, 17 Blatchf. (U. S.) 371; *Ward v. Arredondo*, 1 Paine (U. S.) 410; *Smith v. Rines*, 2 Sumn. (U. S.) 338; *Beardsley v. Torrey*, 4 Wash. (U. S.) 286; *St. Louis, etc., R. Co. v. Trigg*, 63 Ark. 536; *Bliss v. Rawson*, 43 Ga. 183; *Bryan v. Ponder*, 23 Ga. 480; *Darst v. Bates*, 51 Ill. 439; *Chicago, etc., R. Co. v. Martin*, 59 Kan. 437; *Fusz v. Trager*, 38 La. Ann. 173; *Gordon v. Green*, 113 Mass. 261; *Mutual L. Ins. Co. v. Allen*, 134 Mass. 389; *Baxter v. Proctor*, 139 Mass. 151; *Bryant v. Rich*, 106 Mass. 191; *Denniston v. Potts*, 11 Smed. & M. (Miss.) 42; *Merwin v. Wexel*, (C. Pl. Spec. T.) 49 How. Pr. (N. Y.) 115; *Dart v. Walker*, (C. Pl. Gen. T.) 43 How. Pr. (N. Y.) 29, 4 Daly (N. Y.) 188; *Faison v. Hardy*, 114 N. Car. 433; *Shelby v. Hoffman*, 7 Ohio St. 454; *Hazard v. Durant*, 9 R. I. 602; *James v. Thurston*, 6 R. I. 431; *George v. Pilcher*, 28 Gratt. (Va.) 307; *Washington, etc., R. Co. v. Alexandria, etc., R. Co.*, 19 Gratt. (Va.) 601; *Guarantee Co. v. Lynchburg First Nat. Bank*, 95 Va. 480.

Thus, in a joint action against several defendants, where there was no separable controversy and a removal was sought under the Act of 1875, the court said: "There can be no removal by the defendants unless they all join, and all are citizens of different states from the plaintiffs." *Fletcher v. Hamlet*, 116 U. S. 408.

5. **Eighth Circuit.** — *Arkansas Valley Smelting Co. v. Cowenhoven*, 41 Fed.

hand, in the Second and First Circuits it is held that where the requisite diversity of citizenship exists between all of the defendants and the plaintiff, any one of the defendants who is a nonresident of the state where the suit is brought may remove the cause, though there be no separable controversy therein, on his petition alone.¹ Where all the defendants are required to join, one of several plaintiffs whose interest is really that of a defendant must unite with those whose formal position is that of defendants.² Conversely, a defendant who by rearrangement of the parties according to their real interests is a plaintiff³ need not join in the petition for removal.⁴ Formal, nominal, or unnecessary defendants need not join with the others,⁵ and where several defendants would have a right to remove a cause on their joint application, and only one of them is brought within the jurisdiction of the state court, he may remove the cause on his own petition.⁶

b. FOR PREJUDICE OR LOCAL INFLUENCE. — See *supra*, I. 17. *d. Who May Remove Suit.*

c. SUITS BY OR AGAINST ALIENS — In General. — Suits between a citizen of a state and foreign states, citizens, or sub-

Rep. 450; *Thompson v. Chicago, etc.*, R. Co., 60 Fed. Rep. 773; *per* Sanborn, J., in which case all of the defendants were citizens of a state different from that of the plaintiff and were also non-residents of the state in which the suit was brought, and the cause was remanded because all the defendants did not join in the petition as required by construction of clauses 2 and 3 of the Act of 1887-1888, 24 U. S. Stat. at L. 552, c. 373; 25 U. S. Stat. at L. 434, c. 866.

Ninth Circuit. — See *Creagh v. Equitable L. Assur. Soc.*, 88 Fed. Rep. 2.

Sixth Circuit. — See *Smith v. McKay*, 4 Fed. Rep. 354, where Brown, J., said, referring to section 2 of the Act of 1875: "The first clause, as well as the second, contemplates a controversy wholly between citizens of different states, and which can be fully determined as between them. But it would not be consonant with sound principles of construction to say that both of these clauses meant the same thing, and gave the parties the option of petitioning jointly or severally. The second clause evidently contemplates not only a controversy wholly between citizens of different states, and which can be fully determined as between them, but the existence of other plaintiffs or defendants who are not necessary to such controversy."

1. *Second Circuit.* — *Mutual L. Ins. Co. v. Champlin*, 21 Fed. Rep. 85, decided under the Act of 1875. The case was followed in the same circuit in *Garner v. Providence Second Nat. Bank*, 66 Fed. Rep. 369, decided under the Act of 1887-1888, wherein Judge Lacombe, without a new examination of the question, does show convincingly by a citation and explanation of numerous cases that the precise point has not been adjudged to the contrary by the United States Supreme Court. The last case above cited was followed in *Boston Safe-Deposit, etc., Co. v. Mackay*, 70 Fed. Rep. 801.

First Circuit. — The cases above cited were followed in *Hunter v. Conrad*, 85 Fed. Rep. 803.

2. See *Wilson v. Oswego Tp.*, 151 U. S. 63; *Baxter v. Proctor*, 139 Mass. 151.

3. See *supra*, p. 205.

4. *Carson v. Hyatt*, 118 U. S. 286.

5. *Henderson v. Cabell*, 43 Fed. Rep. 257; *Shattuck v. North British, etc., Ins. Co.*, 58 Fed. Rep. 609; *Wortsmann v. Wade*, 77 Ga. 653. See also *supra*, p. 195.

6. *Tremper v. Schwabacher*, 84 Fed. Rep. 414.

Where an action for tort was brought against several defendants only one of whom was served, it was held that those not served and who did not appear were not parties so as to prevent

jects can be removed only by a defendant who is a nonresident of the state where the suit is brought.¹

A Foreign Corporation does not become a resident of a state by doing business and having an office therein so as to defeat its right of removal when sued in that state.²

Joinder in Petition for Removal. — If there are several defendants it is undoubtedly necessary for all of them to unite in the petition for removal.³

d. ON GROUND OF FEDERAL QUESTION. — A removal on the ground that a federal question is involved⁴ can be had only on the petition of a defendant, not on that of a plaintiff.⁵ But if there are several defendants it appears that the cause may be removed on the petition of any one of them who is interested in the federal question, and that all need not unite in the petition.⁶ In any event it would not be necessary for a merely nominal defendant to unite in the application.⁷ It is not necessary that any defendant shall be a nonresident of the state where the suit is brought.⁸

removal by the defendant served. *Norton v. Hayes*, 4 Den. (N. Y.) 245. *Compare Suydam v. Smith*, 1 Den. (N. Y.) 265.

1. Act of 1887-1888, 24 U. S. Stat. at L. 553, c. 373, § 2; 25 U. S. Stat. at L. 435, c. 866, § 2; *Scott v. Texas Land, etc., Co.*, 41 Fed. Rep. 225; *Purcell v. British Land, etc., Co.*, 42 Fed. Rep. 465; *Walker v. O'Neill*, 38 Fed. Rep. 374; *Cudahy v. McGeoch*, 37 Fed. Rep. 1; *Cooley v. McArthur*, 35 Fed. Rep. 372; *Rooker v. Crinkley*, 113 N. Car. 73 (all of which cases were suits against aliens); *Creagh v. Equitable L. Assur. Soc.*, 88 Fed. Rep. 1 (a suit by an alien against a citizen).

Under the Act of 1875 a defendant citizen sued in a court of his own state by an alien could remove the suit. *Deakin v. Lea*, 11 Biss. (U. S.) 27.

2. *Purcell v. British Land, etc., Co.*, 42 Fed. Rep. 465; *Shattuck v. North British, etc., Ins. Co.*, 58 Fed. Rep. 610. *Contra, Scott v. Texas Land, etc., Co.*, 41 Fed. Rep. 225.

3. See *Creagh v. Equitable L. Assur. Soc.*, 88 Fed. Rep. 1, and the cases cited *supra*, p. 278, as to joinder of citizens. The opposing authorities there cited are based upon reasons which would not apply in cases by or against aliens.

4. As to what constitutes a federal question, see *supra*, p. 234.

5. *Darton v. Sperry*, 71 Conn. 339; *Hill v. Graham*, 11 Colo. App. 536.

6. *Seattle, etc., R. Co. v. State*, 52

Fed. Rep. 594, where the court cited *Mitchell v. Smale*, 140 U. S. 406, and speaking of that case, said: "True, the opinion does not in words declare that a case arising under the laws of the United States can be removed from a state court to a United States Circuit Court by the petition of only one of several defendants, but the case was such a case, it was removed upon such a petition, the questions as to the sufficiency of the petition and the jurisdiction of the Circuit Court were contested and were squarely met and decided by the Supreme Court, and the effect of the decision is to affirm the right of one of several defendants to remove a cause, if it be a case at law or in equity, arising under the Constitution or laws of the United States and cognizable in a Circuit Court." See also *Hunter v. Conrad*, 85 Fed. Rep. 805; *Southern Pac. R. Co. v. Townsend*, 62 Fed. Rep. 161; *Lund v. Chicago, etc., R. Co.*, 78 Fed. Rep. 385; *Hoover v. Columbia Straw-Paper Co.*, 68 Fed. Rep. 945.

For Contrary Cases see *New York v. Independent Steam-Boat Co.*, 21 Fed. Rep. 593; *Shearing v. Trumbull*, 75 Fed. Rep. 33; *St. Louis, etc., R. Co. v. Trigg*, 63 Ark. 536; *Chicago, etc., R. Co. v. Martin*, (Kan. 1898) 53 Pac. Rep. 461; *Texas, etc., R. Co. v. Young*, (Tex. Civ. App. 1894) 27 S. W. Rep. 145.

7. *Henderson v. Cabell*, 83 Tex. 541.

8. Act 1887-1888, 24 U. S. Stat. at L. 552, c. 373; 25 U. S. Stat. at L. 433.

e. FOR DIVERSE CITIZENSHIP AND SEPARABLE CONTROVERSY

—(1) *Only Nonresident Citizen Defendant Actually Interested*—

Nonresident.—Under the Judiciary Act of 1789 none but a defendant could remove the suit, and he could remove it only when he was sued in the courts of a state of which he was not a citizen.¹ The Act of 1866² provided that the defendant authorized to remove a suit upon the ground of a separable controversy must be a citizen of a state other than that in which the suit was pending. The Act of 1867,³ which first gave the right of removal on the ground of prejudice or local influence, confined the right of removal to "such citizen of another state whether he be plaintiff or defendant."⁴ The provisions of these acts restricting the right of removal to the party who is a citizen of a state other than that in which the suit is brought were re-enacted and carried into section 639 of the United States Revised Statutes.⁵ The Act of 1875⁶ extended the right of removal to "either party" or "one or more of the plaintiffs or defendants," and did not restrict the right to the party or parties who were nonresidents of the state in which the suit was brought.⁷ But this act was in effect substantially superseded and repealed by the Act of 1887–1888,⁸ now in force, which governs removals. The second clause of section 2 of this act prescribes the rule for removals on the sole ground of diverse citizenship, and restricts the right to defendants who are nonresidents of the state in which the suit is brought.⁹ A like restriction is contained in the fourth clause, relating to removals on the ground of prejudice or local influence.¹⁰ This restriction is not found in express terms in the third clause, relating to removal on the ground of a separable controversy wholly between citizens of different states; but it is held to be plainly implied therein, and as much a part of the clause as if it were expressed.¹¹

c. 866. See also *Lund v. Chicago, etc.*, R. Co., 78 Fed. Rep. 385.

1. 1 U. S. Stat. at L. 79, c. 20, § 12.

2. Act of July 27, 1866, 14 U. S. Stat. at L. 306, c. 288.

3. Act of March 2, 1867, 14 U. S. Stat. at L. 558, c. 196.

4. See *supra*, p. 248, note 4.

5. Rev. Stat. U. S. of 1873–1874, § 639, subsec. 1–3.

6. 18 U. S. Stat. at L. 470, c. 137.

7. The act was confessedly designed to extend the jurisdiction of the federal courts. See *supra*, p. 161.

8. 24 U. S. Stat. at L. 552, c. 373; 25 U. S. Stat. at L. 433, c. 866.

9. *Martin v. Snyder*, 148 U. S. 663.

10. See *supra*, p. 249.

11. *Schofield v. Demorest*, 40 Fed. Rep. 273; *Thurber v. Miller*, 67 Fed. Rep. 371, where after a careful consid-

eration of the question *Caldwell, J.*, came to the conclusion that a suit cannot be removed on the ground of separable controversy by a defendant who is not a nonresident of the state where the suit was brought.

Contra.—*Stanbrough v. Cook*, 38 Fed. Rep. 369, where the court said: "It is urged in argument that no good reason can be adduced why the right of removal is granted in this clause to a defendant, whether a resident or not of the state wherein suit is brought, but in the preceding clause is conferred only on nonresident defendants. It is a sufficient reason for the court to say *ita scripta est*."

In *Anderson v. Appleton*, 32 Fed. Rep. 858, and *Weller v. J. B. Pace Tobacco Co.*, 32 Fed. Rep. 861 (Second Circuit), the court expressly left the

Citizen. — None but a citizen of a state can remove the suit on the ground of a separable controversy.¹ Of course, a citizen of a territory or of the District of Columbia² or an alien³ cannot remove the suit.

Defendant Actually Interested. — Where the suit contains several and separate controversies, it may, by the express terms of the Act of 1887-1888, be removed by "either one or more of the defendants actually interested in such controversy."⁴

(2) **Removal by Intervener.** — Where an original defendant has no separable controversy with the plaintiff, none is acquired by one who intervenes in his place or for his protection⁵ or claims by

point undecided. In *Western Union Tel. Co. v. Brown*, 32 Fed. Rep. 337, it was tacitly assumed not to be necessary for a defendant to be a nonresident of the state where the suit was brought, in order to enable him to remove the suit on the ground of a separable controversy. The case was cited in *Bryan v. Richardson*, 153 Mass. 158, where, however, the court expressed no opinion on the point.

1. Act of 1887-1888, 24 U. S. Stat. at L. 553, c. 373, § 2; 25 U. S. Stat. at L. 434, c. 866, § 2, providing for removal where there is "a controversy which is wholly between citizens of different states."

2. See the preceding note, and *supra*, p. 187.

3. *Merchants' Cotton Press, etc., Co. v. Insurance Co. of North America*, 151 U. S. 386; *King v. Cornell*, 106 U. S. 395; *Tracy v. Morel*, 88 Fed. Rep. 801; *Creagh v. Equitable L. Assur. Soc.*, 88 Fed. Rep. 1; *Woodrum v. Clay*, 33 Fed. Rep. 897; *Guarantee Co. v. Lynchburg First Nat. Bank*, 95 Va. 480.

It was otherwise under subdivision 2 of section 639 of the United States Revised Statutes, but that section was held to have been repealed by the Act of 1875, 18 U. S. Stat. at L. 470, c. 137; *Fisk v. Henarie*, 142 U. S. 459; *King v. Cornell*, 106 U. S. 395; *Atlantic, etc., Fertilizing Co. v. Carter*, 88 Fed. Rep. 707, 4 Hughes (U. S.) 217; *Connell v. Utica, etc., R. Co.*, 13 Fed. Rep. 241.

For a case where a suit was removed by an alien defendant on the ground of a separable controversy, and sustained by the Circuit Court of Appeals on the ground that under the circumstances a severance had been effected by the removal and the subsequent proceedings in the federal Circuit Court, see *Guarantee Co. v. Mechanics' Sav. Bank, etc., Co.*, 80 Fed. Rep. 771.

4. Act of 1887-1888, 24 U. S. Stat. at L. 553, c. 373, § 2; 25 U. S. Stat. at L. 434, c. 866, § 2. See *Grindrod v. Crine*, 22 Fed. Rep. 257; *Smith v. McKay*, 4 Fed. Rep. 353; *Arapahoe County v. Kansas Pac. R. Co.*, 4 Dill. (U. S.) 286, where Mr. Justice Miller said it was the purpose and intent of the separable controversy clause "to enable one man, where all the parties on his side of the controversy had such citizenship as to authorize a removal, to have the case removed, and with it to carry all other parties."

Petitioner Must Be a Defendant. — The suit can be removed only by one who stands in the relation of defendant in the alleged separable controversy. *Concord Coal Co. v. Haley*, 76 Fed. Rep. 883; *In re San Antonio, etc., R. Co.*, 44 Fed. Rep. 145.

The Defendant Must Be Actually Interested in the separate controversy. *Merchants' Cotton Press, etc., Co. v. Insurance Co. of North America*, 151 U. S. 387; *Rand v. Walker*, 117 U. S. 340, where a petition for removal was denied for want of such interest in the petitioner.

A defendant who is not even a proper party to the suit can have no separable controversy therein. *Laidly v. Huntington*, 121 U. S. 179, a bill by a widow for assignment of dower in certain land, the bill alleging that the defendant who petitioned for removal had parted with his interest in the land during the life of the plaintiff's husband.

If one of the petitioners is entitled to removal, the fact that other defendants who have no right to removal join in the petition will not prejudice the application. *Dart v. Walker*, (C. Pl. Gen. T.) 43 How. Pr. (N. Y.) 29, 4 Daly (N. Y.) 188.

5. *In Thorn Wire Hedge Co. v. Ful-*

subrogation to an original defendant;¹ nor can the mere intervention of a defendant create a separable controversy where none existed previously.² But where an intervener claims a distinct interest, especially where he is a necessary party for the plaintiff's complete relief, he may remove the suit, if his intervention raises a separable controversy.³ An intervening defendant whose atti-

ler, 122 U. S. 535, a sheriff was sued for trespass in executing process. Parties who had given a bond of indemnity to the defendant intervened under the provisions of the state statute, and in their answers placed themselves on record as joint actors with the sheriff in the alleged trespass. It was held that as the record stood they had no right of removal. But compare *Greene v. Klinger*, 10 Fed. Rep. 689, a comparatively early case, which was an action of trespass to try title where the grantor and warrantor was brought in as a codefendant at the instance of the original defendant in pursuance of a statutory provision, and it was held that the new defendant had a separable controversy with the plaintiff and could remove the suit. See also *Mitchell v. Smale*, 140 U. S. 406.

One who intervenes simply to protect the defendant and claims nothing independently of the original parties has no standing to remove the cause on the ground of a separable controversy. *Bronson v. St. Croix Lumber Co.*, 35 Fed. Rep. 634.

1. *Baltimore, etc., Tel. Co. v. Morgan's Louisiana, etc., R., etc., Co.*, 37 La. Ann. 883; *Chicago v. Gage*, 6 Biss. (U. S.) 472.

2. *Gudger v. Western North Carolina R. Co.*, 21 Fed. Rep. 81. Thus, in *Wilson v. Oswego Tp.*, 151 U. S. 56, the plaintiff's pleading showed a single cause of action and a single ground of relief, and the case was held not removable by an intervening defendant who set up in his answer and petition for removal an alleged separable controversy.

3. Where a plaintiff has brought suit against a sole defendant, and others intervening claim several interests in the subject-matter, involving separate defenses as to such interests, separable controversies may be held to exist as to them, although the developments in the subsequent progress of the case might show that they were not separable. *Connell v. Smiley*, 156 U. S. 340. In that case the plaintiff brought a suit in equity against a sole defend-

ant to quiet title to a tract of land. Subsequently two other defendants intervened, claiming to be the owners of distinct portions of the tract, and removed the suit on the ground that the controversy as to each of them was separable. No motion to remand was made in the Circuit Court, and the case proceeded to a decree in favor of the plaintiff. On appeal the Supreme Court refused to reverse and remand the case for want of jurisdiction, since it did not appear at the time of the removal that there was no separable controversy, and the record on appeal, which did not contain all the evidence, did not show that it appeared upon the hearing in the Circuit Court that there was no separable controversy, so as to make it the duty of the Circuit Court to remand the case.

In *Galesburg v. Galesburg Water Co.*, 27 Fed. Rep. 321, the plaintiff city sued to vacate and annul a franchise granted to the defendant by the plaintiff. A mortgagee of the defendant was allowed to intervene, and, upon setting up an estoppel between the intervener and the plaintiff, he petitioned for removal on the ground of a separable controversy. It was held that the suit was properly removed. In arriving at this conclusion, however, the court declared that under the circumstances of the case the intervener was a necessary party to the bill as originally framed.

In *Ayers v. Chicago*, 101 U. S. 184, a bill was filed in a state court of Illinois by the city of Chicago against citizens of Illinois to enforce a deed of trust. A citizen of Alabama having a judgment against one of the defendants, and claiming a lien on the property covered by the deed of trust, was admitted as a party defendant to the suit, filed a cross-bill to enforce such lien, and removed the suit into the federal court on the ground that in the original suit there was a controversy wholly between him and the original plaintiff, and that in the cross-suit the controversy was wholly between citizens of different states. But the cause was

tude is really that of a plaintiff cannot remove the suit.¹

20. Time for Making Application — *a. TERMS AND GENERAL PURPOSE AND POLICY OF REMOVAL ACTS.* — In order to procure the removal of a cause under the Judiciary Act of 1789 it was necessary for the defendant to file his petition for removal "at the time of entering his appearance" in the state court.² The provisions of the removal acts of 1866 and 1867, and of clause 2³ of

remanded, the court holding that the original bill and the cross-bill constituted one suit; that the intervener was allowed to take part in a controversy between the city and the debtor; that he had no dispute with the debtor and none separately with the city; that he and the debtor had a controversy with the city as to its lien on the property; that the debtor who was on the same side of the controversy with him was a citizen of the same state with the city; and that such being the case, the suit was not removable.

1. *In re San Antonio, etc.*, R. Co., 44 Fed. Rep. 145.

2. Act of 1789, 1 U. S. Stat. at L. 79, c. 20, § 12.

"The reasons for this were obviously * * * that the defendant who had a right of removal and failed to exercise it at the earliest period possible should be presumed to have acquiesced in the forum chosen by the plaintiff." *Per* Justice Miller in *Pullman Palace Car Co. v. Speck*, 113 U. S. 85.

"If he filed a demurrer, plea, or answer, or otherwise recognized or submitted to the jurisdiction of the state court, he would have waived the benefit of his personal privilege of removal." *Fox v. Southern R. Co.*, 80 Fed. Rep. 946.

It was necessary for the filing of the petition and the entry of appearance to be concurrent acts, and some authorities held that where a defendant gave notice of appearance for the purposes of the motion to remove, but made no actual entry of appearance before filing his petition, the petition was properly denied. *Kerille v. Phoenix L. Ins. Co.*, 3 Thomp. & C. (N. Y.) 788. Others held that no technical entry of appearance was necessary, the filing of the petition for removal being a sufficient appearance. *Sweeney v. Coffin*, 1 Dill. (U. S.) 73; *Stoker v. Leavenworth*, 7 La. 390.

For cases holding that the application was seasonably made under the Act of 1789, see *Fisk v. Fisk*, 4 Mart. N. S. (La.) 676; *Arjo v. Monteiro*, 1

Cai. (N. Y.) 248; *Bird v. Murray*, Col. Cas. (N. Y.) 63; *Norton v. Hayes*, 4 Den. (N. Y.) 245; *Field v. Blair*, (Supm. Ct. Spec. & Gen. T.) 1 Code Rep. N. S. (N. Y.) 292, 361; *Durand v. Hollins*, 3 Duer (N. Y.) 686; *Disbrow v. Driggs*, (N. Y. Super. Ct. Spec. T.) 8 Abb. Pr. (N. Y.) 305, note; *Chatham Nat. Bank v. Merchants' Nat. Bank*, 1 Hun (N. Y.) 702, 4 Thomp. & C. (N. Y.) 196.

For other cases holding that the application was too late, see *Johnston v. Wall*, 1 Mart. N. S. (La.) 541; *Duncan v. Hampton*, 12 Mart. (La.) 92; *Crane v. Reeder*, 28 Mich. 527; *Crane v. Seitz*, 30 Mich. 453; *Robinson v. Potter*, 43 N. H. 188; *Redmond v. Russell*, 12 Johns. (N. Y.) 154, holding that the filing of special bail constituted an appearance; *Livingston v. Gibbons*, 4 Johns. Ch. (N. Y.) 94; *Roberts v. Canington*, 2 Hall (N. Y.) 649; *Cooley v. Lawrence*, 5 Duer (N. Y.) 605, where the defendant had opposed a motion for injunction and read affidavits on the hearing thereof, etc.; *Dart v. Arnis*, (N. Y. Super. Ct. Spec. T.) 19 How. Pr. (N. Y.) 429, where the defendant had previously moved to discharge an order of arrest; *Kingsbury v. Kingsbury*, 3 Biss. (U. S.) 60; *Gibson v. Johnson*, Pet. (C. C.) 44.

Nunc Pro Tunc Order. — In *Gelston v. Johnson*, 3 N. J. L. 207, the state court granted an order of removal *nunc pro tunc* on a petition filed two terms after the defendant's appearance, but the federal Circuit Court remanded the cause as illegally removed. See *Johnson v. Gelston*, 3 N. J. L. 245.

3. Clause 1 of section 639 of the United States Revised Statutes provided that "when the suit is against an alien, or is by a citizen of the state wherein it is brought, and against a citizen of another state, it may be removed on the petition of such defendant, filed in said state court, at the time of entering his appearance in said state court." That clause was superseded and repealed by the Act of 1875, *La Mothe Mfg. Co. v. National Tube*.

section 639 of the United States Revised Statutes are quoted in another part of this article.¹ The Act of 1875, which was the next in chronological order, required the petition for removal to be filed "before or at the term at which said cause could be first tried,"²

Works Co., 15 Blatchf. (U. S.) 433, and was not restored by the Act of 1887-1888. *National Steamship Co. v. Tugman*, 106 U. S. 119, was removed under that clause when it was in force.

1. See *supra*, p. 250.

2. For cases holding that the application was in time under that part of the act quoted in the text to which this note is appended, see *Carson v. Hyatt*, 118 U. S. 279; *Harter v. Kernochan*, 103 U. S. 562; *Kalamazoo Wagon Co. v. Snavely*, 34 Fed. Rep. 823; *Winberg v. Berkeley County R., etc., Co.*, 29 Fed. Rep. 721; *Davies v. Marine Nat. Bank*, 24 Fed. Rep. 194; *Langdon v. Fogg*, 18 Fed. Rep. 5; *Wheeler v. Liverpool, etc., Ins. Co.*, 8 Fed. Rep. 196; *Van Allen v. Atchison, etc., R. Co.*, 1 McCrary (U. S.) 598, 3 Fed. Rep. 545; *Scott v. Clinton, etc., R. Co.*, 6 Biss. (U. S.) 529; *Merchants', etc., Nat. Bank v. Wheeler*, 13 Blatchf. (U. S.) 218; *Palmer v. Call*, 4 Dill. (U. S.) 566; *McCullough v. Sterling School Furniture Co.*, 4 Dill. (U. S.) 563; *Baker v. Peterson*, 4 Dill. (U. S.) 562, note; *Chester v. Wellford*, 2 Flipp. (U. S.) 347, an equity case removed after *pro confesso* taken; *Andrews v. Garrett*, 1 Flipp. (U. S.) 445; *Hunter v. Royal Canadian Ins. Co.*, 3 Hughes (U. S.) 234; *Hoadley v. San Francisco*, 3 Sawy. (U. S.) 553; *Steiner v. Mathewson*, 77 Ga. 657; *Livingston v. Frick*, 76 Ga. 839; *Flagg v. Walker*, 109 Ill. 494; *Hebert v. Lefevre*, 31 La. Ann. 363; *Davis v. Montgomery*, 36 La. Ann. 874; *Garrett v. Bonner*, 30 La. Ann. 1305; *Crane v. Reeder*, 35 Mich. 146; *Wheeler v. Liverpool, etc., Ins. Co.*, 60 N. H. 456; *Phoenix L. Ins. Co. v. Saettel*, 33 Ohio St. 278; *Whitehouse v. Continental F. Ins. Co.*, 14 Phila. (Pa.) 431, 37 Leg. Int. (Pa.) 225; *Feibleman v. Edmonds*, 69 Tex. 334; *Smith v. Life Assoc. of America*, 76 Va. 380.

For cases holding that the application was too late, see *Manning v. Amy*, 140 U. S. 137; *Baltimore, etc., R. Co. v. Burns*, 124 U. S. 165; *Gregory v. Hartley*, 113 U. S. 742; *Edrington v. Jefferson*, 111 U. S. 770; *American Bible Soc. v. Grove*, 101 U. S. 610; *Babbitt v. Clark*, 103 U. S. 606; *Wilkinson v. Delaware, etc., R. Co.*, 23

Fed. Rep. 561; *Chrissenger v. Democrat*, 22 Fed. Rep. 755; *Badger v. Mulville*, 22 Fed. Rep. 257; *National Bank v. Dorset Pipe, etc., Co.*, 20 Fed. Rep. 707; *MacNaughton v. South Pac. Coast R. Co.*, 19 Fed. Rep. 881; *Phoenix Mut. L. Ins. Co. v. Walrath*, 16 Fed. Rep. 161; *Public Grain, etc., Exch. v. Western Union Tel. Co.*, 16 Fed. Rep. 289; *Shirley v. Waco Tap R. Co.*, 13 Fed. Rep. 705; *Cramer v. Mack*, 12 Fed. Rep. 803, 20 Blatchf. (U. S.) 479; *Kerting v. American Oleograph Co.*, 10 Fed. Rep. 17; *Traders' Bank v. Tallmadge*, 9 Fed. Rep. 363; *In re Iowa, etc., Constr. Co.*, 6 Fed. Rep. 799, 2 McCrary (U. S.) 178; *Hendecker v. Rosenbaum*, 6 Fed. Rep. 97; *Murray v. Holden*, 2 Fed. Rep. 740, 1 McCrary (U. S.) 341; *Forrest v. Edwin Forrest Home*, 1 Fed. Rep. 459, 17 Blatchf. (U. S.) 522; *Blackwell v. Braun*, 1 Fed. Rep. 351, *sub nom.* *Blackwell v. Brown*, 4 Hughes (U. S.) 203; *Missouri v. Merritt*, 1 Fed. Rep. 283, 1 McCrary (U. S.) 65; *Stough v. Hatch*, 16 Blatchf. (U. S.) 233; *Knowlton v. Congress, etc., Spring Co.*, 13 Blatchf. (U. S.) 171; *Ames v. Colorado Cent. R. Co.*, 4 Dill. (U. S.) 260; *Gaffney v. Gillette*, 4 Dill. (U. S.) 264, note; *Atlee v. Potter*, 4 Dill. (U. S.) 559; *Gurnee v. Brunswick County*, 1 Hughes (U. S.) 270; *Keeney v. Roberts*, 12 Sawy. (U. S.) 39, 39 Fed. Rep. 629; *Malley v. Firemen's Fund Ins. Co.*, 51 Conn. 486; *Carswell v. Schley*, 59 Ga. 17, holding that after judgment on demurrer affirmed on appeal the cause stood for trial at the term at which the remittitur was entered; *Stafford v. Hightower*, 68 Ga. 394; *Danville Banking, etc., Co. v. Parks*, 88 Ill. 170; *Continental L. Ins. Co. v. Kessler*, 84 Ind. 310; *Chicago, etc., R. Co. v. Welch*, 44 Iowa 665; *McKinley v. Chicago, etc., R. Co.*, 44 Iowa 314; *Barber v. St. Louis, etc., R. Co.*, 43 Iowa 223; *Larson v. Cox*, 39 Kan. 631; *Lamblin v. Cox*, 40 Kan. 311; *Cole v. La Chambre*, 31 La. Ann. 41; *Meanx v. Pittman*, 32 La. Ann. 405; *School Dist. No. 6 v. Aetna Ins. Co.*, 66 Me. 370; *Clark v. Child*, 156 Mass. 344; *New York Warehouse, etc., Co. v. Loomis*, 122 Mass. 431; *Whitte-*

and before the trial thereof." This last phrase, "before the trial thereof," has been retained in that part of the Act of 1887-1888 which provides for removals on the ground of prejudice or local influence.¹

The Act of 1887-1888 requires the petition for removal to be filed "at the time, or any time before the defendant is required by the laws of the state or the rule of the state court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff."² The time for removal is thus made to depend upon the various state laws and rules of court.³ The act was

more *v. Stephens*, 48 Mich. 573; *Nichols v. Stevens*, 123 Mo. 120; *Stebbins v. Lancashire Ins. Co.*, 59 N. H. 414; *Preston v. Travellers' Ins. Co.*, 58 N. H. 76; *Wanner v. Sisson*, 28 N. J. Eq. 117; *Fulton v. Golden*, (N. J. 1879) 9 Cent. L. J. 286; *Warner v. Pennsylvania R. Co.*, 6 Hun (N. Y.) 197; *Meyer v. Schining*, 55 Tex. 430; *Watt v. White*, 46 Tex. 341; *Kennedy v. Ehlen*, 31 W. Va. 540; *White v. Holt*, 20 W. Va. 792; *Wausau First Nat. Bank v. Conway*, 67 Wis. 210; *Eldred v. Becker*, 60 Wis. 43.

Construing This Act in Pullman Palace Car Co. v. Speck, 113 U. S. 86, Mr. Justice Miller said: "It is not the time when the case stands ready for trial on the calendar, but the term at which it could be first tried. Not the term at which the party can no longer delay a trial, but the term at which it could be first tried. These words have no meaning if they do not mean the first term after the commencement of the suit at which a trial was in order when such trial was a thing which the urging or pursuing party had a right to look for, and to put his adversary to a showing if he desired a continuance. In the language of this court, 'the election must be made at the first term at which the cause is in law triable.' *Babbitt v. Clark*, 103 U. S. 606. In other words, at that term in which, according to the rules of procedure of the court, whether they be statutory or rules of the court's adoption, the cause would stand for trial if the parties had taken the usual steps as to pleading and other preparations. This term at which the case could be first tried is to be ascertained by these rules, and not by the manner in which the parties have complied with them, or have been excused for noncompliance by the court, or by stipulation among themselves." See also *Wheeler v. Liver-*

pool, etc., Ins. Co., 60 N. H. 456; *Fisk v. Henarie*, 142 U. S. 459; and further for observations on the general policy of the act, *Murray v. Holden*, 1 McCrary (U. S.) 341.

In Cases Begun Before the Act Was Passed, it was necessary to make the application at or before the term at which the cause could be first tried after the act went into operation. *Myers v. Swann*, 107 U. S. 547; *Removal Cases*, 100 U. S. 473; *Baker v. Peterson*, 4 Dill. (U. S.) 562, note; *Hoadley v. San Francisco*, 3 Sawy. (U. S.) 553; *Andrews v. Garrett*, 1 Flipp. (U. S.) 445; *Merchants', etc., Nat. Bank v. Wheeler*, 13 Blatchf. (U. S.) 218. And a case pending at the time when the act was passed, although it had been tried and judgment reversed on appeal and the cause remanded for further proceedings, stood like a new suit, and was removable at any time before the term at which it could be first tried. *Pettiton v. Noble*, 7 Biss. (U. S.) 449. And the fact that a final decree had been entered before the passage of the act did not prevent a removal after such decree had been set aside, and while the cause stood for a rehearing. *King v. Worthington*, 104 U. S. 44.

Until End of Term.—The act was construed to give the right of removal at any time before the trial until the end of the term at which the cause could be first tried. *Wilkinson v. Delaware, etc., R. Co.*, 22 Fed. Rep. 353.

1. See *supra*, p. 251.

2. 24 U. S. Stat. at L. 554, c. 372; 25 U. S. Stat. at L. 435, c. 866.

3. As to the time to answer or plead in various states as exemplified by decisions in removal cases see:

For *Connecticut*, *Security Co. v. Pratt*, 65 Conn. 161.

For *Indiana*, *Browning v. Reed*, 39 Fed. Rep. 625; *McKeen v. Ives*, 35

designed to contract the jurisdiction of the federal courts by removal,¹ to abolish delay,² and to prevent the defendant from experimenting in the state court on the merits of his case before making an application for removal.³

Act Applies to Special Proceedings. — It was the purpose of the act to include within the time limit all classes of cases removable on the ground of diverse citizenship, or alienage, except such as are within the local prejudice clause,⁴ and special proceedings not subject to the ordinary rules of pleading and practice are not exempted from its operation.⁵

Fed. Rep. 801; *Amsden v. Norwich Union F. Ins. Soc.*, 44 Fed. Rep. 515.

For *Kentucky*, *Fidelity Trust, etc., Co. v. Newport News, etc., Co.*, 70 Fed. Rep. 403.

For *Massachusetts*, *Gregory v. Boston Safe-Deposit, etc., Co.*, 88 Fed. Rep. 3; *Mason v. Interstate Consol. St. R. Co.*, 170 Mass. 382.

For *Missouri*, *Spangler v. Atchison, etc., R. Co.*, 42 Fed. Rep. 305.

For *New York*, *Doyle v. Beaupre*, 39 Fed. Rep. 289; *Price v. Lehigh Valley R. Co.*, 65 Fed. Rep. 825.

For *North Dakota*, *State v. Barnes*, 5 N. Dak. 350.

For *South Carolina*, *Wilcox, etc., Guano Co. v. Phoenix Ins. Co.*, 60 Fed. Rep. 929.

For *Tennessee*, see *Lockhart v. Memphis, etc., R. Co.*, 38 Fed. Rep. 274; *Tennessee Coal, etc., Co. v. Waller*, 37 Fed. Rep. 545; *Gavin v. Vance*, 33 Fed. Rep. 84; *Turner v. Illinois Cent. R. Co.*, 55 Fed. Rep. 689.

For *Texas*, *Evans v. Dillingham*, 43 Fed. Rep. 179.

For *Vermont*, *Sowles v. Witters*, 43 Fed. Rep. 700.

For *West Virginia*, *Martin v. Baltimore, etc., R. Co.*, 151 U. S. 673; *Wilson v. Winchester, etc., R. Co.*, 82 Fed. Rep. 15.

In *Georgia* the statute provides that the defendant in an action commenced by attachment may appear and make his defense "at any time before final judgment is rendered against him." Accordingly, he may file his petition for removal at any time before judgment. *Southern Pac. Co. v. Stewart*, 88 Ga. 13.

Computation of Time. — It is a statutory rule in *Louisiana* that where the statute allows a stated number of days to answer or plead after service of the plaintiff's pleading, neither the day of the service nor that on which the time

expires is counted. *Font v. Gulf State Land, etc., Co.*, 47 La. Ann. 272.

For the general rule in the absence of a statute on the subject see Am. and Eng. Encyc. of Law, title *Time*.

1. See *supra*, p. 161.

"It is settled that the present statute was intended to abridge the right of removal previously existing, and it ought to be so construed and enforced as to effectuate rather than to defeat its obvious purpose." *Daugherty v. Western Union Tel. Co.*, 61 Fed. Rep. 139.

2. "This provision clearly manifests the intention of Congress that the petition for removal should be filed at the earliest possible opportunity." *Powers v. Chesapeake, etc., R. Co.*, 169 U. S. 100.

Delay is "one of the ordinary abuses of the right of removal." *Per Dillon, J.*, in *Atlee v. Potter*, 4 Dill. (U. S.) 562.

3. *Egan v. Chicago, etc., R. Co.*, 53 Fed. Rep. 676; *Brigham v. C. C. Thompson Lumber Co.*, 55 Fed. Rep. 882; *Manning v. Amy*, 140 U. S. 141; *Chicago, etc., R. Co. v. Minnesota, etc., R. Co.*, 29 Fed. Rep. 337. See also *Rosenthal v. Coates*, 148 U. S. 142; *Pullman Palace Car Co. v. Speck*, 113 U. S. 87; *Jifkins v. Sweetzer*, 102 U. S. 179; *Alley v. Nott*, 111 U. S. 472; *Murray v. Holden*, 1 McCrary (U. S.) 341; *Lewis v. Smythe*, 2 Woods (U. S.) 119; *Miller v. Kent*, (Supm. Ct.) 60 How. Pr. (N. Y.) 456; *Watt v. White*, 46 Tex. 341.

4. *Mt. Washington R. Co. v. Coe*, 50 Fed. Rep. 639.

5. In *Minneapolis, etc., R. Co. v. Nestor*, 50 Fed. Rep. 1, a condemnation proceeding, the statute made no provision for pleadings other than a demand for a jury trial to be filed within thirty days from the report of the commissioners, and the court held that

b. THE PHRASE "TO ANSWER OR PLEAD" — In General — Plea in Abatement. — The United States Supreme Court has declared that when the case as stated in the plaintiff's pleading is removable¹ the petition for removal must be filed in the state court as soon as the defendant is required to make any defense whatever in that court, so that if the case should be removed the validity of any and all of his defenses should be tried and determined in the Circuit Court of the United States,² and therefore that a petition for removal filed after the time at which he is required to plead to the jurisdiction of the court or in abatement of the writ is too late.³ Some of the Circuit Courts have declined to follow that ruling as applied to the time for pleading in abatement to the writ, on the ground that the conclusion of the court was incorrect⁴ and a mere dictum;⁵ but it is probable that the

the petition for removal must be filed within the thirty days.

In *Mt. Washington R. Co. v. Coe*, 50 Fed. Rep. 637, where the state statutes provided that an appeal from commissioners in condemnation proceedings should be subject to the ordinary rules obtaining in judicial procedure, one of which required special pleas to be filed within ninety days from the commencement of the term when the action was entered, it was held that the petition for removal must be filed within that period after the entry of the appeal.

1. *Case Becoming Removable After Expiration of Time.* — See *infra*, I. 20. *f. Case Becoming Removable After Expiration of Time.*

2. *Per* Justice Gray in *Martin v. Baltimore*, etc., R. Co., 151 U. S. 687.

Prior to the foregoing decision it had been held that "pleas in abatement or other special pleas which do not reach the merits of the cause are not pleas or answers to the 'declaration' within the meaning of the act; and * * * until such pleas are disposed of, the time for filing a petition for removal has not expired." *Craven v. Turner*, 82 Me. 388, *citing* *Lockhart v. Memphis*, etc., R. Co., 38 Fed. Rep. 274; *McKeen v. Ives*, 35 Fed. Rep. 801; *Whelan v. New York*, etc., R. Co., 35 Fed. Rep. 849; *Tennessee Coal*, etc., Co. *v. Waller*, 37 Fed. Rep. 545.

3. *Martin v. Baltimore*, etc., R. Co., 151 U. S. 686. That ruling was not necessary to the decision of the case, since the court held that the objection that the petition was filed too late had been waived.

4. *Wilson v. Winchester*, etc., R. Co., 82 Fed. Rep. 15 (Fourth Circuit), *per*

Jackson, J., adhering to "the views of my brothers in this circuit," and *following* *Mahoney v. New South Bldg.*, etc., Assoc., 70 Fed. Rep. 513, in the same circuit, where *Simonton, J.*, said: "The Act of Congress says that the petition for removal must be filed at the time or before the time at which the defendant is required to plead or answer. A dilatory plea is one which seeks to excuse the defendant from pleading to or answering the declaration and gives reason why he should not be required so to plead or answer. It is not the sort of plea or answer contemplated in the act."

5. See the cases cited in the preceding note.

An Instructive Precedent. — In *Amy v. Manning*, 144 Mass. 154, it was held, Mr. Justice Field writing the opinion, that allegations of fact in a petition for removal might be traversed in the state court and the issue of fact determined by that court. The statement to the contrary in *Stone v. South Carolina*, 117 U. S. 432, was quoted, but declared to be a dictum and therefore not followed. A few months later, in *Burlington*, etc., R. Co. *v. Dunn*, 122 U. S. 515, the opinion of the Supreme Court of Massachusetts above noticed was declared to be erroneous, Mr. Chief Justice Waite saying: "In deciding *Stone v. South Carolina*, 117 U. S. 430, we took occasion to say: 'All issues of fact made upon the petition for removal must be tried in the Circuit Court, but the state court is at liberty to determine for itself whether, on the face of the record, a removal has been effected.' It is true, as was remarked by the Supreme Judicial Court of

Supreme Court intended to settle the question.¹

Demurrer. — The time within which the defendant is required to file a demurrer is the time required to "answer or plead."²

Time for Original Answer. — The statute has reference to the time required for filing an original answer or plea, not to the time when the defendant is required or may elect to file an amended or supplemental answer.³

Time to Answer Original Pleading. — The statute also refers to the time to answer the original, not an amended pleading.⁴

Motions. — A motion made by the defendant for the dissolution of a preliminary injunction is not the sort of plea or answer contemplated by the provisions of the act.⁵ Whether in a code state a defendant may exhaust his exceptions to the form of the complaint by motions to make definite and certain, and thereafter within time required to file an answer, using the word in its technical sense, procure a removal of the cause, seems not to have been decided.⁶

c. PREMATURE APPLICATION. — The cause is not removable until it becomes a "suit" within the meaning of the statute,⁷

Massachusetts in *Amy v. Manning*, 144 Mass. 153, that this was not necessary to the decision in that case, but it was said on full consideration and with the view of announcing the opinion of the court on that subject."

1. *Martin v. Baltimore, etc., R. Co.*, 151 U. S. 673, the leading case, was followed in *Collins v. Stott*, 76 Fed. Rep. 613; *First Littleton Bridge Corp. v. Connecticut River Lumber Co.*, 71 Fed. Rep. 225 (First Circuit); *Frink v. Blackinton Co.*, 80 Fed. Rep. 307 (First Circuit), where Putnam, J., said: "The expressions of the Supreme Court in *Martin v. Baltimore, etc., R. Co.*, 151 U. S. 673, were repeated by it in *Goldey v. Morning News*, 156 U. S. 524, in such way that we must accept them as stating deliberate conclusions of that court which we are not at liberty to disregard." *Security Co. v. Pratt*, 65 Conn. 161. See also *Fidelity Trust, etc., Co. v. Newport News, etc., Co.*, 70 Fed. Rep. 403; *Wilcox, etc., Guano Co. v. Phoenix Ins. Co.*, 60 Fed. Rep. 931. It was quoted with approval in *Wabash Western R. Co. v. Brown*, 164 U. S. 278, in connection with remarks indicating the opinion of the court that the answer or plea referred to in the removal act may be one which questions the validity of the service of process; and in *Powers v. Chesapeake, etc., R. Co.*, 169 U. S. 98, the court said: "Undoubtedly, when the case, as stated in the plaintiff's declaration,

is a removable one, the defendant should file his petition for removal at or before the time when he is required by the law or practice of the state to make any defense whatever in its courts."

2. *Maher v. Tower Hotel Co.*, 94 Fed. Rep. 225; *Whiteley Malleable Castings Co. v. Sterlingworth R. Supply Co.*, 83 Fed. Rep. 855.

3. *Woolf v. Chisolm*, 30 Fed. Rep. 881; *Doyle v. Beaupre*, 39 Fed. Rep. 289, a case arising in *New York*, holding that, an answer having been served, the removal forty days afterwards was too late notwithstanding the fact that during that period, under Code Civ. Pro. N. Y., § 542, in force in 1889, the defendant might have served an amended answer as of course.

4. *Beyer v. Soper Lumber Co.*, 76 Wis. 145. See *infra*, l. 20. m. (2) (b) *By Amending Pleadings*.

5. *Garrard v. Silver Peak Mines*, 76 Fed. Rep. 1 (Ninth Circuit), *per Hawley, J.*, holding that a petition filed thereafter, but within the time required to plead or answer, was not too late.

6. *People's Bank v. Aetna Ins. Co.*, 53 Fed. Rep. 162.

7. In *Shepard v. Conrad*, (Supm. Ct.) 4 Abb. N. Cas. (N. Y.) 254, an action was commenced against one defendant by summons only, and the plaintiff obtained an order for the examination of the defendant under Code Civ. Pro.

but the application may then be made in due time.¹ A party may appear without service of process and file a petition for removal,² but so long as he is in no sense a party he cannot remove the cause.³ Though a petition and bond be prematurely filed, the irregularity is cured if an order of removal is subsequently made in proper time.⁴

d. WHEN TIME BEGINS TO RUN. — The time to file a petition for removal does not begin to run until due and proper service of process upon the defendant or his full and unrestricted appearance without service.⁵

e. FILING PETITION WITHOUT PRESENTATION TO COURT. — If the petition is seasonably filed, it need not be actually presented to the court within the time required to answer or plead.⁶

f. CASE BECOMING REMOVABLE AFTER EXPIRATION OF TIME — In General. — When the case does not become a removable one until after the time mentioned in the Act of Congress has expired the defendant may file his petition for removal as soon as the action assumes the shape of a removable case in the court in which it was brought.⁷ This may occur where the plaintiff's *ad*

N. Y., § 872, so to enable the plaintiff to draw up his complaint and bring in proper parties. An application for removal made while the cause was in that condition was denied on the ground that it was premature, but without prejudice to its renewal after service of the complaint or issue joined.

1. *Pacific R. Removal Cases*, 115 U. S. 18; *Mississippi, etc., Boom Co. v. Patterson*, 98 U. S. 403; *Delaware County v. Diebold Safe, etc., Co.*, 133 U. S. 473.

2. *Conner v. Skagit Cumberland Coal Co.*, 45 Fed. Rep. 802.

3. See *Sheffield First Nat. Bank v. Merchants' Bank*, 37 Fed. Rep. 657.

4. *Sheffield First Nat. Bank v. Merchants' Bank*, 37 Fed. Rep. 657.

5. In *Donahue v. Calumet Fire-Clay Co.*, 94 Fed. Rep. 23, the defendant corporation appeared specially and moved to quash the sheriff's return of service, which motion was overruled, and the defendant thereupon filed an answer on the merits, prefaced, however, with an objection to the jurisdiction. After various interlocutory orders and proceedings the cause was assigned for trial on motion of the defendant. On that day the order overruling the defendant's motion to quash was vacated and the return quashed, but the sheriff was allowed to amend his return, and the defendant again entered a special appearance and moved to quash the amended return. Before hearing upon

this motion the defendant filed its petition and bond for removal. It was held that the petition was filed in time and that there was no waiver of the right of removal; "the effect of the special appearance originally made ran along with, and inherited in, all the subsequent proceedings in the cause." See also in support of the text, *Conner v. Skagit Cumberland Coal Co.*, 45 Fed. Rep. 802; *Baumgardner v. Bono Fertilizer Co.*, 58 Fed. Rep. 1; *Chicago v. Hutchinson*, 15 Fed. Rep. 129; *Kansas City, etc., R. Co. v. Daughtry*, 138 U. S. 303, where under the circumstances it was held that the service upon a foreign corporation was sufficient by the laws of *Tennessee*, and the application was not made in due time. Compare *State v. Barnes*, 5 N. Dak. 350, holding that a service which is not void, but merely irregular, and which gives to the court jurisdiction over the defendant's person, is as binding and effectual as any other service, until attacked by motion or plea, and that in fixing the time for removal such service must be regarded as valid.

6. *Burck v. Taylor*, 39 Fed. Rep. 581. See also *Texas, etc., R. Co. v. Bloom*, 85 Tex. 283. Compare cases cited *infra*, I. 26. *Filing and Presentation to State Court.*

7. *Per* Justice Gray in *Powers v. Chesapeake, etc., R. Co.*, 169 U. S. 92, which is the first and only case in which that question was directly pre-

damnum, originally below the amount requisite to the jurisdiction of the federal court, is increased by amendment to the necessary amount,¹ or where the plaintiff discontinues his action as to those defendants whose presence prevents a removal,² or by amendment creates a separable controversy which did not previously exist,³ or by amendment presents for the first time

sent to the Supreme Court for adjudication. In that case the action was originally brought against three defendants, two of whom were citizens of the same state as the plaintiff, for which reason the third defendant, who was a citizen of another state, was unable effectually to remove the case. After the time for removal had expired, the plaintiff discontinued his action as to the first two defendants, and thereupon, the case having become removable on the ground of diverse citizenship, the remaining defendant filed his petition for removal. It was held that his petition was filed in time. After quoting the provision of the Act of 1887-1888, the court said: "To construe that provision as restricting to the time prescribed for answering the declaration the removal of a case which is not a removable one at that time, would not only be inconsistent with the words of the statute, but it would utterly defeat all right of removal in many cases; as, for instance, whenever citizens of the same state as the plaintiff were joined as defendants through an honest mistake, not discovered by the plaintiff until after the time prescribed for answering; or whenever a personal injury was supposed, at the time of bringing an action therefor, to be a comparatively trifling one, which might be fully compensated by a sum much less than two thousand dollars, and was afterwards discovered to be so much graver that there could be no doubt of the power and the duty of the court to allow an amendment increasing the *ad damnum*."

"If at any time during the progress of an action in a state court, by amendment or otherwise, a cause of action not before removable, is changed or converted into one which is properly removable, the defendant, whether an alien or a citizen of another state than that of which the plaintiff is a citizen, has a right to file his petition and bond and secure a removal of the cause into the proper federal court." *Yarde v. Baltimore, etc., R. Co., 57 Fed. Rep. 915.*

1. *Huskins v. Cincinnati, etc., R. Co., 37 Fed. Rep. 504; Evans v. Dillingham, 43 Fed. Rep. 180; Clarkson v. Manson, 4 Fed. Rep. 262.* See also *Powers v. Chesapeake, etc., R. Co., 169 U. S. 100; Northern Pac. R. Co. v. Austin, 135 U. S. 315.*

In *Mattoon v. Reynolds, 62 Fed. Rep. 417*, the original complaint alleged that certain notes were given without consideration, and asked for an injunction restraining the defendant from negotiating the notes. After the time expired within which the cause might originally have been removed the plaintiff filed a new count alleging fraud and asking for equitable relief or for a judgment for three thousand dollars damages. In due season thereafter the defendant filed a petition for removal, and it was held that by the filing of the substituted complaint the defendant acquired a right of removal.

2. *Powers v. Chesapeake, etc., R. Co., 169 U. S. 92, cited in the last note but one; Tremper v. Schwabacher, 84 Fed. Rep. 416.* See also *Yulee v. Vose, 99 U. S. 546; Cookerly v. Great Northern R. Co., 70 Fed. Rep. 277; Yarde v. Baltimore, etc., R. Co., 57 Fed. Rep. 915; Yawkey v. Richardson, 9 Mich. 529; Danvers Sav. Bank v. Thompson, 133 Mass. 182.*

A Mere Resignation of a Trustee who is joined as a defendant in his character of trustee does not put him out of the case, so as to enable his codefendants to remove the suit as if he had been dismissed. *Ruohs v. Jarvis-Conklin Mortg. Trust Co., 84 Fed. Rep. 513.*

Renewal of Application.—An application for removal denied on the ground that the presence of a codefendant of the same citizenship as the plaintiff prevented removal may be renewed after the dismissal of that defendant by the plaintiff, and should be granted if made without delay. *Cuyler v. Smith, 78 Ga. 662.* See also *Danvers Sav. Bank v. Thompson, 133 Mass. 182.*

3. *Mecke v. Valley Town Mineral Co., 89 Fed. Rep. 209.* See *Winchell v. Coney, 27 Fed. Rep. 484.*

in the cause a federal question.¹ And it has been broadly declared that when the plaintiff by an amended pleading makes a substantially new or different suit, the limitation as to time within which the petition for removal can be presented should relate to the amended pleading.²

Time for Removal.—Where the case is made removable by an amendment of the plaintiff's pleading, the petition for removal may be filed within the time required to answer or plead to the amendment.³ Where the time cannot be thus definitely fixed the petition should certainly be filed with promptness.⁴

1. See *Davies v. Marine Nat. Bank*, 24 Fed. Rep. 194. In *Houston, etc., R. Co. v. State*, (Tex. Civ. App. 1896) 39 S. W. Rep. 390, the defendant's petition for removal was filed after the time for answering the plaintiff's original petition had expired and the defendant had answered it, but it was contended that the petition was seasonable, inasmuch as it sought removal on the ground of a federal question disclosed in an amendment filed by the plaintiff. The contention was overruled for the reason that prior to the plaintiff's amendment the defendant had filed an amended answer setting up the precise federal question which he made a ground for removal and which he claimed was first presented by the plaintiff's amendment. The correctness of this decision is somewhat questionable, unless it can be put upon the ground of waiver of the right of removal, for it is clear that the case was not removable until the federal question distinctly appeared in the plaintiff's pleading, and could not have been removed upon any allegation by the defendant either in his amended answer or in his petition for removal, as to which point see *infra*, I. 21. *c. As to Federal Question.*

Intervention Raising Federal Question.—In *Speckart v. German Nat. Bank*, 85 Fed. Rep. 12, a national bank was a defendant, but had no right to remove the cause. After it had answered, a receiver of the bank, appointed during the pendency of the suit, was allowed to intervene, and thereupon filed his petition for removal on the ground that a federal question was involved. It was held that the petition was too late.

2. *Evans v. Dillingham*, 43 Fed. Rep. 180, where the plaintiff's pleading before amendment stated no cause of action. Compare *Phoenix L. Ins. Co. v. Walrath*, 117 U. S. 365.

In *Texas v. Day Land, etc., Co.*, 49 Fed. Rep. 596, the court, referring to *Evans v. Dillingham*, 43 Fed. Rep. 177, above cited, and *Huskins v. Cincinnati, etc., R. Co.*, 37 Fed. Rep. 504, said: "These two cases, it is thought, only go to the extent of holding that if the original petition fails to state a cause of action removable under the statute, and the plaintiff subsequently files an amendment embracing a cause of action properly removable, in which the original suit is merged and 'swallowed up,' the time for removal will be computed from the date of filing the new pleading."

3. "If he promptly files his petition and bond after such amendment has been made." *Yarde v. Baltimore, etc., R. Co.*, 57 Fed. Rep. 915.

Increasing Ad Damnum.—In *Huskins v. Cincinnati, etc., R. Co.*, 37 Fed. Rep. 504, the cause became removable by an amendment of the *ad damnum* on the last day of a term, and a petition for removal filed before the next term and presented to the court at its first session was held to be in time.

Separable Controversy.—Where 'by leave of court the plaintiff amends his complaint, and by the amended allegations the suit shows for the first time a separable controversy between the plaintiff and one of the defendants, the latter may file a petition for removal at any time before the expiration of the time for answering the amendment. *Mecke v. Valley Town Mineral Co.*, 89 Fed. Rep. 209.

4. In *Powers v. Chesapeake, etc., R. Co.*, 65 Fed. Rep. 130, it appears that when the cause became removable by discontinuance as to some of the defendants, the remaining defendant "at once filed a petition for removal," or, as was stated in the same case on error, "immediately" filed its petition. *Powers v. Chesapeake, etc., R. Co.*, 169 U. S. 101, where the court said

g. APPLICATION BEFORE ANSWER OR PLEA. — The right of removal may, of course, be exercised before the defendant has filed any pleading,¹ or before the time for pleading has arrived.²

h. APPLICATION WITH ANSWER OR PLEA. — It is no prejudice to an application made in due time that a plea, answer, or demurrer is filed concurrently with the petition for removal.³

i. APPLICATION AFTER ANSWER OR PLEA — **Before Ruling on Pleading.** — The mere filing of an answer or plea does not terminate the time for removal if the time "required" to answer or plead has not expired.⁴

After Ruling on Pleading. — The application comes too late after a ruling on a demurrer, plea, or other defense in the state court⁵ affecting the merits.⁶

j. SEVERAL DEFENDANTS HAVING DIFFERENT TIMES TO PLEAD. — If by expiration of time part of the defendants have lost their right of removal, other defendants compelled to join

that the statute was to be considered "as in intention and effect * * * requiring the defendant to file a petition for removal as soon as the action assumes the shape of a removable case in the court in which it was brought," and further that "the petition filed as soon as the case became a removable one, and before the railway company [defendant] took any new steps in defense of the action, was seasonably filed."

1. *Egan v. Chicago, etc., R. Co.*, 53 Fed. Rep. 676. See also *Brisenden v. Chamberlain*, 53 Fed. Rep. 307.

The Supreme Court of Iowa held that no removal could be had until a pleading making an issue had been duly filed, on the ground that until then it would not appear that there was any controversy to remove. *Bosler v. Booge*, 54 Iowa 251; *Stanbrough v. Griffin*, 52 Iowa 112. But those cases are not authority. *Egan v. Chicago, etc., R. Co.*, 53 Fed. Rep. 677, where the court said: "If Congress had intended not to authorize a removal except in cases wherein an actual controversy was shown to exist by the issues made in the pleadings filed by the adversary parties, apt language would have been used, fixing the time for applying for the removal after issue had been in fact joined."

2. *Egan v. Chicago, etc., R. Co.*, 53 Fed. Rep. 676.

3. *Duncan v. Associated Press*, 81 Fed. Rep. 417; *Texas, etc., R. Co. v. Bloom*, 85 Tex. 284.

4. *Whiteley Malleable Castings Co. v. Sterlingworth R. Supply Co.*, 83 Fed. Rep. 853; *Conner v. Skagit Cumberland Coal Co.*, 45 Fed. Rep. 802; *Duncan v. Associated Press*, 81 Fed. Rep. 417.

5. *Tennessee Coal, etc., Co. v. Waller*, 37 Fed. Rep. 545; *Delbanco v. Singletary*, 40 Fed. Rep. 177. See also *Whiteley Malleable Castings Co. v. Sterlingworth R. Supply Co.*, 83 Fed. Rep. 855; *Martin v. Carter*, 48 Fed. Rep. 598, all of which cases had reference to demurrers.

"We are inclined to think that the recent decisions of the Supreme Court indicate that the trial of a demurrer, a plea, or other defense in the state court precludes the removal of the case thereafter, though the trial may have been within the time required by the state statute or rules within which a defense might have been pleaded." *Fidelity Trust, etc., Co. v. Newport News, etc., Co.*, 70 Fed. Rep. 407.

The ruling on demurrer for want of facts sufficient to constitute a cause of action was a "trial" under the Act of 1875, and no removal could be had thereafter, but it was otherwise where the demurrer was special for some formal defect. See *supra*, p. 253.

6. **Denial of Motion to Strike.** — The right of removal is not lost merely because a motion to strike the plaintiff's pleading from the files on a ground not affecting the merits of the action has been denied. *Richards v. Rock Rapids*, 31 Fed. Rep. 505.

with them in the petition for removal are subject to the same disability.¹

k. SUCCESSIVE APPLICATIONS BY DIFFERENT DEFENDANTS.

— The application need not be made at the same time by all of the defendants, at least where the successive applications are all made in time.² But the federal court cannot acquire jurisdiction to proceed in the suit until all of the necessary defendants, either together or separately, have come into that court.³

l. APPLICATION BY INTERVENING OR SUBSTITUTED PARTIES.

— If a right of removal has once existed, but has been terminated by a failure to exercise the right within the time limited by statute, the suit cannot be removed by one who causes himself to be associated with or substituted for the defendant against whom the bar of time has taken effect.⁴

1. Thus, where some of the defendants were personally served and their time for answer had expired, the cause was not removable by other defendants served by publication whose time for answer had not expired. *Rogers v. Van Nortwick*, 45 Fed. Rep. 513.

Where an action is brought against partners, and process is so served that a judgment will bind all the property within the state belonging to the firm and to the individual partners, one of the partners who is subsequently brought in by personal service of process is debarred from removing the cause if the time for removal by the other partners who appeared and answered has expired. *Fletcher v. Hamlet*, 116 U. S. 408.

2. *Field v. Lowndsdaile*, Deady (U. S.) 289; *Ward v. Arredondo*, 1 Paine (U. S.) 415.

Illustrations.— In *Shelby v. Hoffman*, 7 Ohio St. 453, the court, speaking of removals under the Act of 1789, said: "When none of the defendants are citizens of the state where sued, and are served at different times, or at different times enter their appearance, they may each, at such different times of entering their appearance, respectively make application for removal. *Ward v. Arredondo*, 1 Paine (U. S.) 410. But if all the parties defendant in such case do not appear in the Circuit Court to which the suit is so removed, the case will be remanded by that court. If, however, all the parties defendant have been served, and appear in the state court, in order to give any the benefit of the law of Congress for having the case certified to the Circuit Court of the United States, they must all join in the petition."

In *Walker v. Richards*, 55 Fed. Rep. 129, it was held that where some of the defendants were named and others were described as unknown the former had a right to remove the suit without waiting until the latter were served. The court said: "Such delay would have proven fatal to the right given them by the statute. The right of removal is given to known defendants—such as are made defendants by name and served with process, or voluntarily appear."

Where an action was brought against the members of a partnership all of whom were nonresidents, but process was served upon one only, the statute authorizing judgment in such cases against all, which would bind the partnership property, it was held that "the only defendant who had been served with process, the only one whom it was necessary to serve, the only one, perhaps, whom the plaintiff may wish to serve," might remove the cause under the Act of 1789 on his own application alone. *Vandevoort v. Palmer*, 4 Duer (N. Y.) 679, where the court granted an order of removal and said: "It will be time enough under such circumstances to consider as to the wish or assent of the other defendants to such removal of the cause when they shall have been served with process and shall appear and make the objection."

3. *Pond v. Sibley*, 7 Fed. Rep. 129, 19 Blatchf. (U. S.) 189.

4. *Houston, etc., R. Co. v. Shirley*, 111 U. S. 358; *Burnham v. Leoti First Nat. Bank*, 53 Fed. Rep. 167; *Richmond, etc., R. Co. v. Findley*, 32 Fed. Rep. 641; *Shirley v. Waco Tap R. Co.*, 13 Fed. Rep. 705; *Goodnow v. Dolliwer*, 26 Fed. Rep. 470.

m. EXTENSION OF TIME — (1) *By Order of Court or Stipulation of Parties.* — Under the Act of 1875¹ an extension of time either by order of court or by consent of parties could not prolong the time for removal.² Under the Act of 1887-1888, some of the federal Circuit Courts declare that an extension of time to answer by special order of court cannot postpone the time for removal,³ at least where such order is merely discretionary,⁴ and that a standing rule of court limiting the time for pleading must be regarded as peremptory, though it expressly allows the court to enlarge the time for good cause shown.⁵ Others hold that where the statute allows the court to enlarge the time to answer upon affidavit showing grounds therefor, a petition for removal

Purchaser Pendente Lite. — One who purchases property *pendente lite* and is then made a party to the suit comes into it subject to the disabilities of the other parties in respect to a removal at the time when he came in. *Jefferson v. Driver*, 117 U. S. 272, holding that where the time for removal had expired when he became a party his right of removal was gone; *Cable v. Ellis*, 110 U. S. 389; *Jackson, etc., Co. v. Pearson*, 60 Fed. Rep. 122.

Original Party Without Any Standing. — But where a suit accompanied by trustee process was brought against a dissolved corporation of which a receiver had been appointed, and the receiver came into the case as defendant, it was held that the corporation was never a party to the suit, and its failure to apply for removal could not be imputed to him. Hence his application for removal within due time after appearance was not too late. *American Nat. Bank v. National Ben., etc., Co.*, 70 Fed. Rep. 422.

1. The Act of 1875 is quoted *supra*, p. 285.

2. *Pullman Palace Car Co. v. Speck*, 113 U. S. 86; *Gregory v. Hartley*, 113 U. S. 742; *Babbitt v. Clark*, 103 U. S. 612; *Slough v. Hatch*, 16 Blatchf. (U. S.) 233; *Larson v. Cox*, 39 Kan. 634; *Nichols v. Stevens*, 123 Mo. 120. See also *Bryan v. Ponder*, 23 Ga. 482.

"To prevent a confusion which would be distressing to courts and detrimental to parties, variable and contingent elements should have the least possible influence in prolonging the time within which the transfer of cases may be demanded." *Per* Bleckley, J., in *Carswell v. Schley*, 59 Ga. 24.

3. *Tracy v. Morel*, 88 Fed. Rep. 802; *Daugherty v. Western Union Tel. Co.*,

61 Fed. Rep. 139; *Velie v. Manufacturers' Acc. Indemnity Co.*, 40 Fed. Rep. 547; *Brigham v. C. C. Thompson Lumber Co.*, 55 Fed. Rep. 883; *Ruby Canyon Gold Min. Co. v. Hunter*, 60 Fed. Rep. 305; *Egan v. Chicago, etc., R. Co.*, 53 Fed. Rep. 675; *Spangler v. Atchison, etc., R. Co.*, 42 Fed. Rep. 305; *Austin v. Gagan*, 39 Fed. Rep. 626; *Delbanco v. Singletary*, 40 Fed. Rep. 178; *Williams v. Southern Bell Telephone, etc., Co.*, 116 N. Car. 558; *Northwestern, etc., Hypotheek Bank v. Suksdorf*, 15 Wash. 475. These cases proceed upon the ground that the words "rule of the state court" in the removal act refer to the practice in those states where no time is fixed by the statute for answering, but under the law the court, by rule, prescribes the time; that "a 'rule of court' means uniformity—a regulation in practice applying alike to all suitors, established and fixed, as much so as a statute itself, and known to all litigants and attorneys." *Spangler v. Atchison, etc., R. Co.*, 42 Fed. Rep. 306.

4. *Fox v. Southern R. Co.*, 80 Fed. Rep. 945.

5. *Frink v. Blackinton Co.*, 80 Fed. Rep. 306; *First Littleton Bridge Corp. v. Connecticut River Lumber Co.*, 71 Fed. Rep. 225.

"There has been some diversity of opinion as to whether a special order of extension of time for answer can be deemed 'the rule of the state court' within the meaning of the Act of Congress, but we think the better construction of the statute is that which makes it prescribe a general, invariable, and imperative standard of obligation with respect to the date for filing a petition to remove a cause." *Security Co. v. Pratt*, 65 Conn. 178.

may be filed within the time thus extended by an order of court.¹ All agree that a stipulation without an order of court is ineffectual to extend the time,² and that when the right of removal has once been lost by lapse of time, it cannot be restored by order of court or act of the parties.³

1. *Wilcox, etc., Guano Co. v. Phoenix Ins. Co.*, 60 Fed. Rep. 929 (Fourth Circuit; following *People's Bank v. Aetna Ins. Co.*, 53 Fed. Rep. 161, in the same circuit); *Rycroft v. Green*, 49 Fed. Rep. 177 (Second Circuit); *Simonson v. Jordon*, 30 Fed. Rep. 721 (Second Circuit); *Chiatovich v. Hanchett*, 78 Fed. Rep. 195; *Schipper v. Consumer Cordage Co.*, 72 Fed. Rep. 803. See also *Turner v. Illinois Cent. R. Co.*, 55 Fed. Rep. 689 (Sixth Circuit). Compare *Hurd v. Gere*, 38 Fed. Rep. 537.

"If a judge had made an order extending the period for pleadings, founded upon affidavit for cause shown, in accordance with state laws, such order would have extended the operation of the removal statute for the period which the judge could grant as matter of right and law; but a mere discretionary order, made with consent of parties, would have no such effect." *Fox v. Southern R. Co.*, 80 Fed. Rep. 948.

Expiration of Extended Time.—When the time to answer is extended, it expires with the filing of an answer, and therefore a petition for removal subsequently filed is too late even if the time for removal may be considered as extended by the order. *Howard v. Southern R. Co.*, 122 N. Car. 944.

2. *Wilcox, etc., Guano Co. v. Phoenix Ins. Co.*, 60 Fed. Rep. 931; *Velie v. Manufacturers' Acc. Indemnity Co.*, 40 Fed. Rep. 545; *Austin v. Gagan*, 39 Fed. Rep. 626; *Dixon v. Western Union Tel. Co.*, 38 Fed. Rep. 377; *Martin v. Carter*, 48 Fed. Rep. 596; *Beyer v. Soper Lumber Co.*, 76 Wis. 151; *Schipper v. Consumer Cordage Co.*, 72 Fed. Rep. 803.

In *Chiatovich v. Hanchett*, 78 Fed. Rep. 193, the petition for removal was filed within the time specified in a written stipulation of counsel filed in the court. On a motion to remand it was said: "This court must be governed in its decision upon this point by the laws and rules of the court of the state of Nevada. By the laws of this state the Supreme Court is authorized to 'make rules not inconsistent with the constitution and laws of the state for

its own government and the government of the District Courts.' Gen. Stat. Nev., § 3612. In pursuance of that authority the Supreme Court adopted certain rules for the government of the District Courts, among others that no agreement or stipulation of counsel should be regarded, 'unless the same shall be entered in the minutes in the form of an order by consent or unless the same shall be in writing subscribed by the party against whom the same shall be alleged or by his attorney or counsel.' Rule 27, 20 Nev. 28, and 24 Pac. Rep. xi. In *Haley v. Eureka County Bank*, 20 Nev. 410, the court held that such rules were intended to be supplemental to the provisions of the statute as rules for the government of all proceedings in the District Court, and that they should have the same force and effect as if they were incorporated in the statutory provisions of the state. No default could have been entered in the state court. The time for defendants to plead had not expired. The petition for removal was filed in time."

Oral Stipulation.—In *Dwyer v. Pe-shall*, 32 Fed. Rep. 497, it was held that an oral stipulation whereby the time to answer was indefinitely extended was not effectual to enlarge the time for removal. See also *Price v. Lehigh Valley R. Co.*, 65 Fed. Rep. 825.

Appearance Pursuant to Stipulation.—In *Tracy v. Morel*, 88 Fed. Rep. 801, it was held, and consistently with the rule stated in the text, that where a defendant voluntarily appeared without service of process, and pursuant to a stipulation that he should have a certain time to plead, he could file his petition for removal within that time, although the statutory time for answering had expired.

3. *Wilcox, etc., Guano Co. v. Phoenix Ins. Co.*, 60 Fed. Rep. 931; *Del-banco v. Singletary*, 40 Fed. Rep. 177; *Hurd v. Gere*, 38 Fed. Rep. 537; *Price v. Lehigh Valley R. Co.*, 65 Fed. Rep. 825; *Rock Island Nat. Bank v. Keator Lumber Co.*, 52 Fed. Rep. 897; *North-western, etc., Hypotheek Bank v. Suks-dorf*, 15 Wash. 475. See also *Frisbie*

(2) *By Implication* — (a) *By Filing Demurrer or Dilatory Plea.* — The filing of a demurrer¹ or plea in abatement² or motion to set aside the service of summons³ does not operate to extend the time to answer or plead.

(b) *By Amending Pleadings.* — An amendment of the plaintiff's pleadings⁴ not making a new ground of removal,⁵ or an amendment of the defendant's answer,⁶ does not extend the time within which the petition for removal must be filed.

(c) *By Act of God, or Illness or Ignorance of Counsel.* — The act of God,⁷ the illness of counsel,⁸ or the ignorance of counsel as to the existence of the statute,⁹ is no excuse for delay in filing the petition for removal.

(d) *By Failure of Plaintiff to Fix Default.* — The failure of the plaintiff to take judgment by default for want of a plea or answer does not extend the time for removal.¹⁰

21. Record on Application for Removal — *a. FEDERAL JURISDICTION MUST APPEAR AFFIRMATIVELY.* — In order to justify a removal of the cause from a state to a federal court, the necessary jurisdictional facts must appear affirmatively in the record of removal, and no presumptions can be indulged in favor of the jurisdiction of the federal court.¹¹ But where the jurisdictional

v. Chesapeake, etc., R. Co., 59 Fed. Rep. 369; Bryan v. Ponder, 23 Ga. 482; Gibson v. Johnson, Pet. (C. C.) 44.

1. *McDonald v. Hope Min. Co., 48 Fed. Rep. 593.*

2. See *Browning v. Reed, 39 Fed. Rep. 625; Kaitel v. Wylie, 38 Fed. Rep. 865.*

3. *Wedekind v. Southern Pac. Co., 36 Fed. Rep. 279. Compare Donahue v. Calumet Fire Clay Co., 94 Fed. Rep. 23, cited supra, p. 290, note 5.*

4. *Houston, etc., R. Co. v. State, (Tex. Civ. App. 1896) 39 S. W. Rep. 390; Edrington v. Jefferson, 111 U. S. 770. See also Beyer v. Soper Lumber Co., 76 Wis. 145; Phoenix L. Ins. Co. v. Walrath, 117 U. S. 365.*

Amendment of Course. — Where a complaint is amended as of course, in pursuance of a state statute which allows to the defendant a prescribed time to answer after service of the amended complaint upon him, and he waives service by demurring to the amended complaint, his petition for removal must be filed within the prescribed period after such waiver. *Martin v. Carter, 48 Fed. Rep. 596.*

5. See *supra*, p. 292.

6. *Cramer v. Mack, 20 Blatchf. (U. S.) 479.*

7. *Daugherty v. Western Union Tel. Co., 61 Fed. Rep. 138, where the de-*

fendant's counsel was unable to reach the court in season to file his petition, by reason of a snowstorm blockading his train for one day.

8. *Roberts v. Canington, 2 Hall (N. Y.) 649.*

9. *Barber v. St. Louis, etc., R. Co., 43 Iowa 223, where the statute had been enacted so recently that it had not yet been published, so as to be generally known to the profession.*

10. *Kansas City, etc., R. Co. v. Daughtry, 138 U. S. 303.*

A petition filed after the time prescribed is too late, though the case is one where no advantage could be taken of the defendant's default until service of process upon a codefendant. *Davis v. Tillotson, 48 Fed. Rep. 606.*

11. *Thayer v. Life Assoc. of America, 112 U. S. 719; Mansfield, etc., R. Co. v. Swan, 111 U. S. 379; Grace v. American Cent. Ins. Co., 109 U. S. 283; Bible Soc. v. Grove, 101 U. S. 610; Robertson v. Cease, 97 U. S. 646; Gold-Washing, etc., Co. v. Keyes, 96 U. S. 201; Phoenix Ins. Co. v. Pechner, 95 U. S. 183; Pittsburg, etc., R. Co. v. Ramsey 22 Wall. (U. S.) 326; Tracy v. Morel, 88 Fed. Rep. 801; Foster v. Paragould Southeastern R. Co., 74 Fed. Rep. 273; Olds Wagon Works v. Benedict, 67 Fed. Rep. 5; Craswell v. Belanger, 56 Fed. Rep. 530; Grand*

facts do not sufficiently appear in the petition for removal or elsewhere in the record, it does not follow that if the federal court proceeds to judgment such judgment will be void on collateral attack.¹

6. AS TO CITIZENSHIP OR ALIENAGE OF PARTIES. — The citizenship or alienage requisite to confer jurisdiction on the federal court by removal need not appear in the pleadings or elsewhere in the record prior to the filing of the petition for removal if it is sufficiently alleged in the petition.² On the other hand, the absence of proper averments as to citizenship or alienage in the petition for removal is immaterial if the jurisdictional facts affirmatively appear in any other part of the record.³ The rec-

Trunk R. Co. v. Twitchell, 59 Fed. Rep. 729; Southwestern Tel., etc., Co. v. Robinson, 48 Fed. Rep. 769; Kenyon v. Knipe, 46 Fed. Rep. 315; Dunton v. Muth, 45 Fed. Rep. 391; Strasburger v. Beecher, 44 Fed. Rep. 214; Mills v. Newell, 41 Fed. Rep. 529; Freeman v. Butler, 39 Fed. Rep. 2; Austin v. Gagan, 39 Fed. Rep. 627; Wedekind v. Southern Pac. Co., 36 Fed. Rep. 281; Adams v. May, 27 Fed. Rep. 907; Kaeiser v. Illinois Cent. R. Co., 6 Fed. Rep. 3; Field v. Lownsdale, Deady (U. S.) 291; Southern Pac. R. Co. v. Superior Ct., 63 Cal. 607; Franciscus v. Surget, 6 Rob. (La.) 34; Blair v. West Point Mfg. Co., 7 Neb. 147; New York, etc., Land Co. v. Martin, (Tex. Civ. App. 1894) 25 S. W. Rep. 475; Burnham v. Leoti First Nat. Bank, 53 Fed. Rep. 167, where the court said: "As it thus clearly appears on the face of this record that the Circuit Court did not have jurisdiction of this case, we are precluded from considering the questions discussed in the briefs of counsel, and must reverse the judgment of the Circuit Court for want of jurisdiction; thus holding for naught all that was done in that court — a result which should impress upon the trial courts, as well as upon counsel interested in cases sought to be brought therein, either originally or by removal, the need that exists for ascertaining in every case that jurisdiction in fact exists, and is made to appear affirmatively on the record, before the litigants are subjected to the delay and expense caused by a trial on the merits followed by a reversal of the judgment for want of jurisdiction."

In *Burke v. Flood*, 1 Fed. Rep. 551, referring to an attempted removal on the ground of diverse citizenship, the court said: "I suppose the right of

citizens of California to have their controversies among themselves adjudicated in the state courts is as absolute and indefeasible as that of a citizen of Nevada to have his controversy with a citizen of California adjudicated in the national courts. Indeed, in the state courts the jurisdiction is general and universal, while that of the national courts is limited to the cases expressly provided for and specially pointed out by the United States Constitution and the laws of Congress made in pursuance thereof; and the case must be clearly brought within the language of the national constitution and statutes, or the national courts cannot assume jurisdiction."

The Court Cannot Act upon Its Personal Knowledge of jurisdictional facts not appearing on the record. *Savings Bank v. Benton*, 2 Met. (Ky.) 242.

1. *Pullman's Palace Car Co. v. Washburn*, 66 Fed. Rep. 794; *Des Moines Nav., etc., Co. v. Iowa Homestead Co.*, 123 U. S. 552; *Kennedy v. Georgia Bank*, 8 How. (U. S.) 611; *Dowell v. Applegate*, 152 U. S. 337; *Evers v. Watson*, 156 U. S. 527.

2. *Ysleta v. Canda*, 67 Fed. Rep. 6; *Ladd v. Tudor*, 3 Woodb. & M. (U. S.) 325; *Pittsburg, etc., R. Co. v. Ramsey*, 22 Wall. (U. S.) 326.

"Under the removal acts it has always been held that when the jurisdictional facts necessary to a removal do not appear in the record they may be set up in the petition; and that the petition constitutes a part of the record to be consulted upon the raising of any jurisdictional question in the court to which the case is removed." *Burke v. Bunker Hill, etc., Co.*, 46 Fed. Rep. 648.

3. *Gold-Washing, etc., Co. v. Keyes*, 96 U. S. 199; *Bondurant v. Watson*,

ord, in the sense in which the term is thus used, includes principally the pleadings and process.¹ The petition for removal cannot be aided by reference to the pleadings unless the latter are produced on the hearing of the application.²

c. AS TO FEDERAL QUESTION. — Under the Act of Congress of March 3, 1875, which was the earliest act conferring on the United States Circuit Courts general jurisdiction, either original or by removal, of suits involving federal questions, so called,³ it was held sufficient to justify a removal by the defendant that the record at the time of the removal, including the petition for removal, showed that either party claimed a right under the Constitution or laws of the United States.⁴ Under the Act of 1887-1888, however, a removal cannot be had unless the federal question appears from the plaintiff's own statement of his case.⁵

103 U. S. 285; *Chambers v. McDougal*, 42 Fed. Rep. 694; *Freeman v. Butler*, 39 Fed. Rep. 2; *Brown v. Murray*, 43 Fed. Rep. 617; *McLane v. Leicht*, 27 Fed. Rep. 888; *Shattuck v. North British, etc., Ins. Co.*, 58 Fed. Rep. 609. See also *Pullman's Palace Car Co. v. Washburn*, 66 Fed. Rep. 795; *Gregory v. Hartley*, 113 U. S. 745; *Hayes v. Todd*, 34 Fla. 233; *Seddon v. Virginia, etc., Steel, etc., Co.*, 36 Fed. Rep. 8; *Baltimore, etc., R. Co. v. Pittsburg, etc., R. Co.*, 17 W. Va. 860; *Lake Erie, etc., R. Co. v. Juday*, 19 Ind. App. 436.

"It is not always necessary that the citizenship of the parties be set out in the petition for removal. The requirements of the law are met if the citizenship of the parties to the controversy sought to be removed is shown affirmatively by the record of the case." *National Steamship Co. v. Tugman*, 106 U. S. 122.

Alienage at Commencement of Suit. — Where the plaintiff's pleading contains a sufficient averment of the alienage of a party, and the petition for removal avers his alienage in the present tense, the record affirmatively shows his alienage during the whole period from the commencement of the action to the application for removal. *National Steamship Co. v. Tugman*, 106 U. S. 121.

1. See *Phoenix Ins. Co. v. Pechner*, 95 U. S. 186.

Affidavit for Publication. — Where the plaintiff's complaint and his affidavit for publication show that the defendants are nonresident foreign corporations, the petition for removal may refer to the complaint and affidavit to substantiate its general averment of

the defendant's nonresidence and citizenship in another state. *Chambers v. McDougal*, 42 Fed. Rep. 694.

Statements in Written Instrument. — Statements of the citizenship of the parties in an insurance policy on which the action is founded and which constitutes a part of the record may be resorted to for the purpose of supplementing averments in the petition for removal. *Robertson v. Scottish Union, etc., Ins. Co.*, 68 Fed. Rep. 177.

2. *Lalor v. Dunning*, (C. Pl. Spec. T.) 56 How. Pr. (N. Y.) 210.

3. See *supra*, p. 234.

4. *Tennessee v. Union, etc., Bank*, 152 U. S. 460, citing *New Orleans, etc., R. Co. v. Mississippi*, 102 U. S. 135; *Ames v. Kansas*, 111 U. S. 462; *Brown v. Houston*, 114 U. S. 623; *Provident Sav. L. Assur. Soc. v. Ford*, 114 U. S. 642; *Pacific R. Removal Cases*, 115 U. S. 1; *Tennessee v. Whitworth*, 117 U. S. 139; *Southern Pac. R. Co. v. California*, 118 U. S. 109; *Bock v. Perkins*, 139 U. S. 628.

5. *Tennessee v. Union, etc., Bank*, 152 U. S. 454 (Justices Harlan and Field dissenting), which is now the leading case and explains the departure from the doctrine under the Act of 1875; *Galveston, etc., R. Co. v. Texas*, 170 U. S. 226; *Walker v. Collins*, 167 U. S. 57; *Chappell v. Waterworth*, 155 U. S. 102; *Texas, etc., R. Co. v. Cody*, 166 U. S. 606; *Speckart v. German Nat. Bank*, 85 Fed. Rep. 12; *Hanford v. Davies*, 163 U. S. 273; *Postal Tel. Cable Co. v. Alabama*, 155 U. S. 487; *East Lake Land Co. v. Brown*, 155 U. S. 488; *U. S. v. American Bell Telephone Co.*, 159 U. S. 553; *Oregon Short Line, etc., R. Co. v. Skottowe*, 162 U.

If it does not so appear the want cannot be supplied by any statement in the subsequent pleadings or in the petition for removal.¹ But it has been held that, consistently with the fore-

S. 490; *Florida v. Charlotte Harbor Phosphate Co.*, 74 Fed. Rep. 578; *Wichita Nat. Bank v. Smith*, 72 Fed. Rep. 568; *Bailey v. Mosher*, 63 Fed. Rep. 488; *Sturgeon River Boom Co. v. Sawyer Lumber Co.*, 89 Fed. Rep. 113; *Johnson v. Wells*, 91 Fed. Rep. 3; *La Page v. Day*, 74 Fed. Rep. 978; *Pitkin v. Cowen*, 91 Fed. Rep. 600; *In re Stutsman County*, 88 Fed. Rep. 337; *Darton v. Sperry*, (Conn. 1899) 41 Atl. Rep. 1052; *Echols v. Smith*, (Ky. 1897) 42 S. W. Rep. 538. See also the cases cited in the next note.

If the plaintiff's pleading does not set forth facts raising a federal question, it is not sufficient for the purpose of removal that it foreshadows or anticipates a possible defense by referring to Acts of Congress and alleging certain proceedings under them. *Kansas v. Atchison*, etc., R. Co., 77 Fed. Rep. 339.

In *Tennessee v. Union*, etc., Bank, 152 U. S. 460, it was held that to authorize a removal it must appear from the plaintiff's complaint that his claim is so far predicated upon some provision of the Constitution, laws, or treaties of the United States that he would be entitled to bring an original action in the federal court. As to the sufficiency of the plaintiff's pleading in this behalf when he invokes the original jurisdiction of the Circuit Court, see article UNITED STATES COURTS.

Effect of Rule on Cases Against Indians.—“Prior to the decision in the case of *Tennessee v. Union*, etc., Bank, 152 U. S. 454, the petitioner for removal might show that the controversy or suit necessarily involved a federal question, and thus procure a removal, although the existence of such federal question did not appear on the face of the complaint or declaration, but was disclosed by the answer or petition for removal. While such a practice existed, Indians could generally procure a removal of suits against them from the state into the federal courts, because rights of action in civil causes by or against them usually arose under the laws of the United States or under treaties made with the Indian tribes. As the law is now settled, an unnaturalized Indian cannot remove a civil suit brought against him in a court of the

state into the courts of the United States, unless it affirmatively appears on the face of the complaint or declaration that a federal question is necessarily involved.” *Paul v. Chilsoquie*, 70 Fed. Rep. 403.

Amendment in State Court After Removal.—If the plaintiff's complaint does not disclose a federal question, but the cause is removed, it will be remanded despite an amendment to the original petition in the state court subsequent to the removal, such amendment showing a federal question. *Caples v. Texas*, etc., R. Co., 67 Fed. Rep. 9.

1. *Walker v. Collins*, 167 U. S. 57, where the federal question was set up in the answer and petition for removal [overruling in effect *Wood v. Drake*, 70 Fed. Rep. 881]; *Chappell v. Waterworth*, 155 U. S. 102, an action of ejectment, wherein the declaration merely described the land and alleged an ouster of the plaintiff by the defendant, and the case was held to have been improperly removed though the petition for removal set forth that the United States owned and held the land for a lighthouse, and that the defendant was holding possession as the keeper thereof under the authority of the United States; *Oregon Short Line*, etc., R. Co. v. Skottowe, 162 U. S. 490; *Tennessee v. Union*, etc., Bank, 152 U. S. 454; *East Lake Land Co. v. Brown*, 155 U. S. 488; *Postal Tel. Cable Co. v. Alabama*, 155 U. S. 482; *Indiana v. Alleghany Oil Co.*, 85 Fed. Rep. 870; *Argonaut Min. Co. v. Kennedy Min.*, etc., Co., 84 Fed. Rep. 2 [*distinguishing* *Consolidated Wyoming Gold Min. Co. v. Champion Min. Co.*, 62 Fed. Rep. 945, on the ground that the latter was decided before the doctrine was settled by the Supreme Court]; *Lincoln v. Lincoln St. R. Co.*, 77 Fed. Rep. 658; *Wabash R. Co. v. Barbour*, 73 Fed. Rep. 513; *Wichita Nat. Bank v. Smith*, 72 Fed. Rep. 568; *Caples v. Texas*, etc., R. Co., 67 Fed. Rep. 9; *Haggin v. Lewis*, 66 Fed. Rep. 199.

The Defect Is Not “Modal,” but Is Absolutely Fatal, and in *Wabash R. Co. v. Barbour*, 73 Fed. Rep. 513, a judgment of the Circuit Court against the defendant who procured the removal was reversed by the Circuit Court of Ap-

going rule, if a federal corporation is a defendant, and by mistake or otherwise is erroneously stated in the plaintiff's pleading to have been created under the state laws, it is entitled to remove the case upon proper allegations in its petition for removal;¹ and the same principle has been applied in other cases.²

d. PETITION FOR REMOVAL PARAMOUNT TO PLEADINGS.—The petition for removal is primarily the basis of federal jurisdiction.³ It may aver the jurisdictional facts to be contrary to the allegations thereof in the pleadings in the state court,⁴ and the

peals upon the defendant's writ of error, and the cause was remanded to the state court, because a federal question was shown only in the petition for removal.

Title to Public Land.—In *Spokane Falls, etc., R. Co. v. Ziegler*, 167 U. S. 65, it was held that the plaintiff's complaint sufficiently disclosed a case of contest between a settler claiming title under the laws of the United States and a railroad company under an Act of Congress.

1. *Texas, etc., R. Co. v. Cody*, 166 U. S. 606 [followed in *Texas, etc., R. Co. v. Barrett*, 166 U. S. 617], where the defendant, in fact a federal corporation, was described as "a private corporation created and existing under the laws of the state of Texas." The petition for removal averred in due form that the defendant was created by Act of Congress, and it was held that the case was properly removed; *distinguishing* *Oregon Short Line, etc., R. Co. v. Skottowe*, 162 U. S. 490, and declaring that if the plaintiff had simply described the defendant by its name, without more, the court would take judicial notice that it was a federal corporation. See also *Supreme Lodge, etc., v. Wilson*, 66 Fed. Rep. 785; *Texas, etc., R. Co. v. Watson*, (Tex. Civ. App. 1898) 43 S. W. Rep. 1060. The reader will recall that a suit by or against a federal corporation raises *ipso facto* a federal question. See *supra*, p. 236.

2. **Removal by Federal Receiver.**—Thus, in *Speckart v. German Nat. Bank*, 85 Fed. Rep. 12, the plaintiff alleged that the defendant was a national bank, and it was held that when a receiver of the bank intervened as a defendant, and petitioned for a removal in his official capacity, it sufficiently appeared by the plaintiff's pleading that a federal question was raised. In like manner the federal

court will take judicial notice of the fact shown by its own records that a defendant sued as receiver was appointed by it, and that a federal question is thus presented. *Pitkin v. Cowen*, 91 Fed. Rep. 599, where the plaintiff's pleading failed to disclose by what court the defendant was appointed a receiver, but it was held that the case was properly removed so far as that point was concerned. See also *In re Stutsman County*, 88 Fed. Rep. 342. Compare *Echols v. Smith*, (Ky. 1897) 42 S. W. Rep. 538, where the defendants were sued as receivers of a railroad company to recover for personal injuries. They petitioned for removal, alleging their appointment as receivers by a federal court, etc., and it was held, *following* *Walker v. Collins*, 167 U. S. 57, that the suit was not removable; *distinguishing* *Hardwick v. Kean*, 95 Ky. 563.

3. *McLane v. Leicht*, 27 Fed. Rep. 887; *Adams v. May*, 27 Fed. Rep. 908.

4. *McLane v. Leicht*, 27 Fed. Rep. 888; *Clarkhuff v. Wisconsin, etc., R. Co.*, 26 Fed. Rep. 466, where Love, J., said: "It would be most extraordinary if one party or the other could, by mere allegations in pleading or otherwise, conclusively establish or repel the jurisdiction of the [federal] court. If the plaintiff in the state court desired to exclude the jurisdiction of the federal court, and if he could accomplish his purpose by mere pleading, he might in any imaginable case deprive his adversary of his constitutional and legal right of removal by alleging a fact to be true having no foundation in truth. He might state the value of the property involved to be less than five hundred dollars [now two thousand dollars], the contrary being the fact. He might allege untruly that his adversary is a citizen of the same state with himself. He might unite some mere nominal party

state court must receive such statements made in the petition for removal as true so far as they consist of facts not legally repugnant to the plaintiff's pleadings.¹

22. Removal by Stipulation of Parties. — It is a well-settled principle in the jurisprudence of the federal courts that the judicial power of the United States must not be exerted in a case to which it does not extend, even if both parties desire to have it exerted,² and an action pending in a state court cannot be removed by a written stipulation where there is nothing in the latter or in the record to show that by reason of the subject-matter or the character of the parties the federal court can take cognizance of it.³ But the federal court might perhaps acquire jurisdiction by an order of removal upon a stipulation admitting the existence of all the facts essential to its jurisdiction.⁴

23. Petition for Removal — *a.* **NECESSITY OF APPLICATION BY PETITION.** — A petition for removal is required by the express terms of the removal act.⁵ The term "petition," in legal language, describes an application to a court in writing, in contradistinction to a motion, which may be made *viva voce*.⁶ If no application for removal is made, error cannot be predicated of the judgment in the state court, on the ground that the cause was in fact removable to the federal court.⁷

as defendant with the real party in interest, falsely averring such nominal party to be a citizen of the same state with himself, and jointly concerned with the real party in the controversy. Thus might the plaintiff in the state court, by the simple process of pleading, without even the verification of his own affidavit, defeat the whole purpose of the removal act. It is manifest, therefore, that the party seeking the removal is at liberty to make averment against the facts as stated in the pleadings." See also *Guinault v. Louisville, etc., R. Co.*, 42 La. Ann. 52; *Mackaye v. Mallory*, 6 Fed. Rep. 743, 19 Blatchf. (U. S.) 165, 61 How. Pr. (N. Y.) 24; *Texas, etc., R. Co. v. Cody*, 166 U. S. 606.

1. *Clarkhuff v. Wisconsin, etc., R. Co.*, 26 Fed. Rep. 466.

No issues of fact arising on a petition for removal can be tried in the state court. See *infra*, I. 31. *d. Determination of Questions of Fact.*

2. *Mansfield, etc., R. Co. v. Swan*, 111 U. S. 384. See also *Connell v. Smiley*, 156 U. S. 335.

3. *People's Bank v. Calhoun*, 102 U. S. 256; *Olds Wagon Works v. Benedict*, 67 Fed. Rep. 5; *Kingsbury v. Kingsbury*, 3 Biss. (U. S.) 60; *Parkersburg First Nat. Bank v. Prager*, 91 Fed.

Rep. 689, where the decree of the Circuit Court on the merits was reversed by the Circuit Court of Appeals as an absolute nullity and the cause was remanded to the state court. See also *Indiana v. Tolleston Club*, 53 Fed. Rep. 19; *In re Foley*, 76 Fed. Rep. 390; *Walker v. Collins*, 167 U. S. 57.

4. See *Pittsburg, etc., R. Co. v. Ramsey*, 22 Wall. (U. S.) 322; *People's Bank v. Calhoun*, 102 U. S. 261. For a case where an order of removal was entered by consent of all parties, and jurisdiction exercised by the federal court, see *Hervey v. Illinois Midland R. Co.*, 3 Fed. Rep. 709.

5. Act of 1887-1888, 24 U. S. Stat. at L. 552, c. 373; 25 U. S. Stat. at L. 433, c. 866, providing that the defendant "may make and file a petition," etc.

Under the Judiciary Act of 1789, which did not specifically require a petition, it was said that "the necessary facts may be satisfactorily made to appear by admissions of the parties, by an affidavit, or by the testimony of witnesses." *People v. Superior Ct.*, 34 Ill. 357.

6. *Shaft v. Phoenix Mut. L. Ins. Co.*, 67 N. Y. 547. See generally article PETITIONS, vol. 16, p. 503.

7. *Northern Pac. R. Co. v. Austin*, 135 U. S. 315.

b. TITLE, VENUE, AND ADDRESS — **Title.** — The petition should be entitled in the cause.¹

The Venue should be laid in the state court in which the cause is pending.²

Address. — The petition should be addressed to the court.³

c. ALLEGATIONS OF PETITION — (1) *General Requisites as a Pleading.* — The petition for removal, when filed, becomes a part of the record,⁴ and performs the office of pleading.⁵ It should state facts which, taken in connection with such as already affirmatively appear in other parts of the record, entitle the petitioner to a removal of the cause.⁶ It must state facts, not mere conclusions of law,⁷ and its essential allegations must be

1. See precedents cited *infra*, note 6 on this page, and generally article PETITIONS, vol. 16, p. 515.

2. See *Northern Pac. R. Co. v. McMullen*, 86 Wis. 503, where by clerical mistake the venue of a petition filed in a case pending in the District Court was laid in the Circuit Court, but the court allowed an amendment.

3. See precedents cited *infra*, note 6 on this page, and generally article PETITIONS, vol. 16, p. 515.

4. *Phoenix Ins. Co. v. Pechner*, 95 U. S. 185; *Gold-Washing, etc., Co. v. Keyes*, 96 U. S. 201; *Burke v. Bunker Hill, etc., Co.*, 46 Fed. Rep. 648.

5. *Gold-Washing, etc., Co. v. Keyes*, 96 U. S. 202.

6. *Phoenix Ins. Co. v. Pechner*, 95 U. S. 186; *Gold-Washing, etc., Co. v. Keyes*, 96 U. S. 202; *Pittsburg, etc., R. Co. v. Ramsey*, 22 Wall. (U. S.) 328; *Crehore v. Ohio, etc., R. Co.*, 131 U. S. 244; *Stone v. South Carolina*, 117 U. S. 432; *Powers v. Chesapeake, etc., R. Co.*, 169 U. S. 101; *Illinois Cent. R. Co. v. Le Blanc*, 74 Miss. 642; *Field v. Blair*, (Supm. Ct. Gen. T.) 1 Code Rep. N. S. (N. Y.) 361; *Lalor v. Dunning*, (C. Pl. Spec. T.) 56 How. Pr. (N. Y.) 210; *Texas, etc., R. Co. v. McAllister*, 59 Tex. 359; *Southern Pac. R. Co. v. Harrison*, 73 Tex. 106; *Baltimore, etc., R. Co. v. Pittsburg, etc., R. Co.*, 17 W. Va. 860.

"It should therefore set forth the essential facts, not otherwise appearing in the case, which the law has made conditions precedent to the change of jurisdiction." *Gold-Washing, etc., Co. v. Keyes*, 96 U. S. 202.

"Its office is like that of filing a declaration at law, or a bill in equity, and like them [it] must contain such averments as will, on being either conceded or established, entitle the petitioners

to the relief asked for." *Per Jones, J.*, in *De Camp v. New Jersey Mut. L. Ins. Co.*, 2 Sweeny (N. Y.) 488.

Reference to Other Parts of Record. — "A removing defendant may supplement the case made by his petition by a reference to the facts which appear elsewhere in the record." *Mayer v. Denver, etc., R. Co.*, 41 Fed. Rep. 724.

Precedents of Petitions for Removal, most of them including the caption, address, and signature, will be found in *Mathis v. Southern R. Co.*, 53 S. Car. 246; *Jackson v. Allen*, 132 U. S. 30; *Removal Cases*, 100 U. S. 463; *Bertha Zinc, etc., Co. v. Carico*, 61 Fed. Rep. 133; *Treadway v. Chicago, etc., R. Co.*, 21 Iowa 353; *Crane v. Reeder*, 28 Mich. 528; *Hill v. Henderson*, 6 Smed. & M. (Miss.) 351; *De Camp v. New Jersey Mut. L. Ins. Co.*, 2 Sweeny (N. Y.) 482; *Tate v. Douglas*, 113 N. Car. 191; *Faison v. Hardy*, 114 N. Car. 430; *Springer v. Sheets*, 115 N. Car. 375; *Herndon v. Lancashire Ins. Co.*, 107 N. Car. 191; *Robb v. Parker*, 3 S. Car. 61, where the several averments are paraphrased and numbered according to the practice in code pleading; *Continental Ins. Co. v. Kasey*, 27 Gratt. (Va.) 218; *Henen v. Baltimore, etc., R. Co.*, 17 W. Va. 882. See also *Graves v. Corbin*, 132 U. S. 579; *Marsh v. Atlanta, etc., R. Co.*, 53 Fed. Rep. 168; *Warax v. Cincinnati, etc., R. Co.*, 72 Fed. Rep. 639; *Hukill v. Maysville, etc., R. Co.*, 72 Fed. Rep. 748.

It should be observed that not all of the petitions in the foregoing cases were drawn under the removal act now in force.

7. *Gold-Washing, etc., Co. v. Keyes*, 96 U. S. 202; *Tremper v. Schwabacher*, 84 Fed. Rep. 415; *Anderson v. Appleton*, 32 Fed. Rep. 857; *Texas, etc., R. Co. v. McAllister*, 59 Tex. 359.

positive,¹ not argumentative² or in the alternative.³

(2) *As to Nature of Suit.*—The petition usually contains a formal statement of the nature of the suit,⁴ and it is the better practice also to make a direct averment in the petition that there is a controversy between the parties.⁵

(3) *As to Citizenship of Parties*—*a.* NECESSITY OF AVERMENT—*aa.* IN GENERAL.—Where removal is sought on the ground of diverse citizenship alone the petition should allege the citizenship of each of the necessary parties on both sides of the suit,⁶ if it does not affirmatively appear elsewhere in the record.⁷

Removal for Separable Controversy.—In a petition for removal on the ground of a separable controversy it may not be absolutely necessary to allege the citizenship of those parties to the suit who are not parties to the alleged separable controversy.⁸

Removal for Federal Question.—If it appears in the plaintiff's pleading that the cause is removable on the ground of a federal question the allegations of citizenship of the parties may be omitted.⁹

bb. PERSONAL, NOT OFFICIAL, CITIZENSHIP.—Where the jurisdiction of the federal courts depends upon the citizenship of the parties, it has reference to the parties as persons.¹⁰ A petition for removal must therefore state the personal citizenship of the parties, and not their official citizenship.¹¹

1. Wolff v. Archibald, 14 Fed. Rep. 369.

Allegations on Information and Belief are insufficient. Hambleton v. Durham, 22 Fed. Rep. 465.

2. Tremper v. Schwabacher, 84 Fed. Rep. 415; Grace v. American Cent. Ins. Co., 109 U. S. 284.

3. Glover v. Shepperd, 15 Fed. Rep. 836.

4. For instance, that it is a suit of a civil nature at law or in equity, as the case may be. See precedents cited *supra*, p. 303, note 6.

5. Egan v. Chicago, etc., R. Co., 53 Fed. Rep. 677.

6. Mitchell v. Smale, 140 U. S. 406; Mansfield, etc., R. Co. v. Swan, 111 U. S. 381; Cameron v. Hodges, 127 U. S. 322; Levy v. Laclede Bank, 18 Fed. Rep. 193; *Ex p.* Grimbail, 61 Ala. 606; Beebe v. Armstrong, 11 Mart. (La.) 440; Adams Express Co. v. Trego, 35 Md. 62; Guarantee Co. of North America v. Lynchburg First Nat. Bank, 95 Va. 480.

"In cases where jurisdiction depends upon the citizenship of the parties, such citizenship, or the facts which in legal intentment constitute it, should be distinctly and positively averred in the pleadings, or they should appear affirmatively and with

equal distinctness in other parts of the record." Robertson v. Cease, 97 U. S. 649; Stevens v. Nichols, 130 U. S. 231.

The Court Cannot Act upon Its Personal Knowledge of the citizenship of a party. Savings Bank v. Benton, 2 Met. (Ky.) 242.

Petition by Alien.—In a petition for removal by an alien defendant the citizenship of the plaintiff must be alleged. Herndon v. Aetna Ins. Co., 107 N. Car. 194.

7. See *supra*, p. 298.

8. See Mitchell v. Smale, 140 U. S. 406.

9. Lacroix v. Lyons, 27 Fed. Rep. 404.

10. See *supra*, p. 189.

Where an executor or administrator is a party in his representative capacity his personal citizenship must be alleged. Continental Ins. Co. v. Rhoads, 119 U. S. 237.

11. Wilson v. Smith, 66 Fed. Rep. 82. In Amory v. Amory, 95 U. S. 186 [*affirming* 58 N. Y. 684, which *affirmed* 36 N. Y. Super. Ct. 525], the defendant's petition for removal alleged that the suit was instituted by the plaintiffs as executors and under letters testamentary issued to them in New York, and further averred "that said plaintiffs, as such executors, are citizens of

cc. CITIZENSHIP OF PLAINTIFF'S ASSIGNOR. — Where the suit is brought by an assignee and the federal jurisdiction depends upon the citizenship of the assignor,¹ the citizenship of the latter must be alleged in the petition for removal² unless it affirmatively appears elsewhere in the record.³

dd. PARTNERSHIP OR JOINT-STOCK COMPANY — Partnership. — In a petition for removal of a suit by or against a partnership on the ground of diverse citizenship the individual names of the partners must be set out and the citizenship of each of them duly alleged.⁴

Joint-stock Company. — An allegation that a party is a joint-stock company organized under the laws of a certain state and is a citizen of that state is not a sufficient averment for the purpose of federal jurisdiction; the jurisdiction depends upon the citizenship of each member, which must be stated.⁵

(b) Time of Alleged Citizenship. — The diverse citizenship of the parties must be alleged as existing at the commencement of the action,⁶ unless that fact affirmatively appears elsewhere in

the state of New York.' The averment was held insufficient, the court saying: "From the language here employed the court may properly infer that as persons the plaintiffs in error were not citizens of New York. For all that appears, they may have been citizens of New Jersey, as was the defendant." The case was *distinguished* in *Cooke v. Seligman*, 7 Fed. Rep. 263, 17 Blatchf. (U. S.) 452, where an averment in the petition for removal by defendants sued as executors that they, "as they are the qualified executors of the last will and testament," etc., were and are citizens of the state of New York, was held a sufficient averment of personal citizenship. The case was also *distinguished* in *Wehl v. Wald*, 17 Blatchf. (U. S.) 342, where the petition for removal alleged a controversy "between citizens of different states, that is to say, between the * * * plaintiff * * * as assignee, * * * who was * * * and now is a citizen," etc., "and the * * * defendant," an assignee in bankruptcy, describing him in the same manner, and it was held that the petition sufficiently alleged the personal citizenship of the parties.

Citizenship of Administrator. — "That the plaintiff, R. S. Daughtry, administrator, was at the beginning of this suit and still is a citizen and resident of the state of Tennessee," was passed as sufficient in *Kansas City, etc., R. Co. v. Daughtry*, 138 U. S. 301.

1. See *supra*, pp. 206, 207.

2. *Sharkey v. Port Blakely Mill Co.*, 92 Fed. Rep. 425; *Levy v. Laclede Bank*, 18 Fed. Rep. 193; *McNulty v. Connecticut Mut. L. Ins. Co.*, 46 Fed. Rep. 305.

3. *Shattuck v. North British, etc., Ins. Co.*, 58 Fed. Rep. 609, where the requisite citizenship of the assignor did not appear in the petition for removal, but the jurisdiction was sustained by reason of its appearance in other parts of the record.

4. *Adams v. May*, 27 Fed. Rep. 908, holding that a petition for removal stating that the partnership plaintiffs, naming the firm, were citizens of a certain state, was not sufficient where the individual citizenship of all its members did not appear in other parts of the record.

5. *Chapman v. Barney*, 129 U. S. 677, *overruling* in effect such cases as *Bushnell v. Park*, 46 Fed. Rep. 209.

6. *An Averment of Citizenship in the Present Tense* is insufficient. *Jackson v. Allen*, 132 U. S. 27; *Mattingly v. Northwestern Virginia R. Co.*, 158 U. S. 53; *Kellam v. Keith*, 144 U. S. 568; *Stevens v. Nichols*, 130 U. S. 232; *Akers v. Akers*, 117 U. S. 197; *Phoenix Ins. Co. v. Pechner*, 95 U. S. 185 (*affirming* 65 N. Y. 195); *La Confiance Compagnie, etc. v. Hall*, 137 U. S. 61; *Gibson v. Bruce*, 108 U. S. 561; *Mansfield, etc., R. Co. v. Swan*, 111 U. S. 379; *Bradley v. Ohio River, etc., R. Co.*, 78 Fed. Rep. 388; *Foster v. Paragould Southeastern R. Co.*, 74 Fed. Rep. 273; *Grand Trunk R. Co. v.*

the record,¹ and it must also be alleged as existing at the time when the removal is sought.² A petition for removal by an intervener must state his citizenship at the time of the intervention as well as at the time of removal,³ unless the petition to intervene and the petition for removal are filed simultaneously, in which case it is sufficient to allege his citizenship in the present tense.⁴

(e) **Sufficiency of 'Averment** — *aa.* IN GENERAL. — Citizenship should be stated positively and directly,⁵ and not in the alterna-

Twitchell, 59 Fed. Rep. 729; Seddon v. Virginia, etc., Steel, etc., Co., 36 Fed. Rep. 7; Johnston v. Donovan, 30 Fed. Rep. 395; Endy v. Commercial F. Ins. Co., 24 Fed. Rep. 657; McNaughton v. South Pac. Coast R. Co., 19 Fed. Rep. 881; Brinkerhoff v. Morris Canal, etc., Co., 18 Fed. Rep. 97; Ferry v. Merrimack, 18 Fed. Rep. 657; Beede v. Cheeney, 5 Fed. Rep. 388; People v. Superior Ct., 34 Ill. 356; U. S. Savings Inst. v. Brockschmidt, 72 Ill. 371; Weed Sewing Mach. Co. v. Smith, 71 Ill. 205; Indianapolis, etc., R. Co. v. Risley, 50 Ind. 60; Savings Bank v. Benton, 2 Met. (Ky.) 240; Merwin v. Wexel, (C. Pl. Spec. T.) 49 How. Pr. (N. Y.) 115; Risley v. Indianapolis, etc. R. Co., 1 Hun (N. Y.) 203; Nye v. Northern Cent. R. Co., 24 Hun (N. Y.) 557; Holden v. Putnam F. Ins. Co., 46 N. Y. 1; Bradley v. Ohio River, etc., R. Co., 119 N. Car. 744; Herndon v. Lancashire Ins. Co., 107 N. Car. 193; Blackwell v. Lynchburg, etc., R. Co., 107 N. Car. 217; Baltimore, etc., R. Co. v. Pittsburg, etc., R. Co. 17 W. Va. 860.

Contra in a few cases decided under the Act of 1875 before the doctrine had been otherwise settled by the Supreme Court. Wehl v. Wald, 17 Blatchf. (U. S.) 342; McLean v. St. Paul, etc., R. Co., 16 Blatchf. (U. S.) 309; Chicago, etc., R. Co. v. McComb, 17 Blatchf. (U. S.) 371; Jackson v. Mutual L. Ins. Co., 3 Woods (U. S.) 413; Phoenix L. Ins. Co. v. Saettel, 33 Ohio St. 278.

1. See *supra*, p. 298.

2. Gibson v. Bruce, 108 U. S. 561; Mansfield, etc., R. Co. v. Swan, 111 U. S. 381, holding that an averment in the petition for removal that one of the plaintiffs who was a necessary party to the suit was not at the time of filing the petition a citizen of the same state as the defendant petitioner did not affirmatively show the diverse citizenship of the party at that time, since it was consistent with the petition that

he was not a citizen of any state. See also Graves v. Corbin, 132 U. S. 579, and *supra*, p. 192.

Precedent of Averment. — The following averment of citizenship and residence was approved in Stadlemann v. White Line Towing Co., 92 Fed. Rep. 209: "That the said plaintiff [naming him] was at the time of the commencement of said suit, ever since has been, and still is, a citizen of the state of Wisconsin, and resides at Sauk City, in said state of Wisconsin." See also precedents cited *supra*, p. 303, note 6.

3. Burdick v. Peterson, 6 Fed. Rep. 843, 2 McCrary (U. S.) 135.

In Wilson v. Oswego Tp., 151 U. S. 61, the petition by an intervener alleged his citizenship at the commencement of the suit and at the time of the motion.

4. Burdick v. Peterson, 6 Fed. Rep. 840, 2 McCrary (U. S.) 135.

5. Amory v. Amory, 36 N. Y. Super. Ct. 525, *affirmed* 58 N. Y. 684, which was *affirmed* 95 U. S. 186.

"The fact of the citizenship of the parties * * * is jurisdictional, and must in every case appear in the record. The fact that it may exist *in pais* is of no importance, since the court cannot look beyond the record to ascertain it." Kaeiser v. Illinois Cent. R. Co., 6 Fed. Rep. 3.

An Allegation that the Citizenship Is Unknown is insufficient, even in connection with the averment that the party is not a citizen of the state where in the suit is brought. Tracy v. Morel, 88 Fed. Rep. 803.

Averment on Information and Belief is not sufficient. Wolff v. Archibald, 14 Fed. Rep. 369.

Construction of Averment. — In Stoker v. Leavenworth, 7 La. 390, the plaintiff's petition alleged that he was a resident of a certain parish of the state. The defendant's petition for removal alleged that the plaintiff was a citizen of the state and resident of the parish,

tive¹ or in such a manner as to require the court to reason out the fact from the premises alleged.² The state of which each is a citizen should be specified.³ But if the petitioner is alleged to be a citizen of a named state, it need not also be alleged that he is not a citizen of the state wherein the suit is brought.⁴

An **Averment of the Residence of the Parties** is not the equivalent of an averment of citizenship for the purpose of giving jurisdiction to the federal courts.⁵

"as appears by the [plaintiff's] petition." It was contended that the reference to the pleading confined the averment to that of residence merely, but the court held that the averment of the plaintiff's citizenship was sufficient.

1. *Glover v. Shepperd*, 15 Fed. Rep. 836; *Brown v. Keene*, 8 Pet. (U. S.) 112.

Alternative Averments.—An averment that a party is not a citizen of a state named, and that his actual citizenship is unknown except that he is a citizen of one of the states or territories, is not a sufficient averment of citizenship in any state. *Mansfield, etc., R. Co. v. Swan*, 111 U. S. 381.

An averment that "the plaintiffs, or at least" two of the three plaintiffs, were citizens, etc., was held insufficient to show the citizenship of all. *Case v. Douglas*, 1 Dill. (U. S.) 299.

2. *Glover v. Shepperd*, 15 Fed. Rep. 836.

Place of Business.—A description of a person as "having his usual place of business in" a certain city and state is not an allegation of citizenship. *Amy v. Manning*, 144 Mass. 154.

Averment Aided by Judicial Notice.—In *Berlin v. Jones*, 1 Woods (U. S.) 638, an averment that a party was a citizen of the southern federal district of Alabama was held to be a sufficient averment of his citizenship in the state of Alabama. To the same point see *Edwards v. Nichols*, 3 Day (Conn.) 16.

3. *Cameron v. Hodges*, 127 U. S. 325, where the court said: "This court has always been very particular in requiring a distinct statement of the citizenship of the parties, and of the particular state in which it is claimed, in order to sustain the jurisdiction." See also *U. S. Savings Inst. v. Brockschmidt*, 72 Ill. 370.

"The averment that the controversy is between citizens of different states is not sufficiently specific, but should be followed by the further statement of the particular state of which each of the parties is a citizen." *Stadleman v.*

White Line Towing Co., 92 Fed. Rep. 209.

A petition alleging the citizenship of the petitioner, but merely alleging as to the citizenship of the plaintiffs that neither of them is a citizen of the same state with the petitioner, is not sufficient. *Cameron v. Hodges*, 127 U. S. 322.

Averment Merely Defective.—But an averment showing residence in different states in connection with a positive averment "that there is, and was at the time when this action was brought, a controversy therein between citizens of different states," would not necessarily result in a remand of the cause, but may be perfected by amendment in the federal Circuit Court. *Grace v. American Cent. Ins. Co.*, 109 U. S. 278. See also *Stadleman v. White Line Towing Co.*, 92 Fed. Rep. 209.

It is no ground for remanding the cause that the state citizenship of a party is incorrectly stated, if the petition contains the general averment that the controversy is between citizens of different states and such is the fact. *Duncan v. Associated Press*, 81 Fed. Rep. 417.

4. *Guinault v. Louisville, etc., R. Co.*, 41 La. Ann. 571, where the court said that an allegation that a natural person is a citizen of one state excludes the idea that he is a citizen of another state.

5. *Neel v. Pennsylvania Co.*, 157 U. S. 153; *Pennsylvania Co. v. Bender*, 148 U. S. 257; *Robertson v. Cease*, 97 U. S. 648; *Continental Ins. Co. v. Rhoads*, 119 U. S. 237; *Grace v. American Cent. Ins. Co.*, 109 U. S. 285; *Cameron v. Hodges*, 127 U. S. 325; *Everhart v. Huntsville College*, 120 U. S. 223; *Menard v. Goggan*, 121 U. S. 253; *Shelton v. Tiffin*, 6 How. (U. S.) 163; *Parker v. Overman*, 18 How. (U. S.) 137; *Egerton v. Starin*, 91 Fed. Rep. 932; *Wood v. Wagnon*, 2 Cranch U. S.) 9; *Grand Trunk R. Co. v. Twitchell*, 59 Fed. Rep. 728; *Craswell*

bb. CITIZENSHIP OF CORPORATION. — An allegation that a party with a corporate name is a citizen of a particular state is not a sufficient averment of its citizenship as a corporation;¹ the averment should be that it was and is a corporation created by the laws of a particular state.² And as the averment is jurisdictional,

v. Belanger, 56 Fed. Rep. 529; *Southwestern Tel., etc., Co. v. Robinson*, 48 Fed. Rep. 769; *Merchants' Nat. Bank v. Brown*, 17 Fed. Rep. 161, 4 Woods (U. S.) 263; *Glover v. Shepperd*, 15 Fed. Rep. 833; *Sherman v. Windsor Mfg. Co.*, 11 Fed. Rep. 852; *Kelly v. Houghton*, 9 Sawy. (U. S.) 19, 23 Fed. Rep. 417; *Brock v. Doyle*, 18 Fla. 172; *Darst v. Bates*, 51 Ill. 439; *Cleveland, etc., R. Co. v. Monaghan*, 140 Ill. 474; *Cleveland, etc., R. Co. v. Doerr*, 41 Ill. App. 530; *Eastin v. Rucker*, 1 J. J. Marsh. (Ky.) 232; *Martin v. Coons*, 24 La. Ann. 169; *Beebe v. Armstrong*, 11 Mart. (La.) 440; *Corp v. Vermilye*, 3 Johns. (N. Y.) 145; *Pechner v. Phoenix Ins. Co.*, 65 N. Y. 195; *Guarantee Co. of North America v. Lynchburg First Nat. Bank*, 95 Va. 480. Compare *U. S. Express Co. v. Kountze*, 8 Wall. (U. S.) 351.

Thus the description of a person as "of" a certain place in a state is not an averment of citizenship in that state. *Grand Trunk R. Co. v. Twitchell*, 59 Fed. Rep. 729; *Merchants' Nat. Bank v. Thompson*, 4 Fed. Rep. 879; *Carswell v. Schley*, 59 Ga. 17.

If the petition for removal fails to allege the citizenship of the parties in the present tense, and is therefore insufficient (see *supra*, p. 305, note 6), it cannot be aided by an averment of residence in the plaintiff's complaint. *Herndon v. Lancashire Ins. Co.*, 107 N. Car. 193.

1. *De Loy v. Traveler's Ins. Co.*, 59 Fed. Rep. 319; *Frisbie v. Chesapeake, etc., R. Co.*, 57 Fed. Rep. 2, where the petition, which was held insufficient, averred that "the suit is wholly between citizens of different states, to wit, between said petitioner, who avers that it was at the time of the bringing of this suit and still is a citizen of the state of Virginia, and the said plaintiff, who, as your petitioner avers, was and still is a citizen of the state of Kentucky." In *Lafayette Ins. Co. v. French*, 18 How. (U. S.) 404, and in *Muller v. Dows*, 94 U. S. 444, similar averments were held bad.

2. *Frisbie v. Chesapeake, etc., R.*

Co., 57 Fed. Rep. 1; *De Loy v. Traveler's Ins. Co.*, 59 Fed. Rep. 320.

Averments Pronounced Sufficient. — "A corporation created and existing under the laws of the state of Missouri, having its principal business office at the city of St. Louis in said state, and a citizen of the said state of Missouri, and a resident of said state," was evidently regarded as sufficient in *Wabash Western R. Co. v. Brow*, 164 U. S. 271. See also *Mattingly v. Northwestern Virginia R. Co.*, 158 U. S. 55, where the petition stated: "The Baltimore and Ohio Railroad Company, a corporation created and existing under and by virtue of the laws of the state of Maryland. * * * Your petitioner was at the time of bringing the said suit and still is such corporation, and as such a citizen of the state of Maryland and a resident thereof."

In *Neel v. Pennsylvania Co.*, 157 U. S. 153, the defendant's petition for removal of a suit brought in Ohio alleged that "the Pennsylvania Company, the defendant herein, is a corporation duly incorporated under and by virtue of the laws of the state of Pennsylvania, and was at the commencement of this action and still is a citizen of that state, and was not then, nor has it ever been, a citizen of the state of Ohio."

"That your petitioner, the Kansas City, Fort Scott, and Memphis Railroad Company, was at the time when this suit was commenced and still is a corporation created and existing under and by virtue of the laws of the states of Missouri, Arkansas, and Kansas, and was and still is a citizen of said states," was the averment in *Kansas City, etc., R. Co. v. Daughtry*, 138 U. S. 301.

An allegation that "the Covington Drawbridge Company, of Covington, is a corporation and citizen of the state of Indiana," was held to be a sufficient statement of incorporation by that state, where the company was incorporated by a public act. *Covington Drawbridge Co. v. Shepherd*, 21 How. (U. S.) 123.

In *U. S. Express Co. v. Kountze*, 8

it must be free from ambiguity.¹

(4) *As to Alienage of Parties.* — Where the federal jurisdiction depends upon the fact that a party is a foreign citizen or subject² the fact must be stated in express terms,³ and it must be alleged as existing both at the commencement of the suit and when the petition for removal is filed.⁴ If the foreign citizen be a cor-

Wall. (U. S.) 351, the court said: "The citizenship of the defendant is clearly enough averred. It is alleged that the United States Express Company, the defendant in the suit, is a foreign corporation formed under and created by the laws of the state of New York. The obvious meaning of this allegation is that the defendant is a citizen of the state of New York."

An averment that a party "is a body corporate by an act of the General Assembly of Maryland" was held a sufficient averment of citizenship as a corporation. *Marshall v. Baltimore, etc., R. Co.*, 16 How. (U. S.) 325.

An averment that the petitioner "is a corporation formed under the laws of the state of New York" was held sufficient in *Rathbone Oil Tract Co. v. Rauch*, 5 W. Va. 82.

"A corporation under the laws of the state of Georgia, of said county," was adjudged sufficient in *Western Union Tel. Co. v. Griffith*, 104 Ga. 56.

In *Koshland v. National F. Ins. Co.*, (Oregon 1897) 40 Pac. Rep. 849, the plaintiff's complaint averred that the defendant was a corporation created and existing under and by virtue of the laws of the state of Connecticut, and the petition for removal, held sufficient, alleged that the defendant "was at the time of the commencement of the action and still is a citizen of the state of Connecticut, and of no other state, and has its principal office and place of business in the city of Hartford, in said state of Connecticut." See also *Warax v. Cincinnati, etc., R. Co.*, 72 Fed. Rep. 639; *Hukill v. Maysville, etc., R. Co.*, 72 Fed. Rep. 748.

As to the necessity of alleging non-residence and noncitizenship in the state where the suit is brought, as well as incorporation in another state, see *infra*, p. 311.

1. An averment "that for the purposes of this action it was at the commencement of this suit and still is a corporation chartered, incorporated, and created under and by virtue of the laws of the state of Kansas," was held not to be a sufficient averment of citi-

zenship of the defendant corporation. *Fitzgerald v. Missouri Pac. R. Co.*, 45 Fed. Rep. 816.

A description of the petitioner as "a joint-stock company or foreign corporation organized under the laws of" another state, was held insufficient by O'Brien, J., in *Bushnell v. Parker*, (Supm. Ct. Gen. T.) 37 N. Y. St. Rep. 303.

2. See *supra*, p. 238.

3. *Börs v. Preston*, 111 U. S. 252, citing *Brown v. Keene*, 8 Pet. (U. S.) 115; *Bingham Cabot*, 3 Dall. (U. S.) 382; *Capron v. Van Noorden*, 2 Cranch (U. S.) 126, and *Robertson v. Cease*, 97 U. S. 646, and holding that "it cannot be inferred argumentatively from the single circumstance that such person holds and exercises the office of consul of a foreign government;" *Glover v. Shepperd*, 15 Fed. Rep. 836, holding that an allegation in the alternative of citizenship in one of the United States or of alienage is insufficient; *Michaelson v. Denison*, 3 Day (Conn.) 294, decided under the Act of 1789, which differed in phraseology from the Act of 1887-1888. But the principle of the case, at least, holds good.

On Information and Belief. — An allegation that a party is an alien as the petitioner is informed and verily believes is insufficient. *Wolff v. Archibald*, 14 Fed. Rep. 369.

Form of Averment. — In *Craswell v. Belanger*, 56 Fed. Rep. 529, a resident of Prince Edward's Island alleged himself to be "a citizen of the British empire and a subject of her Britannic majesty, Queen Victoria," and no objection was made that the averment of foreign citizenship was insufficient.

Whether an averment that a party is "a citizen of Scotland" is sufficient to show that he is a citizen of a "foreign country" was left undecided in *Robertson v. Scottish Union, etc., Ins. Co.*, 68 Fed. Rep. 176.

4. *Craswell v. Belanger*, 56 Fed. Rep. 529, where a petition for removal stating the foreign citizenship in the present tense was held insufficient. *La Confiance Compagnie, etc., v. Hall*, 137

poration, the form of the averment should correspond with that required when the party is a domestic corporation.¹

(5) *As to Nonresidence in State Where Suit Is Brought* — (a) **In General.** — A suit can be removed on the ground of diverse citizenship only by a defendant who is a nonresident of the state where the suit is brought.² It may be that a proper averment of his citizenship in a state, naming it, other than that in which the suit is brought is equivalent to an averment of nonresidence in the latter;³ but the better practice is to make a distinct averment of the nonresidence of the petitioner in addition to the averment of citizenship, or at least to aver that he is a citizen *and* resident of a state named.⁴ The allegation of nonresidence must be averred as of the time when the suit was begun as well as of the time when the petition for removal was filed.⁵

U. S. 61. But an omission to aver alienage at the commencement of the suit is cured by an averment thereof in the plaintiff's pleading. *National Steamship Co. v. Tugman*, 106 U. S. 121.

1. See *supra*, p. 308.

Averments Held Sufficient.—A description of a party as "a corporation created and existing under and by virtue of the laws of the United Kingdom of Great Britain and Ireland" shows it to be a foreign citizen or subject. *National Steamship Co. v. Tugman*, 106 U. S. 121.

In *Robertson v. Scottish Union, etc., Ins. Co.*, 68 Fed. Rep. 176, it was held that an averment in the petition that the petitioner was "a company duly chartered and incorporated under the laws of Great Britain" sufficiently showed it to be a foreign corporation.

In *Scott v. Texas Land, etc., Co.*, 41 Fed. Rep. 226, the petition for removal, evidently regarded as sufficient on this point, alleged that the defendant was "a corporation incorporated and existing under the laws and authority of the kingdom of Great Britain."

2. See *supra*, p. 274.

3. See *supra*, p. 274.

As to requisites of averment of citizenship, see *supra*, p. 306.

In *Myers v. Murray*, 43 Fed. Rep. 698, Shiras, J., held that citizenship and residence are synonymous terms when the issue is as to state citizenship or residence, and that "an averment that A. B. is a citizen of a given state of necessity includes the averment that he is a resident of that state, and precludes the assumption that he may be a resident of any other state," citing the Fourteenth Amendment to the

Federal Constitution, which declares that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside." See also *Bushnell v. Parker*, (Supm. Ct. Gen. T.) 37 N. Y. St. Rep. 303.

4. In *Barth v. Coler*, 60 Fed. Rep. 466, a suit brought in Colorado, the petitioner for removal alleged that he was a citizen of New Jersey, but did not allege that he was a nonresident of the state of Colorado. The court said: "It is not necessary to decide at this time whether this latter fact is also fatal to the jurisdiction of the Circuit Court of the United States for the District of Colorado, but we allude to it for the purpose of saying that, in view of the different meanings which the words 'citizen,' 'resident,' 'inhabitant,' etc., have now acquired, counsel will frequently save their clients great expense and delay, which might easily be avoided, by speaking in the exact language of the removal acts when they attempt to use either of the above terms." See also the precedents cited *supra*, p. 303, note 6.

5. *Campelle v. Balbach*, 46 Fed. Rep. 81; *Frisbie v. Chesapeake, etc., R. Co.*, 57 Fed. Rep. 1; *Overman Wheel Co. v. Pope Mfg. Co.*, 46 Fed. Rep. 577.

Thus in *Texas, etc., R. Co. v. Bloom*, 85 Tex. 279, the plaintiff's pleading described the defendant as a resident of Texas. The latter filed a petition for removal alleging himself to be a citizen of the state of Tennessee, but did not negative his residence in Texas when the suit was brought, and the petition was held insufficient.

(b) **Nonresidence of Corporation.** — Some cases hold that a petition for removal showing that the defendant is a corporation chartered by the laws of another state or foreign country need not negative its residence or citizenship in the state where the suit is brought;¹ but inasmuch as a corporation may possibly be a resident and citizen of more than one state,² other cases hold that when a corporation of one state is sued in the courts of another state, a petition for removal is not sufficient unless it alleges, in addition to the usual averments as to citizenship, that the defendant is a nonresident of the state in which it is sued.³

(c) **Nonresidence of Alien.** — An allegation that the petitioner is a foreign citizen and subject is insufficient without an allegation that he is also a nonresident of the state in which the suit is brought.⁴ Although it has been held that the allegation of nonresidence is unnecessary where it is duly alleged that the petitioner is an alien corporation,⁵ it is the better practice to allege both.⁶

(6) *As to Amount in Dispute.* — Where a sufficient amount in dispute is clearly shown by the plaintiff's pleading on file it need not be alleged in the petition for removal.⁷ But it is always

1. *Shattuck v. North British, etc., Ins. Co.*, 58 Fed. Rep. 610, "because in legal contemplation its residence and citizenship can only be in the state or country by the laws of which it was created, although it may have an office and do business in other states whose laws permit it," followed in *Wilcox, etc., Guano Co. v. Phoenix Ins. Co.*, 60 Fed. Rep. 929. See also *Frisbie v. Chesapeake, etc., R. Co.*, 57 Fed. Rep. 3, where the court said: "It would seem that an averment that a corporation had been created by the laws of another state would necessarily imply that it was a nonresident of the state in which the plaintiff resided." And see *Myers v. Murray*, 43 Fed. Rep. 695; *Koshland v. National F. Ins. Co.*, 31 Oregon 205.

2. See *supra*, p. 188.

3. *Hirsch v. J. I. Case Threshing Mach. Co.*, 42 Fed. Rep. 803, *per* Justice Miller; *Overman Wheel Co. v. Pope Mfg. Co.*, 46 Fed. Rep. 577, allowing the petition to be amended in the federal court. See also *Scott v. Texas Land, etc., Co.*, 41 Fed. Rep. 226; *Guinault v. Louisville, etc., R. Co.*, 42 La. Ann. 52. That such is the practice, see *Brown v. Murray*, 43 Fed. Rep. 617.

4. *Guarantee Co. of North America v. Lynchburg First Nat. Bank*, 95 Va. 480; *Walker v. O'Neill*, 38 Fed. Rep.

374. See also *Rooker v. Crinkley*, 113 N. Car. 73.

Undoubtedly the allegation of nonresidence, like that of alienage, should be made as of the time of the commencement of the suit as well as of the time of filing the petition. See *supra*, pp. 305, 309.

5. *Shattuck v. North British, etc., Ins. Co.*, 58 Fed. Rep. 610.

6. See *supra*, p. 310. Both were alleged in *Robertson v. Scottish Union, etc., Ins. Co.*, 68 Fed. Rep. 176.

7. *Phoenix L. Ins. Co. v. Saettel*, 33 Ohio St. 280; *Building, etc., Assoc. v. Cunningham*, 92 Tex. 155.

Where the plaintiff's complaint showed affirmatively that the value of the matter in controversy exceeded two thousand dollars it was held that the cause was removable, though the defendant's petition for removal simply alleged that it exceeded five hundred dollars in value, since there was no inconsistency between these statements. *Reed v. Hardeman County*, 77 Tex. 167.

It Must Affirmatively Appear somewhere in the record, which includes the petition, that the jurisdictional amount is involved. *Keith v. Levi*, 2 Fed. Rep. 743; *Strasburger v. Beecher*, 44 Fed. Rep. 214; *New York, etc., Land Co. v. Martin*, (Tex. Civ. App. 1894) 25 S. W. Rep. 475.

advisable to allege in the language of the statute¹ that there is in the suit a controversy in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars;² and the petition must show that the requisite amount was in dispute at the date of the commencement of the suit, if that fact does not otherwise appear in the record.³

(7) *Showing Relative Interests of Other Parties.* — In a petition for removal on the ground of diverse citizenship it is usual to allege that parties whose presence would otherwise prevent a removal are formal, nominal, or unnecessary,⁴ or that they are sham parties and fraudulently joined for the purpose of preventing a removal.⁵ But an allegation that a party is merely nominal is a conclusion of law and cannot overcome the facts stated in the plaintiff's pleading and the nature of the relief sought.⁶ If the right of removal depends upon a rearrangement of the parties according to their real interests,⁷ it is the better practice to insert in the petition for removal a clear allegation of such interests.⁸

1. See *supra*, p. 267.

2. See for a sufficient averment, *Chambers v. McDougal*, 42 Fed. Rep. 696, and the precedents cited *supra*, p. 303, note 6.

In *Egan v. Chicago, etc., R. Co.*, 53 Fed. Rep. 677, the petition for removal stated that "your petitioner, who is defendant in the above-entitled cause, respectfully shows to this honorable court that the matter and amount in dispute in the above-entitled suit exceeds, exclusive of interest and costs, the sum or value of two thousand dollars," etc. The plaintiff's complaint asserted a claim against the defendant and claimed damages in the sum of twenty-seven thousand dollars. It was held that the petition, fairly construed, constituted a positive averment of a matter in dispute of the jurisdictional amount.

On Information and Belief. — A petition for removal alleging the matter in controversy to be "of the sum and value of over two thousand dollars, as petitioner is informed and verily believes," if the record elsewhere does not aid the petition in its statement of value, is insufficient. *New York, etc., Land Co. v. Martin*, (Tex. Civ. App. 1894) 25 S. W. Rep. 475.

As to Averment Respecting Interest. — Where the suit as brought does not and cannot involve a question of interest, omission of the word "interest" in stating the amount in the petition for removal is not fatal. *Weber v. Travel-*

ers' Ins. Co., 45 Fed. Rep. 657, a suit for the specific performance of a contract for the purchase of land where the plaintiff's complaint was silent as to the value of the land, and the petition for removal, which was held sufficient, averred that "the matter involved in dispute in the above-entitled action exceeds, exclusive of costs, the sum or value of two thousand dollars."

Averment Manifestly Untrue. — An averment that there is in dispute the jurisdictional amount cannot avail where the nature of the proceeding shows it to be manifestly untrue. *Caswell v. Caswell*, 120 Ill. 382, a bill to set aside a decree of divorce.

3. *Kenyon v. Knipe*, 46 Fed. Rep. 309, where the jurisdictional amount did not appear in the pleadings and was stated in the petition for removal in the present tense. The cause was remanded, as it also was for a like reason in *Strasburger v. Beecher*, 44 Fed. Rep. 209, and *Back v. Sierra Nevada Consol. Min. Co.*, 46 Fed. Rep. 673.

4. See *Chicago, etc., R. Co. v. Crane*, 113 U. S. 430; *Pond v. Sibley*, 7 Fed. Rep. 132, 19 Blatchf. (U. S.) 189; *Springer v. Sheets*, 115 N. Car. 375.

5. See *supra*, p. 202.

6. *Security Co. v. Pratt*, 65 Conn. 161; *Mayer v. Denver, etc., R. Co.*, 41 Fed. Rep. 724. See also *Security Co. v. Pratt*, 64 Fed. Rep. 405.

7. See *supra*, p. 205.

8. If the fact that one of the defend-

(8) *As to Separable Controversy.* — In a suit by a sole plaintiff against a sole defendant no mention of a separable controversy need be made in the petition for removal.¹ And in suits against several defendants, if a removal on the alleged ground of diverse citizenship alone fails for insufficiency of the petition in that behalf, it may nevertheless be sustained where the record apart from the petition affirmatively shows a separable controversy with the petitioning defendant.² Ordinarily if a separable controversy exists it is disclosed by the plaintiff's pleading, so that a general averment thereof in the petition for removal will suffice.³ But such an averment is a mere legal conclusion or expression of opinion,⁴ and where the pleadings do not on their face show a separable controversy its existence must be averred in the petition for removal by a statement of the facts from which the conclusion arises.⁵

ants' interest is on the same side with the plaintiff and adverse to the petitioner for removal becomes important in determining the right of removal, the fact of adverse interest should be distinctly stated. See *Security Co. v. Pratt*, 65 Conn. 161. In *Hutton v. Joseph Bancroft, etc., Co.*, 77 Fed. Rep. 481, a petition for removal by one defendant averred that the controversy was between himself on one side and his codefendant on the other. See also a precedent in *Springer v. Sheets*, 115 N. Car. 375.

1. *Sharkey v. Port Blakely Mill Co.*, 92 Fed. Rep. 425, holding that a suit between single parties of diverse citizenship on several causes of action may be removed without any statement of a separable controversy in the petition for removal.

2. See *Merchants' Nat. Bank v. Thompson*, 4 Fed. Rep. 878, cited *infra*, I. 23. *c. Prayer for Removal.*

If All the Defendants Unite in a Petition for Removal showing by its allegations that one of them is a citizen of the same state as the plaintiff, it seems that a removal cannot be had on the ground of a separable controversy with a part of the defendants unless the appropriate allegation thereof is made. *Smith v. Horton*, 7 Fed. Rep. 270.

3. **Precedents.** — A general averment following the language of the statute would be, in substance, after stating the citizenship of the parties, together with the nonresidence of the defendant, that "in said suit there is a controversy which is wholly between citizens of different states, namely 'between,' etc., specifying the parties thereto,

"and that your petitioner is actually interested in such controversy."

For precedents of such general averments, see *Graves v. Corbin*, 132 U. S. 579; *Sloane v. Anderson*, 117 U. S. 277; *Rand v. Walker*, 117 U. S. 343; *Ayres v. Wiswall*, 112 U. S. 189; *Shainwald v. Lewis*, 108 U. S. 160; *Winchester v. Loud*, 108 U. S. 130; *Chicago, etc., R. Co. v. Crane*, 113 U. S. 430; *Warax v. Cincinnati, etc., R. Co.*, 72 Fed. Rep. 639; *Rich v. Gross*, 29 Neb. 339.

4. *Anderson v. Bowers*, 40 Fed. Rep. 708; *Clark v. Opdyke*, 10 Hun (N. Y.) 383; *Levy v. O'Neil*, (C. Pl. Spec. T.) 14 Abb. Pr. N. S. (N. Y.) 63; *Crane v. Seitz*, 30 Mich. 453.

5. Thus, in *Anderson v. Bowers*, 40 Fed. Rep. 708, a suit was brought by taxpayers against county officials and resident and nonresident holders of county bonds to restrain the levy of a tax for their collection and to cancel the bonds as illegally issued. The petition for removal by a nonresident holder of bonds averred that "the attack upon the said bonds of this petitioner is entirely distinct and different from the attack upon the bonds of each of the other defendants, and that the defense, therefore, is likewise entirely distinct and different, and the whole controversy between the plaintiffs and this petitioner is entirely distinct and different from that between the plaintiffs and each of said * * * parties defendant." It was held that this averment would not sustain a removal upon the ground of a separable controversy between the plaintiff and the petitioner arising out of the fact, not shown by the pleadings, that the bonds held by

(9) *As to Federal Question.* — In a petition for removal on the ground of a federal question under the Act of 1875, it was necessary for the petitioner to set forth the facts constituting the alleged federal question, at least where they did not affirmatively appear in the pleadings of the parties.¹ Since the Act of 1887-1888, the federal question must appear on the face of the plaintiff's pleading and cannot be shown by allegations in the petition for removal alone.² Therefore it would seem to be wholly unnecessary for the defendant to make any averment in his petition for removal other than a general statement that the suit arises under the Constitution or laws of the United States, as appears by the plaintiff's pleading. If the defendant seeks a removal on the specific ground that it is a federal corporation, or that he is sued as a receiver appointed by a federal court, or a receiver of a national bank, it is proper and customary to allege the fact of incorporation by Act of Congress or appointment as a receiver.³

the petitioner were of a different series or issue from those held by the other defendants. See further as to the importance of specifically claiming removal on the ground of a separable controversy, *Sharkey v. Port Blakely Mill Co.*, 92 Fed. Rep. 428, where the court said: "Such a case cannot be properly removed or brought within the jurisdiction of a Circuit Court of the United States, if the petition fails to set forth the separable controversy." And see also *Winnemans v. Edgington*, 27 Fed. Rep. 325; *Security Co. v. Pratt*, 65 Conn. 161; *Crane v. Seitz*, 30 Mich. 453.

In *Connell v. Smiley*, 156 U. S. 335, a bill against a single defendant to quiet title to land, other defendants intervened and filed a petition for removal, alleging as to a separable controversy only that "each of said parties own and claim separate and distinct portions of said land." On objection made for the first time on appeal, it was held that though the petition "left much to be desired in the way of fulness and accuracy, it set up a separable controversy;" but the court was evidently of opinion that the better practice would have been to set forth the character of the defendants' claims, as, for instance, whether they were *bona fide* purchasers without notice, etc.

In *Allin v. Robinson*, 1 Dill. (U. S.) 119, a petition for removal under the "separable controversy" Act of 1866, an action of ejectment had been brought against a single defendant.

Another party, stating that he was the owner of the land, was allowed to intervene as a codefendant, and he thereupon filed a petition for removal which contained no allegation concerning his relation to the other defendant, who did not join in the petition for removal. It was held on a motion to remand that the cause could not be retained in the federal court on the contention that the original defendant was the tenant of the intervening petitioner, and that, therefore, the latter had a separable controversy with the plaintiff.

On Appeal or Error in State Court. — In *Young v. Oakes*, 104 Ga. 62, the petition for removal was based on the ground of diverse citizenship. On error to the judgment, after denying the petition, the Supreme Court declined to consider whether there was a separable controversy, because it was not alleged as a ground of removal.

1. *Gibbs v. Crandall*, 120 U. S. 105; *Trafton v. Nougues*, 4 Sawy. (U. S.) 178.

2. See *supra*, pp. 299, 300.

3. See *Supreme Lodge, etc., v. Wilson*, 66 Fed. Rep. 785; *Texas, etc., R. Co. v. Kirk*, 115 U. S. 2; *Ellis v. Atlantic, etc., R. Co.*, 134 Mass. 338; *Sullivan v. Barnard*, 81 Fed. Rep. 886.

Precedents of Petitions. — For the text of a petition for removal by a receiver of a national bank, see *Speckart v. German Nat. Bank*, 85 Fed. Rep. 14. For the substance of a petition by a receiver appointed by a federal court and sued for death by wrongful act, see *Louisville Southern R. Co. v. Tucker*, (Ky. 1899) 49 S. W. Rep. 314.

(10) *As to Filing of Bond.* — It is usual to state in the petition for removal that the petitioner has made and filed therewith a bond with good and sufficient surety conditioned as the statute requires.¹

(11) *As to Time of Filing Petition.* — It is usual to make an express averment that the petition is filed within the time prescribed by the removal act.² And where the time for removal has apparently expired, it is at least eminently proper to state the special circumstances, if any there be, which avoid the bar of the statute.³

d. JOINDER OF SEVERAL GROUNDS. — Several grounds of removal are frequently alleged in the same petition,⁴ and the insufficiency of one alleged ground of removal is no prejudice to removal on another alleged ground.⁵

e. PRAYER FOR REMOVAL — In General. — The petition should contain a prayer for the removal of the cause⁶ into the federal Circuit Court to be held in the district where the suit is pending.⁷

1. See precedents cited *supra*, p. 303. Thus, in *Probst v. Cowen*, 91 Fed. Rep. 930, where no special bail was required, the petition for removal stated that "your petitioners have made and herewith file a bond, with good and sufficient surety, for their entering in the said Circuit Court of the United States for the district of Ohio aforesaid, on the first day of the next session, a copy of the record in this suit, and for paying all costs that may be awarded by the said Circuit Court, if said court shall hold that this suit was wrongfully or improperly removed thereto."

2. *La Mothe Mfg. Co. v. National Tube Works Co.*, 15 Blatchf. (U. S.) 435.

"Your petitioner now, before the time when it is required by the laws of this state or the rules of this court to answer or plead to the declaration or complaint of plaintiff, files this its petition in this suit for the removal of the same," etc., was the language of the petition in *Texas*, etc., *R. Co. v. Bloom*, 85 Tex. 283, and closely follows the language of the removal statute in respect of the time for filing the petition.

3. Thus, in *Powers v. Chesapeake*, etc., *R. Co.*, 169 U. S. 102, where the cause became removable during the progress of the suit and the petition for removal was filed after the time for removing the suit as originally brought had elapsed, the facts justifying the removal at that time were

fully and distinctly alleged in the petition for removal. See also *Chicago*, etc., *R. Co. v. Welch*, 44 Iowa 665; *Warner v. Pennsylvania R. Co.*, 6 Hun (N. Y.) 199.

In *King v. Worthington*, 104 U. S. 47, an application for removal under the Act of 1875, a decree having been rendered and reversed and the cause remanded for a rehearing, the petition alleged that the then current term of the court was the first term at which it could have been tried after docketing the cause in the trial court.

4. See *Houser v. Clayton*, 3 Woods (U. S.) 273; and there are numerous other cases.

5. *Shattuck v. North British*, etc., *Ins. Co.*, 58 Fed. Rep. 609.

6. *People v. Superior Ct.*, 34 Ill. 357. See the precedents cited *supra*, p. 303, note 6.

7. The Act of 1887-1888, 24 U. S. Stat. at L. 552, c. 373, 25 U. S. Stat. at L. 433, c. 866, provides for a petition "for the removal of such suit into the Circuit Court to be held in the district where such suit is pending."

Designation of Wrong District. — A prayer for removal into the Circuit Court for a designated district which does not exist is fatally defective. *Ex p. Groom*, 40 Ala. 731.

Effect of Irregularity. — A petition praying for removal to the next Circuit or District Court, etc., and an order granting such petition, though irregular, will not necessitate a remand of the cause. *McVaughter v. Cassily*, 4

The prayer must not be in the alternative,¹ nor multifarious.² It is not necessary to specify the statute or section under which removal is sought.³

Erroneous Reference to Statute or Ground for Removal. — Where the petition refers to the wrong statute in stating the ground for removal it will be sustained if the facts stated show that the petitioner may remove the suit under a different statute;⁴ nor is the efficacy of the petition impaired by assigning a wrong ground for removal⁵ or by invoking as authority for the removal statutes

McLean (U. S.) 351, where a motion to remand was overruled "as there can be no uncertainty or surprise by the other party. * * * As the District Court has no jurisdiction, the removal could only be to the Circuit Court."

In *Wilcox, etc., Guano Co. v. Phoenix Ins. Co.*, 60 Fed. Rep. 933, the court said: "The next point is that the petition is for the removal into the Circuit Court of the United States for the eastern district of South Carolina. Strictly, it should have been into the district of South Carolina, the Circuit Court having jurisdiction over the whole district of South Carolina. But the plaintiffs themselves have filed the record, and have made their motions in this court. They have not been misled. The record is here. The court has been asked by the plaintiffs to take cognizance and jurisdiction over it. The defendants have fulfilled one of the conditions, the main condition, of the bond. The defendants have also submitted themselves to the jurisdiction, and the addition of the word 'eastern' will be treated as surplusage."

1. Alternative Prayer. — A petition praying for removal in case the court should overrule a motion to dismiss and a plea in abatement theretofore filed was held insufficient. *Manning v. Amy*, 140 U. S. 137.

2. Multifarious Petition. — Thus, in *Pelzer Mfg. Co. v. Sun Fire Office*, 36 S. Car. 213, the defendant sought by a single petition to consolidate several causes brought against him by the same plaintiff and prayed for a removal of all of them. In one of them the amount in controversy was insufficient, and the petition for removal was properly denied as to both, since the court could not know that the petitioner desired either to be removed without the other.

3. Goodrich v. Hunton, 29 La. Ann. 373.

4. Dart v. Walker, (C. Pl. Gen. T.) 43 How. Pr. (N. Y.) 29, 4 Daly (N. Y.) 188; *Norris v. Mineral Point Tunnel*, 7 Fed. Rep. 272, 19 Blatchf. (U. S.) 201; *Kaeiser v. Illinois Cent. R. Co.*, 6 Fed. Rep. 4. See also *Goodrich v. Hunton*, 29 La. Ann. 373.

5. Averments Treated as Surplusage — Averments of Separable Controversy. — It is immaterial that a removal is claimed on the ground of a separable controversy, where the petition is sufficient for removal on the ground of diverse citizenship alone. *Shattuck v. North British, etc., Ins. Co.*, 58 Fed. Rep. 610.

Averments of Prejudice or Local Influence. — Under the former removal act a petition for removal on the ground of prejudice or local influence filed in the state court, if insufficient for want of an affidavit, was effectual to remove the suit on the ground of diverse citizenship where it was filed in time and contained the proper allegations, the statements as to prejudice, etc., being rejected as surplusage. *Removal Cases*, 100 U. S. 471.

In *Burnham v. Chicago, etc., R. Co.*, 4 Dill. (U. S.) 503, the case had been removed by the plaintiff under the Act of 1867, on the ground of prejudice or local influence. On a motion to remand it was contended that the cause was not removable on that ground since some of the defendants were residents of the state where the suit was brought. But it appeared by the petition for removal and other parts of the record that the petitioner for removal had a separable controversy under the Act of 1875, and the motion to remand was denied.

Averments of Diverse Citizenship Alone. — It has been held that if a petition for removal is based upon the sole ground of diverse citizenship, the jurisdiction of the federal court will be sustained if the record shows a separable controversy between the petitioner and

which have been repealed,¹ if the petition discloses a sufficient ground and conforms in every essential particular to the law in force at the time.

In Removals for Separable Controversy. — In petitions for removal on the ground of a separable controversy the petitioner should not limit his prayer for removal to the transfer of his part of the suit.²

f. SIGNATURE. — Petitions are usually signed,³ but it is not necessary that a petition for removal be signed by the petitioner in person;⁴ it may be and usually is signed by an attorney⁵ or authorized agent.⁶ Objection that the petition was unsigned is waived if not taken in the state court.⁷

If Some of the Petitioners Are Not Parties to the Suit their names may be

the plaintiff. *Merchants' Nat. Bank v. Thompson*, 4 Fed. Rep. 878, where the court said: "I understand the law to be that if upon the whole record the jurisdiction of the court can be sustained, the cause will not be remanded for such a misconception in the petition." *Citing Osgood v. Chicago, etc., R. Co.*, 6 Biss. (U. S.) 330; and *Ruckman v. Ruckman*, 1 Fed. Rep. 591, where the court said: "The question in this court is not whether the counsel for the petitioners comprehends and assigns the true reasons for the removal, but whether the whole record reveals a case over which the court has jurisdiction." *Compare Ruckman v. Palisade Land Co.*, 1 Fed. Rep. 370.

1. *Stanley v. Chicago, etc., R. Co.*, 62 Mo. 508; *Canal, etc., Streets R. Co. v. Hart*, 114 U. S. 660. *Compare Kelly v. Houghton*, 9 Sawy. (U. S.) 19, 23 Fed. Rep. 417, where one of the grounds upon which the cause was remanded was that the petition for removal was based upon and in express terms limited to a statute not in force at the time.

2. If he has a right of removal the entire suit is removed, not a part of it. See *supra*, p. 232.

It was held in *Clark v. Chicago, etc., R. Co.*, 11 Fed. Rep. 355, that where the petition for removal embraced all the jurisdictional facts sufficient to authorize a removal under the separable controversy clause of the removal act, the prayer that "this cause be removed as against your petitioner," was not such an irregularity as to require the federal court to remand the cause. See also *Northern Pac. Terminal Co. v. Lowenberg*, 18 Fed. Rep. 339. But in *Atlantic, etc., Fertilizing Co. v. Carter*, 4 Hughes (U. S.) 217, 88 Fed. Rep. 707, the cause appears to have

been remanded solely on the ground of the irregularity; to which point see also *Chambers v. Holland*, 11 Fed. Rep. 209.

3. See article PETITIONS, vol. 16, p. 516.

4. *Dennis v. Alachua County*, 3 Woods (U. S.) 683.

By Mark. — In *Neal v. Delaware*, 103 U. S. 373, the petitioner for removal signed the petition by his mark.

5. *Dennis v. Alachua County*, 3 Woods (U. S.) 683; *Cooke v. Seligman*, 7 Fed. Rep. 266; *Shaft v. Phoenix Mut. L. Ins. Co.*, 67 N. Y. 547; *Vandevoort v. Palmer*, 4 Duer (N. Y.) 677. See also *Bell v. Lycoming Ins. Co.*, 3 Hun (N. Y.) 410, 6 Thomp. & C. (N. Y.) 54, and the precedents of petitions for removal cited *supra*, p. 303, note 6.

Under the Act of 1789, in one of the early cases it was held that a petition signed by the applicant's attorney was insufficient. *Kirkpatrick v. Hopkins*, 2 Miles (Pa.) 277.

6. **Signature for Corporation.** — A petition in behalf of a nonresident corporation, filed by an attorney, and signed by the resident general agent of the corporation, with an affidavit attached showing affirmatively the authority of the agent, was pronounced amply sufficient in *Bell v. Lycoming F. Ins. Co.*, 3 Hun (N. Y.) 410, 6 Thomp. & C. (N. Y.) 54, where the court said: "Though it may be better in cases of this kind that the petition should be executed by the principal officers of the company, yet after all they are only agents of a higher position." In *Weeks v. Billings*, 55 N. H. 372, the petition by a corporation was signed by its president.

7. **Removal Cases**, 100 U. S. 471, holding that the objection might be cured by amendment.

rejected as surplusage and the petition will stand in legal effect as the petition of the others.¹

g. VERIFICATION — Necessity. — The removal act requires the application for removal to be made by petition.² Applications to a court by petition are generally verified,³ and accordingly it is the common practice to verify a petition for removal.⁴ It is also distinctly recommended as the better practice.⁵ But it is settled beyond dispute that no verification is necessary to the sufficiency of the petition.⁶

1. Removal Cases, 100 U. S. 471.

2. Act of 1887-1888, 24 U. S. Stat. at L. 552, c. 373; 25 U. S. Stat. at L. 433, c. 866.

3. See article PETITIONS, vol. 16, p. 517; Shaft v. Phoenix Mut. L. Ins. Co., 67 N. Y. 547.

4. Petitions for removal were verified in the following cases: Graves v. Corbin, 132 U. S. 579, and Louisville, etc., R. Co. v. Wangelin, 132 U. S. 600, cases removed from *Illinois*; Hartford F. Ins. Co. v. Vanduzor, 49 Ill. 491; Empire Transp. Co. v. Richards, 88 Ill. 405; Whiteley Malleable Castings Co. v. Sterlingworth R. Supply Co., 83 Fed. Rep. 853, a case removed from *Indiana*; Combs v. Nelson, 91 Ind. 124; Kaeiser v. Illinois Cent. R. Co., 6 Fed. Rep. 2, a case removed from *Iowa*; Treadway v. Chicago, etc., R. Co., 21 Iowa 354; Ohle v. Chicago, etc., R. Co., 64 Iowa 600; Hardwick v. Kean, 95 Ky. 565; Guinault v. Louisville, etc., R. Co., 42 La. Ann. 52, 41 La. Ann. 571; Stoker v. Leavenworth, 7 La. 390; Baron v. Kingsland, 5 La. 378; Bondurant v. Watson, 103 U. S. 284, a case removed from *Louisiana*; Oakey v. Commercial, etc., Bank, 14 La. 515; Ellis v. Atlantic, etc., R. Co., 134 Mass. 339, where the petition was verified by the president of the defendant corporation; Trester v. Missouri Pac. R. Co., 23 Neb. 245; Weeks v. Billings, 55 N. H. 372; Yulee v. Vose, 99 U. S. 541, a case removed from *New York*; Holden v. Putnam F. Ins. Co., 46 N. Y. 5; Miller v. Kent, (Supm. Ct.) 60 How. Pr. (N. Y.) 456; Barrowcliffe v. La Caisse Generale, etc., (Marine Ct.) 58 How. Pr. (N. Y.) 131, 1 City Ct. (N. Y.) 151; Chatham Nat. Bank v. Merchants' Nat. Bank, 1 Hun (N. Y.) 702, 4 Thomp. & C. (N. Y.) 196; Jackson v. Stiles, 4 Johns. (N. Y.) 493; Livingston v. Gibbons, 4 Johns. Ch. (N. Y.) 95; Herndon v. Aetna Ins. Co., 107 N. Car. 195; Rooker v. Crinkley, 113 N. Car. 73; Herndon v. Lancashire

Ins. Co., 107 N. Car. 192; Robb v. Parker, 3 S. Car. 61; Edgerton v. Gilpin, 3 Woods (U. S.) 279, a case removed from *Texas*; Blum v. Thomas, 60 Tex. 159; Kennedy v. Ehlen, 31 W. Va. 548; Mead v. Walker, 15 Wis. 499.

Forms of Verification will be found in Kaeiser v. Illinois Cent. R. Co., 6 Fed. Rep. 2; De Camp v. New Jersey Mut. L. Ins. Co., 2 Sweeney (N. Y.) 483, where the affidavit is set forth in full.

5. Not to verify the petition is "contrary to good practice." *Per* Fuller, C. J., in Kansas City, etc., R. Co. v. Daughtry, 138 U. S. 303.

"It is eminently proper that the petition should be verified." *Per* Justice Bradley in Houser v. Clayton, 3 Woods (U. S.) 277. See also Chamberlain v. American Nat. L., etc., Co., 11 Hun (N. Y.) 370.

6. Osgood v. Chicago, etc., R. Co., 6 Biss. (U. S.) 336; Connor v. Scott, 4 Dill. (U. S.) 243; Allen v. Ryerson, 2 Dill. (U. S.) 501; Sweeney v. Coffin, 1 Dill. (U. S.) 73; Houser v. Clayton, 3 Woods (U. S.) 277; *Ex p.* Grimbail, 61 Ala. 607; People v. Superior Ct., 34 Ill. 357; Tunstall v. Madison, 30 La. Ann. 471; Guinault v. Louisville, etc., R. Co., 42 La. Ann. 52; Shaft v. Phoenix Mut. L. Ins. Co., 67 N. Y. 544; Southern Pac. R. Co. v. Harrison, 73 Tex. 106.

"There is nothing in the thing itself [the petition], nor in the naming of it by its name alone in a statute, which demands that it should be verified." Shaft v. Phoenix Mut. L. Ins. Co., 67 N. Y. 547.

Under the Act of 1789 it was held in a few cases that verification was necessary. Ogden v. Baker, 13 N. J. L. 75, quoted with approval in Robinson v. Potter, 43 N. H. 194. *Contra*, Osgood v. Chicago, etc., R. Co., 6 Biss. (U. S.) 336. Verification was the general practice. So stated in Sweeney v. Coffin, 1 Dill. (U. S.) 75, and People v. Superior Ct., 34 Ill. 357. "The petition was

Sufficiency.— Even if it were essential, a verification by attorney¹ or agent² would suffice.

Waiver.— Nor could verification be a jurisdictional requisite and not subject to waiver.³

24. Notice of Application.— Notice of the application is frequently given⁴ and has been recommended as the better practice;⁵ but none is necessary under the Act of 1887–1888, nor was it required by the earlier removal acts;⁶ and a rule of practice

sworn to, which seems to be the method contemplated by the act." *Kennedy v. Woolfolk*, 1 Overt. (Tenn.) 454. In *Ogden v. Baker*, 13 N. J. L. 75, the court called for an affidavit or other verification of the facts stated in the petition, and referred, in order to show the practice, to the following cases, in all of which an affidavit accompanied the petition: *Respublica v. Cobbet*, 3 Dall. (Pa.) 467; *Rush v. Cobbet*, 2 Yeates (Pa.) 275; *Corp v. Vermilye*, 3 Johns. (N. Y.) 145; *North River Steam Boat Co. v. Hoffman*, 5 Johns. Ch. (N. Y.) 300; *Johnson v. Gelston*, 3 N. J. L. 245.

1. *Guinault v. Louisville*, etc., R. Co., 42 La. Ann. 52; *Wormser v. Dahlman*, 16 Blatchf. (U. S.) 319, 57 How. Pr. (N. Y.) 286.

2. *Vandevort v. Palmer*, 4 Duer (N. Y.) 678; *Rosenfield v. Adams Express Co.*, 21 La. Ann. 233, holding that verification by the superintendent of the petitioning corporation was sufficient.

3. The absence of verification of the petition would be at most only an informality which would be waived if not made a ground of objection in a motion to remand in the federal court. *Canal*, etc., *Streets R. Co. v. Hart*, 114 U. S. 660.

An objection is not tenable when raised for the first time in the state court of last resort on appeal from a judgment rendered after denial of a petition for removal. *Pacific R. Removal Cases*, 115 U. S. 17.

4. In the following cases notice was given: *La Page v. Day*, 74 Fed. Rep. 977; *New Orleans v. Sheppard*, 10 La. Ann. 268; *Butterfield v. Home Ins. Co.*, 14 Minn. 310; *Yulee v. Vose*, 99 U. S. 541, a case removed from *New York*; *Clark v. Opdyke*, 10 Hun (N. Y.) 383; *Cooke v. State Nat. Bank*, 1 Lans. (N. Y.) 495; *Disbrow v. Driggs*, (N. Y. Super. Ct. Spec. T.) 8 Abb. Pr. (N. Y.) 305, note, where the court said that many considerations "have led to the

adoption of the rule in this court not to grant an order of removal without notice or on order to show cause;" *Knickerbocker L. Ins. Co. v. Gorbach*, 70 Pa. St. 151; *Allegheny County v. Cleveland*, etc., R. Co., 51 Pa. St. 228; *Gillespie v. Jamieson*, 12 Phila. (Pa.) 176, 34 Leg. Int. (Pa.) 58; *Kulp v. Ricketts*, 5 Phila. (Pa.) 305; *Northern Pac. Co. v. McMullen*, 86 Wis. 503, where "copies of the petition, bond, and notice of motion for removal order were personally served upon the plaintiff's attorneys and their admission indorsed thereon."

For a Precedent of Notice see *Robb v. Parker*, 3 S. Car. 62, where the order to show cause is given in full.

5. "The more commendable practice would be to give notice of the application and in that manner avoid all possibility of future dissensions and misunderstandings." *Erismann v. Pidcock*, (Supm. Ct. Spec. T.) 62 How. Pr. (N. Y.) 329.

6. *Creagh v. Equitable L. Assur. Soc.*, 83 Fed. Rep. 850; *Chiatovich v. Hanchett*, 78 Fed. Rep. 193; *Noble v. Massachusetts Ben. Assoc.*, 48 Fed. Rep. 338; *Strasburger v. Beecher*, 44 Fed. Rep. 209; *Young v. Merchants' Ins. Co.*, 29 Fed. Rep. 274; *Stevens v. Richardson*, 9 Fed. Rep. 194 (Second Circuit), where the court said: "It has always been held in this court that no notice was necessary;" *Cooke v. Seligman*, 7 Fed. Rep. 267; *Wehl v. Wald*, 17 Blatchf. (U. S.) 346 (Second Circuit), where the court said: "If as matter of discretion a state court can or does require notice in any case of removal, such notice was dispensed with in this case by the state court; and the matter being one of practice, it is for the state court to regulate its own practice, and this court will not review such a question;" *Wormser v. Dahlman*, 16 Blatchf. (U. S.) 319, 57 How. Pr. (N. Y.) 286; *Fisk v. Union Pac. R. Co.*, 8 Blatchf. (U. S.) 243, 10 Abb. Pr. N. S.

in the state court requiring notice would not affect the validity of a removal without notice.¹ Hence irregularities in the notice of the petition for removal are immaterial.²

25. Who May File Petition. — The petition need not be filed by the petitioner in person; it may be presented by an attorney.³

An Infant Defendant, where the case is removable, may remove the suit by his regular guardian *ad litem* or next friend, who may file the petition and give the bond.⁴

26. Filing and Presentation to State Court — Necessity and Sufficiency. — It has been held in some of the Circuit Courts that the filing of a petition and bond in vacation with the clerk of the state court constitutes judicial knowledge or presentation, and is all that is required.⁵ On the other hand it has been held that filing a petition and bond with the clerk in vacation,⁶ or presenting

(N. Y.) 457; *Southern R. Co. v. Hudgins*, (Ga. 1899) 33 S. E. Rep. 442; *Ficklin v. Tarver*, 59 Ga. 263, 60 Ga. 373, holding that it was erroneous to refuse an application for removal on the ground that no notice thereof was given; *Sharp v. Gutcher*, 74 Ind. 363; *Erismann v. Pidcock*, (Supm. Ct. Spec. T.) 62 How. Pr. (N. Y.) 329, where the court said that in the Act of Congress, "by enumerating precisely the steps required to be taken and declaring the effect of a compliance to that extent with the provisions of the law, the obligation to give notice of the application is by implication excluded;" *Rosenfield v. Condict*, 44 Tex. 466.

In *Creagh v. Equitable L. Assur. Soc.*, 83 Fed. Rep. 850, the court said: "The right of removal is absolute in causes which may be removed, and questions as to the right of removal, and the sufficiency of the petition and bond in each case, can be determined only by the Circuit Court. Therefore notice to the plaintiff of proceedings prior to filing the transcript in the Circuit Court could avail nothing if given."

In *Bristol v. Chapman*, (Supm. Ct. Gen. T.) 34 How. Pr. (N. Y.) 140, it was held that in proceedings for removal under the Act of 1789 notice of the application was necessary. *Disapproved or distinguished* in *Chamberlain v. American Nat. L., etc., Co.*, 11 Hun (N. Y.) 372, an application under the Act of 1875. See also *Hazard v. Durant*, 9 R. I. 610. In *Rhode Island Horse Shoe Co. v. Goodenough Horse Shoe Co.*, (Supm. Ct. Spec. T.) 1 Abb. N. Cas. (N. Y.) 13, 52 How. Pr. (N. Y.) 111, the court was strongly of the opinion that notice was indispensable

to effect a removal by merely filing a petition and bond in the clerk's office without bringing them to the attention of the court.

1. *Chiatovich v. Hanchett*, 78 Fed. Rep. 194. See also *Ficklin v. Tarver*, 59 Ga. 264.

2. *Minnett v. Milwaukee, etc., R. Co.*, 3 Dill. (U. S.) 462.

Service of Defective Papers. — No objection to the application for removal can be predicated upon defects in the copies of the motion papers served on the plaintiff's attorney, where the defects do not exist in the original papers. *Chatham Nat. Bank v. Merchants' Nat. Bank*, 1 Hun (N. Y.) 702, 4 Thomp. & C. (N. Y.) 196.

3. *Cooke v. Seligman*, 7 Fed. Rep. 267; *Fisk v. Fisk*, 4 Mart. N. S. (La.) 676. See also *supra* p. 317, as to the signature to the petition.

4. *Woolridge v. McKenna*, 8 Fed. Rep. 675.

5. *Osgood v. Chicago, etc., R. Co.*, 6 Biss. (U. S.) 340; *Noble v. Massachusetts Ben. Assoc.*, 48 Fed. Rep. 338; *Brown v. Murray*, 43 Fed. Rep. 614; *North American L. & T. Co. v. Colonial, etc., Mortg. Co.*, 3 S. Dak. 590. See also *Waite v. Phoenix Ins. Co.*, 62 Fed. Rep. 769; *Wills v. Baltimore, etc., R. Co.*, 65 Fed. Rep. 532; *Amsden v. Norwich Union F. Ins. Soc.*, 44 Fed. Rep. 516. And see *Miller v. Tobin*, 18 Fed. Rep. 609, holding that the jurisdiction of the state court ceased upon the filing of the petition and bond in vacation and that proceedings taken before a referee prior to an order of removal, but after the filing of the petition and bond, were nugatory.

6. *Shedd v. Fuller*, 36 Fed. Rep. 609, *per Gresham, J.*; *Fox v. Southern R.*

them to a judge when his court is not in session,¹ does not effect a removal. The point has not been clearly adjudged by the federal Supreme Court.² All the cases agree that the safe and decorous practice is to present the petition and bond to the court for its inspection.³ Where the papers are called to the atten-

Co., 80 Fed. Rep. 945; *La Page v. Day*, 74 Fed. Rep. 977, where the court said: "Notwithstanding an occasional dictum to the contrary it is conceded by the defendant that the petition and bond must have been presented to the court, the mere filing in the clerk's office * * * being insufficient;" *Roberts v. Chicago, etc., R. Co.*, 45 Fed. Rep. 433, where the party seeking the removal filed the petition and bond therefor with the clerk, and a certified copy of the record was immediately given to the defendant and filed in the federal court, and *Nelson, J.*, said that "the court never had its attention called to the petition;" *Hall v. Chattanooga Agricultural Works*, 48 Fed. Rep. 601, where *Key, J.*, said: "The cause is not removed until the petition and bond shall be presented to the state court for acceptance;" *Roberts v. Chicago, etc., R. Co.*, 48 Minn. 530; *Howard v. Southern R. Co.*, 122 N. Car. 944. See also *State v. Coosaw Min. Co.*, 45 Fed. Rep. 804; *Probst v. Cowen*, 91 Fed. Rep. 931; *Texas, etc., R. Co. v. Bloom*, 85 Tex. 283; *Robinson v. Potter*, 43 N. H. 193. In *Scoutt v. Keck*, 73 Fed. Rep. 907, the point was left undecided. In *Kinne v. Lant*, 68 Fed. Rep. 438, *Swan, J.*, said: "It would seem, notwithstanding it has frequently been said in terms 'that the filing of the petition and bond for removal deprive the state court of jurisdiction,' that some further act would be necessary to work that result, and that it would not be successfully claimed that a party would be entitled to the removal of a cause by the mere deposit and filing of the papers with the clerk of the state court, without advising the court itself of his action, and asking at least for the usual order of removal. He could not, for example, sit silently by and permit the court to dispose of his cause without insisting upon the rights to which his compliance with the removal act would entitle him." In *Rhode Island Horse Shoe Co. v. Goodenough Horse Shoe Co.*, (Supm. Ct. Spec. T.) 1 Abb. N. Cas. (N. Y.) 13, 52 How. Pr. (N. Y.) 111, the court, after stating the contention of

counsel that a removal was effected by merely filing the petition and bond in the clerk's office, said: "In other words, that a plaintiff who brings a suit in our courts may, in complete ignorance of the removal, proceed to judgment and execution only to find himself a trespasser. If Congress meant this, the language should have been so precise and specific that no other construction could possibly be put upon it."

"The scheme of removal ordained by the Act of Congress is open and public. It is by petition. It contemplates a taking with leave, and not furtively by a sort of statutory larceny." *Carswell v. Schley*, 59 Ga. 19.

The Act of 1789 plainly contemplated that the petition was to be filed in term time. *Bell v. Lycoming Ins. Co.*, 3 Hun (N. Y.) 410, 6 Thomp. & C. (N. Y.) 54. See also *Redmond v. Russell*, 12 Johns. (N. Y.) 155.

1. *Williams v. Massachusetts Ben. Assoc.*, 47 Fed. Rep. 533, where the judge declined to act upon the petition and bond when so presented, and the petitioner then filed them in the clerk's office in apt time. On that state of facts the court held that it was not sufficient to present the petition and bond, when no court was in session, to a judge of the state court sitting in his office, and subsequently file the paper presented in the clerk's office. Compare *State v. Coosaw Min. Co.*, 45 Fed. Rep. 804.

2. See *Monroe v. Williamson*, 81 Fed. Rep. 977, wherein *Rogers, J.*, scrutinizes the language of the Supreme Court in *National Steamship Co. v. Tugman*, 106 U. S. 122; *Marshall v. Holmes*, 141 U. S. 595; and *Wabash Western R. Co. v. Brow*, 164 U. S. 279, and intimates that a presentation to the court is not deemed necessary.

In *Chicago, etc., R. Co. v. McKinley*, 99 U. S. 149, the court found it "unnecessary to consider whether the filing of the petition for removal in the clerk's office, the court not being in session, was sufficient of itself to effect a removal."

3. *Noble v. Massachusetts Ben. Volume XVIII.*

tion of the court in session, so that it may acquire knowledge of their contents, the presentment is sufficient.¹ If they are actually filed with the clerk it is not material that he fails to make a proper entry thereof on the minutes,² and it is immaterial whether they were marked "filed" before their presentation to the court.³ The petition and bond must be filed with the clerk of the court in the county of the venue, not with the clerk of the same court in another county.⁴

On Appeal or Error in State Court. — Unless the petition and bond filed in the court are called to its attention and action thereon is invoked, it cannot be assigned as error to the judgment on the merits that the court was deprived of jurisdiction.⁵

27. Amendment of Petition — a. IN STATE COURT. — If the

Assoc., 48 Fed. Rep. 338; *North American L. & T. Co. v. Colonial, etc., Mortg. Co.*, 3 S. Dak. 590.

1. *Monroe v. Williamson*, 81 Fed. Rep. 977; *Roberts v. Chicago, etc., R. Co.*, 48 Minn. 532.

A record showing a motion to strike the petition from the files on the ground of the insufficiency of the bond discloses a sufficient presentation to the state court for approval though no action was taken on the motion. *Probst v. Cowen*, 91 Fed. Rep. 931.

Called Up by Adverse Counsel. — If the petition for removal is overruled by the state court, though its attention was called to the petition by adverse counsel, the presentment is sufficient. *Chambers v. McDougal*, 42 Fed. Rep. 694.

2. *Wills v. Baltimore, etc., R. Co.*, 65 Fed. Rep. 532.

3. *Waite v. Phoenix Ins. Co.*, 62 Fed. Rep. 769.

4. *Noble v. Massachusetts Ben. Assoc.*, 48 Fed. Rep. 337.

5. *Home Ins. Co. v. Curtis*, 32 Mich. 403.

In *Roberts v. Chicago, etc., R. Co.*, 48 Minn. 521, the defendant filed a proper petition and bond for removal in the clerk's office, but they were not presented to the judge of the state court, nor was his attention called to the fact that they had been filed in the clerk's office, nor was any notice of the filing served on the plaintiff. A copy of the record was filed in the federal Circuit Court, and the cause was subsequently remanded to the state court. In the meanwhile the state court had proceeded in the cause and rendered judgment by default against the de-

fendant. On appeal it was held that this judgment was valid, as no removal had been effected.

Contra — Voluntary Abdication in Favor of Federal Court. — In *Merriam v. Dunbar*, 11 Neb. 208, the entire statement of the case consists of the following opinion of the court: "There can be no doubt of the right of the plaintiff in error to have the case removed to the Circuit Court of the United States for the proper district, upon the petition and bond set out in the record. And had he called the attention of the District Court to the said petition and bond, we are bound to presume that the court would have entered an order of removal, and would not have rendered a judgment in the case. Or, had he afterwards called the attention of the District Court to its erroneous judgment in the case, no doubt said court would have set it aside. And a strict adherence to the rules of practice in this court would justify the refusal of relief until the said plaintiff had first brought the matter to the attention of the district court and afforded it an opportunity to correct its own records. But as no substantial purpose would be served by a strict practice in this case, the judgment of the District Court will be reversed and the cause remanded with direction to the District Court to enter an order of removal, as prayed by the plaintiff in error, *nunc pro tunc*, but without costs in this court." Compare *Blair v. West Point Mfg. Co.*, 7 Neb. 156, where, under similar circumstances, it was held that the petitioner for removal "voluntarily submitted to the jurisdiction of the court" and was debarred from relief.

petition claims the right of removal on wrong grounds it may be amended or replaced by another within the time allowed for filing an original petition.¹ In like manner the want of a signature to the petition may be cured by amendment.² But the petitioner will not be permitted to amend his petition, after the time for filing an original petition has passed, so as to vary or enlarge the grounds of removal set up in the original petition.³

1. *Security Co. v. Pratt*, 65 Conn. 180; *Hammond v. Buchanan*, 68 Ga. 732; *Cuyler v. Smith*, 78 Ga. 662; *Hardwick v. Kean*, 95 Ky. 563; *Herdon v. Aetna Ins. Co.*, 108 N. Car. 649. See also *Kern v. Huidekoper*, 103 U. S. 487.

"There is, of course, no objection on principle to the amendment of a petition. There is no objection to the filing of a second petition, provided it is done within the time prescribed by Congress." *Brigham v. C. C. Thompson Lumber Co.*, 55 Fed. Rep. 884.

"There is no good reason why a defendant should not be allowed to amend his petition, if by inadvertence it is imperfect as first presented." *Per Justice Bradley*, in *Houser v. Clayton*, 3 Woods (U. S.) 273.

In *Mitchell v. Smale*, 140 U. S. 406, a petition was filed in the state court for removal on the ground of diverse citizenship, and afterwards an amended petition was filed within the time allowed for removal, stating an additional ground for removal, and it was held that the amendment was properly allowed. See also *Bradley v. Ohio River, etc.*, R. Co., 78 Fed. Rep. 388.

2. Removal Cases, 100 U. S. 471.

3. *Security Co. v. Pratt*, 65 Conn. 179, where the original petition for removal alleged that the plaintiff was a merely nominal party and that the whole controversy was between the petitioner and one of the other defendants. After the time for pleading had expired the petitioner filed an amendment taking the form of a new petition, wherein it was alleged that if the plaintiff had any interest in the suit he should be classed as a defendant and adverse to the petitioner, and that there was a separable controversy between the petitioner and the other defendant. Subsequently he filed a further amendment to the petition, alleging in substance that the suit was commenced at the suggestion and request of the other defendant, and for

her benefit and through collusion with her. *Baldwin, J.*, said: "In our opinion it would be contrary to the policy of the act to permit any substantial amendment of that character after the time for filing an original petition had gone by." *Brigham v. C. C. Thompson Lumber Co.*, 55 Fed. Rep. 881; *Carson, etc., Lumber Co. v. Holtzclaw*, 44 Fed. Rep. 785. * * * There are decisions of Circuit Courts in support of the view that petitions which show no case for a removal may be amended or replaced by another, at any subsequent time, by leave of the state court, and that such action will relate back to the time when the original petition was filed. *Freeman v. Butler*, 39 Fed. Rep. 6. Such a doctrine seems to us to contravene the theory on which the fact of removal depends." To the same effect see *Frisbie v. Chesapeake, etc., R. Co.*, 59 Fed. Rep. 369; *Kaeiser v. Illinois Cent. R. Co.*, 6 Fed. Rep. 1; *Wilcox, etc., Sewing Mach. Co. v. Follett*, 2 Flipp. (U. S.) 266.

Second Removal After Remand. — Where the cause is removed and on account of defective allegations of residence and citizenship remanded to the state court, it cannot be again removed on an amended petition if the time for original removal has expired. *Frisbie v. Chesapeake, etc., R. Co.*, 59 Fed. Rep. 369. See *Overman Wheel Co. v. Pope Mfg. Co.*, 46 Fed. Rep. 580.

Mere Formal Amendment. — In *Northern Pac. R. Co. v. McMullen*, 86 Wis. 504, the petitioner was permitted to amend the venue of his petition according to the truth, though the time for an original application for removal had expired.

After Reversal on Appeal with Reservation of Right to Amend. — In *Guinault v. Louisville, etc., R. Co.*, 42 La. Ann. 52, an order of removal was reversed on appeal because of a defective averment of citizenship, reserving to the petitioner the right to remedy the defect, and it was held that after remand

and such amendment, if allowed, will be inoperative.¹

6. IN FEDERAL COURT. — If upon the face of the petition and of the whole record of the state court sufficient grounds for removal are shown, the petition may be amended in the Circuit Court of the United States, with leave of that court, by stating more fully and distinctly the facts which support those grounds.²

to the trial court, and amendment of the petition, an order of removal was properly granted.

Question Res Judicata. — In *Herndon v. Aetna Ins. Co.*, 108 N. Car. 648, it was held that even if a proposed amendment might be allowable as against an objection that it was too late, it could not be allowed for the purpose of curing a defect adjudged fatal on appeal from an order refusing to grant the petition.

The Act of 1789 required the petition for removal to be filed at the time of entering appearance, and therefore an amendment not contemporaneous with appearance would be after the time for removal had expired. But in *Colcord v. Wall*, 2 Miles (Pa.) 459, an application for removal under that act, it was intimated that the petition was amendable by the insertion of an allegation of the citizenship of the plaintiff's assignor. And in *Field v. Blair*, (Supm. Ct. Gen. T.) 1 Code Rep. N. S. (N. Y.) 362, it was held that an allegation of citizenship might be amended before the entry of an order of removal. After the denial of his petition it was very doubtful if the petitioner could have a removal on an amended petition setting up additional grounds. *Savings Bank v. Benton*, 2 Met. (Ky.) 242.

1. *Security Co. v. Pratt*, 65 Conn. 179; *Brigham v. C. C. Thompson Lumber Co.*, 55 Fed. Rep. 883, *disapproving Freeman v. Butler*, 39 Fed. Rep. 4.

2. *Per Justice Gray*, in *Powers v. Chesapeake, etc.*, R. Co., 169 U. S. 101 [*affirming* 65 Fed. Rep. 129], where the petitioner was allowed to correct a clerical mistake in the name of one of the parties; *Carson v. Dunham*, 121 U. S. 421; *Martin v. Baltimore, etc.*, R. Co., 151 U. S. 690; *Johnson v. Christian*, 125 U. S. 643; *Ayers v. Watson*, 113 U. S. 594; *Robertson v. Scottish Union, etc., Ins. Co.*, 68 Fed. Rep. 173; *Stadleman v. White Line Towing Co.*, 92 Fed. Rep. 209, where the petition alleged that the controversy was between citizens of different states, but was defective in its allega-

tion of citizenship, and upon motion the court granted leave to amend within twenty days, the cause to be remanded if no amendment should be made; *Tremper v. Schwabacher*, 84 Fed. Rep. 413, allowing an amendment of an imperfect averment of citizenship; *Johnson v. F. C. Austin Mfg. Co.*, 76 Fed. Rep. 616; *Waite v. Phoenix Ins. Co.*, 62 Fed. Rep. 769.

In *Grace v. American Cent. Ins. Co.*, 109 U. S. 278 the petition for removal did not satisfactorily show the citizenship of the parties, but it averred that there was "a controversy therein between citizens of different states," alleged the residence of the parties, etc. The Supreme Court reversed the judgment for want of an affirmative showing of jurisdiction, but instead of directing a remand to the state court, "called attention to the insufficient showing as to the jurisdiction of the Circuit Court, so that, upon the return of the cause, the parties may take such further steps touching that matter as they may be advised."

Adding New Ground After Jurisdiction Acquired. — In *Carson v. Dunham*, 121 U. S. 421, the defendant's petition for removal on the ground of diverse citizenship was sufficient on its face, and the federal Circuit Court therefore acquired jurisdiction by the removal. The petition alleged a federal question as an additional ground for removal, but its statements in that behalf were mere conclusions of law, and were defective for that reason. In the Circuit Court the plaintiff filed an answer to the petition for removal, and therein denied the averment of diverse citizenship, and on the trial of that issue it was found in his favor and the cause was ordered to be remanded. But prior to the plaintiff's answer to the petition for the removal the defendant had filed an answer to the plaintiff's bill, and therein set up the facts upon which the allegation of a federal question in the petition for removal was based. It was held that this answer might fairly be treated as an amendment to the petition for removal, and

Doubtless by consent of both parties such amendment would be allowed in the Supreme Court or in the Circuit Court of Appeals;¹ but in the absence of consent, the judgment will be reversed, and upon remand to the Circuit Court that court may allow the amendment.² In one case the Circuit Court suspended an order to remand so as to give to the defendant a reasonable time to make the proper amendment of his petition for removal

that if the petition as thus amended had shown a federal question authorizing a removal the order of remand to the state court would not have been erroneous. But the order was affirmed solely because the facts stated did not constitute a federal question. The case was decided when the removal act of 1875 was in force. Under the Act of 1887-1888, which now regulates removals, the order of remand would not have been reviewable in any circumstances by the Supreme Court. See *infra*, l. 46. *a. Appealability of Orders and Review of Final Judgment.* But so far as it prescribes the proper practice for the Circuit Court the authority of the case remains unimpaired.

In *Cameron v. Hodges*, 127 U. S. 322, the court said: "There is no precedent known to us which authorizes an amendment to be made * * * in the Circuit Court by which grounds of jurisdiction may be made to appear which were not presented to the state court on the motion for removal." But the remark was made in a case which had not in fact been properly removed on any ground. See as having an indirect bearing on the point in discussion, *Rand v. Walker*, 117 U. S. 340.

In *Sherwood v. Newport News, etc., Co.*, 55 Fed. Rep. 1, the parties waived by stipulation the question whether a petition for removal sufficient on its face, on the ground that the plaintiff and defendant were citizens of different states, could be amended after the allegation of citizenship was disproved on a plea in abatement, so as to set up as ground of removal the alienage of the plaintiff and the citizenship of the defendant.

If an Amendment Is Clearly Unnecessary the court will not out of abundant caution require an amendment at a late stage of the case, after the pleadings are made up, and a jury selected and sworn to try the issue joined. *Robertson v. Scottish Union, etc., Ins. Co.*, 68 Fed. Rep. 177.

Striking Surplusage Out of Prayer. — In *Northern Pac. Terminal Co. v. Lowenberg*, 18 Fed. Rep. 339, the petitioners for removal on the ground of a separable controversy when the Act of 1875 was in force inadvertently prayed for removal "as to your petitioners," in conformity to a repealed statute. There was also a general prayer that the court would "make the order of removal required by law." In the Circuit Court the petitioner was allowed to amend by striking out the special prayer, although the court was of opinion that the amendment was not necessary.

1. See *Fitchburg R. Co. v. Nichols*, 85 Fed. Rep. 870; *Fletcher v. Peck*, 6 Cranch (U. S.) 127; *Kennedy v. Georgia Bank*, 8 How. (U. S.) 611; *U. S. v. Hopewell*, 51 Fed. Rep. 798; *Nashua, etc., R. Corp. v. Boston, etc., R. Corp.*, 61 Fed. Rep. 245; and generally article AMENDMENTS, vol. 1, p. 608.

2. *Johnson v. Christian*, 125 U. S. 643; *Continental Ins. Co. v. Rhoads*, 119 U. S. 237; *Thayer v. Life Assoc. of America*, 112 U. S. 720; *Grace v. American Cent. Ins. Co.*, 109 U. S. 278. See also *Robertson v. Cease*, 97 U. S. 646; *Fitchburg R. Co. v. Nichols*, 85 Fed. Rep. 870, which was a reversal of a judgment in a case originally brought in the Circuit Court, the allegation of citizenship being defective, and the court, suggesting that an amendment be allowed after remand, said: "It is not necessary to set aside the verdict, as the court below may allow an amendment, in accordance with the facts, to supply the defect, as well after verdict as before, provided it gives the adverse party an opportunity to meet the new issue thus raised, if that party is advised to do so. * * * Of course if an amendment is not made, or the issue made by it is not sustained, it will be the duty of the court below to dismiss the suit," or, rather, to remand it if it has been a removed case.

in the state court.¹ A petition for removal on the ground of prejudice or local influence, the application being made to the federal Circuit Court,² may be amended in that court in the same manner as a petition for removal on other grounds may be amended in the state court wherein it is filed.³ No amendment can be allowed where the jurisdictional facts are not already substantially stated in the petition for removal.⁴ This limitation of the power to allow amendments of the petition is based

1. *Overman Wheel Co. v. Pope Mfg. Co.*, 46 Fed. Rep. 580, and then "to take such action, upon notice to the plaintiff, in regard to the amended record in this court, as it may be advised."

2. See *supra*, p. 254.

3. *Bradley v. Ohio River, etc., R. Co.*, 78 Fed. Rep. 388. As to the privilege of amending petitions in the state court, and its limitations, see *supra*, p. 322 *et seq.*

4. *Martin v. Baltimore, etc., R. Co.*, 151 U. S. 691; *Jackson v. Allen*, 132 U. S. 27; *Crehore v. Ohio, etc., R. Co.*, 131 U. S. 240; *Graves v. Corbin*, 132 U. S. 571; *Cameron v. Hodges*, 127 U. S. 322; *Stadlemann v. White Line Towing Co.*, 92 Fed. Rep. 209; *Tremper v. Schwabacher*, 84 Fed. Rep. 414; *Caples v. Texas, etc., R. Co.*, 67 Fed. Rep. 12; *Waite v. Phoenix Ins. Co.*, 62 Fed. Rep. 770; *Overman Wheel Co. v. Pope Mfg. Co.*, 46 Fed. Rep. 580; *Campreille v. Balbach*, 46 Fed. Rep. 81; *Fitzgerald v. Missouri Pac. R. Co.*, 45 Fed. Rep. 814; *MacNaughton v. South Pac. Coast R. Co.*, 19 Fed. Rep. 881; *Hall v. Chattanooga Agricultural Works*, 48 Fed. Rep. 605. See also *Winnemans v. Edgington*, 27 Fed. Rep. 324, drawing an unsound distinction, however, between cases where the state court did not and those where it did order a removal. The foregoing cases must be considered as thoroughly overruling *Woolridge v. McKenna*, 8 Fed. Rep. 678. But it is doubtful if that case had any ground to stand on, since it cites for its authority *Barclay v. Levee Com'rs*, 1 Woods (U. S.) 254, which was not a case of an amendment of a petition for removal, but an amendment of the plaintiff's pleading, styled a "petition" in *Louisiana*. The confusion arose out of the fact that the removal was had upon the petition of the plaintiff. The same mistake in citing this case is made in *Black's Dillon on Removal of Causes*, § 181, p. 297.

In *Freeman v. Butler*, 39 Fed. Rep.

4. Judge Barr, speaking of the distinction between amendments allowable and those not allowable in the federal court, said: "The distinction is that where the facts, as stated, or which are in the record, if true, would give the Circuit Court jurisdiction, then the jurisdiction attaches, and then the amendments may be allowed, even to the extent of changing the grounds upon which the court is to continue its jurisdiction; but if the allegations in the petition of removal or the facts in the record as filed, if true, are not sufficient to transfer the case from the state court, then the federal court never had jurisdiction, and of course cannot take jurisdiction for the purpose of allowing an amendment." The court also remarked that in *Parker v. Overman*, 18 How. (U. S.) 139, decided in 1855, "it does not distinctly appear where the amendment was made—whether in the state or the federal court. Whatever may have been the fact in that case, it is evident the mode and manner of removing a case from the state courts to the United States courts had not then received the careful consideration they have had since that time." In *Glover v. Shepperd*, 15 Fed. Rep. 836, the court allowed an amendment to the petition so as to allege the citizenship instead of the residence of the party, citing as authority *Parker v. Overman*, 18 How. (U. S.) 137, above criticised. See also *Merchants' Nat. Bank v. Thompson*, 4 Fed. Rep. 878.

The Reason of the Rule was forcibly stated by Sawyer, J., in *MacNaughton v. South Pac. Coast R. Co.*, 19 Fed. Rep. 883, as follows: "It has been said by some judges that they saw no reason why an amendment showing the jurisdictional facts should not be allowed to the petition in the Circuit Court that is not equally applicable to the case of a bill originally filed in the Circuit Court which omits to properly state the jurisdictional facts

upon irrefragable reasons, and the consequence is that when leave to amend a jurisdictional defect in the petition for removal is denied by the federal Circuit Court the cause must be remanded

depending upon citizenship or otherwise. In my judgment, there is a very important distinction, that does not appear to have attracted the attention of the courts in the cases hitherto reported. Take the present case, for example. The record in the state court shows a case over which that court has jurisdiction, and it does not show a proper case for removal, or any case of which this court has jurisdiction. The Supreme Court has decided that whenever the proceedings in the state court have been perfected so as to show upon the record of that court that the petitioner is entitled to have his case removed, all jurisdiction of the state court ceases, and all subsequent proceedings in the case are illegal and void, even if it has refused to make any order for the removal, and that no order of removal is necessary. The jurisdiction of the state court is suspended, or superseded, the moment the proceedings showing a proper case for removal have been perfected. But the Supreme Court has also held the correlative proposition to be true, that the state court is not bound to renounce its jurisdiction, or let go its hold upon the case, until its record shows upon its face a proper case for removal, and that the jurisdiction of the United States court has attached; that the state court is authorized to proceed until its own record shows that it has lost jurisdiction and the jurisdiction of the Circuit Court has attached. Now in this case the record of the state court shows jurisdiction in that court and does not show jurisdiction in this court. The state court is therefore fully authorized to proceed to a final judgment, which will be valid. The record in this court does not show jurisdiction in this court, but if the petition be amended here, as desired, jurisdiction will be shown by the record in this court. Its jurisdiction appearing on the record, it can also regularly proceed to final judgment. Thus each court, proceeding on its own record, has jurisdiction, and the result may be two final valid judgments, entirely different, or even opposite judgments, with no error in the record upon which either judgment or decree could be reversed on writ of error or appeal.

* * * In my judgment, in such

cases as this the Circuit Court * * * should not permit a case to be thus embarrassed by an amendment to the petition, so as to show a proper case for removal and jurisdiction in the Circuit Court when these conditions are not shown in the record of the state court." See also, for similar views, *Endy v. Commercial F. Ins. Co.*, 24 Fed. Rep. 657; *Kaiser v. Illinois Cent. R. Co.*, 6 Fed. Rep. 4; *Crehore v. Ohio, etc., R. Co.*, 131 U. S. 240; *Walser v. Memphis, etc., R. Co.*, 19 Fed. Rep. 152. To the point that the jurisdiction of the state and of the federal court should rest on one record, the following remarks of the Supreme Court in *Burlington, etc., R. Co. v. Dunn*, 122 U. S. 516, are significant: "Even though the state court should refuse to stop proceedings, the petitioning party may enter a copy of the record of that court, as it stood on the filing of his petition, in the Circuit Court, and have the suit docketed there. If the Circuit Court errs in taking jurisdiction the other side may bring the decision here for review, after final judgment or decree, if the value of the matter in dispute is sufficient in amount. * * * In that case, the same as in the writ of error to the state court, the question will be decided on the face of the part of the record of the state court which ends with the petition for removal, for the Circuit Court can no more take a case until its jurisdiction is shown by the record than the state court can be required to let it go until the record shows that its jurisdiction has been lost. The questions in the two courts will be identical, and will depend on the same record, namely, that in the state court ending with the petition for removal. The record remaining in the state court will be the original; that in the Circuit Court an exact copy."

Rule Applied.—Thus where the petition for removal states the citizenship of the parties in the present tense, the defect cannot be cured by amendment. *Jackson v. Allen*, 132 U. S. 27; *Crehore v. Ohio, etc., R. Co.*, 131 U. S. 240; *Stevens v. Nichols*, 130 U. S. 230; *Endy v. Commercial F. Ins. Co.*, 24 Fed. Rep. 657; *MacNaughton v. South Pac. Coast R. Co.*, 19 Fed. Rep. 883.

So where the petition for removal

to the state court.¹ Leave to amend in the Circuit Court, in a case where an amendment is allowable, is discretionary with the court, and error cannot be assigned upon its ruling, so far as it constitutes an exercise of discretion.² But undoubtedly if the court exceeded its power in allowing an amendment the final judgment would be reversed on error, with directions to remand the cause to the state court.³

28. Effect of Petition as Appearance. — The petition for removal is not an appearance such as to constitute a waiver of objection to the jurisdiction by reason of insufficiency of the service of process;⁴ but it is a waiver of the privilege of being sued in a particular federal district.⁵

29. Withdrawal of Petition. — A party may withdraw his petition, at least before any action has been taken by the state court thereon and before a copy of the record has been transmitted to the federal court.⁶

30. Bond for Removal — a. NECESSITY OF BOND. — In order to procure a removal a bond is made necessary by the express terms of the removal act.⁷

b. FILING BOND — (1) Time for Filing. — The law supposes

sufficiently alleged the citizenship of the petitioner, but omitted to allege that of the plaintiff, it was held to be beyond the reach of amendment in the federal court. *Cameron v. Hodges*, 127 U. S. 322.

In *De Loy v. Traveler's Ins. Co.*, 59 Fed. Rep. 319, the case was removed on a record which did not show whether the defendant was a natural or an artificial person, but the petition for removal averred that the defendant was a citizen of Connecticut. The federal court refused to allow an amendment duly alleging citizenship as a corporation, and remanded the cause.

In *Camprelle v. Balbach*, 46 Fed. Rep. 81, the federal court refused to allow a petition for removal to be amended by inserting an allegation of the petitioner's nonresidence at the time when the suit was begun. See also *Freeman v. Butler*, 39 Fed. Rep. 1.

An averment of residence cannot be amended by alleging citizenship. *Grand Trunk R. Co. v. Twitchell*, 59 Fed. Rep. 729.

On Appeal or Error. — An amendment that could not have been allowed by the Circuit Court cannot be allowed in the Supreme Court on appeal or error in order to support the jurisdiction of the Circuit Court to render the judgment or decree. *Cameron v. Hodges*, 127 U. S. 322.

1. See *Endy v. Commercial F. Ins.*

Co., 24 Fed. Rep. 657, and the cases cited in the preceding note.

2. *Ayers v. Watson*, 137 U. S. 584. See generally article AMENDMENTS, vol. 1, p. 524.

3. *Johnson v. F. C. Austin Mfg. Co.*, 76 Fed. Rep. 617. See generally article AMENDMENTS, vol. 1, p. 531.

4. See *infra*, I. 39. *b. Motion to Quash Service of Process.*

5. See *supra*, pp. 180, 181.

6. *Wadleigh v. Standard L., etc., Ins. Co.*, 76 Wis. 439, decided on the general principle that a party may waive his right of removal, and holding that a denial of leave to withdraw the petition was appealable. The court said: "It is said that as a proper petition and bond had been filed, entitling the defendant to a removal, the rightful jurisdiction of the state court over the cause was at an end, and that no further proceedings could properly be had in that court, not even to grant the request that its jurisdiction should be restored. We cannot adopt that view of the law. Consent would surely restore the jurisdiction of the state court over the cause, and place it in the same position it would have stood if the defendant had omitted to exercise its right to remove it to a federal court." The motion to withdraw the petition for removal was made upon notice to the plaintiff's attorney.

7. Act of 1887-1888, 24 U. S. Stat. at

that the petition and bond will be filed together,¹ or rather that the bond will be filed within the time prescribed for removal.² There is no objection to filing the petition first; but it has no effect upon the jurisdiction of the state court until the bond is presented.³

(2) *Filing or Presentation.* — Whether it is sufficient to file the bond in the office of the clerk without actually presenting it to the judge will depend upon authorities cited in another part of this article.⁴

c. FORM OF BOND — *Joint or Several.* — It has been held that a joint bond is insufficient, and that the obligation must be several.⁵ But where, as in many of the states, joint contracts are

L. 552, c. 373; 25 U. S. Stat. at L. 433, c. 866.

1. *Per* Lowell, C. J., in *Maine v. Gilman*, 11 Fed. Rep. 216. See also *Bell v. Lycoming Ins. Co.*, 3 Hun (N. Y.) 410, 6 Thomp. & C. (N. Y.) 54.

The Act of 1887-1888 provides that the defendant "may make and file a petition * * * and shall make and file therewith a bond," etc.

The Act of 1789 was construed to mean that the security offered should be simultaneous with the filing of the petition. *Robinson v. Potter*, 43 N. H. 188, holding that an offer of security made in the petition for removal was not alone sufficient, and that where the security was not actually tendered until objection was made on the hearing of the petition it was too late. See also *Hazard v. Durant*, 9 R. I. 608; *Kirkpatrick v. Hopkins*, 2 Miles (Pa.) 277. Compare *Durand v. Hollins*, 3 Duer (N. Y.) 687.

2. *St. Anthony Falls Water-power Co. v. King Wrought-iron Bridge Co.*, 23 Minn. 186, holding that no removal was effected although the petition therefor was filed in time, the bond being filed too late; *Maine v. Gilman*, 11 Fed. Rep. 214. See also *Howard v. Southern R. Co.*, 122 N. Car. 947; *Wilcox, etc., Sewing Mach. Co. v. Follett*, 2 Flipp. (U. S.) 266.

3. *Austin v. Gagan*, 39 Fed. Rep. 626, where the court said: "The filing of a bond is required by the same language as the filing of a petition, and it must receive the same construction with reference to the bond as with reference to the petition." Thus, in *Maine v. Gilman*, 11 Fed. Rep. 214, the defendant filed his petition for removal, but filed no bond. On a subsequent day the plaintiff amended his complaint by reducing his *ad damnum* be-

low the jurisdiction of the federal court, whereupon the defendant at a later hour on the same day filed his bond for removal, which was approved. It was held that the bond was filed too late, and that the cause was not removed.

4. See *supra*, p. 320, as to filing and presentation of petition for removal.

"The security required must be actually produced and presented for the approval of the court." *St. Anthony Falls Water-power Co. v. King Wrought-iron Bridge Co.*, 23 Minn. 188. In *Rhode Island Horse Shoe Co. v. Goodenough Horse Shoe Co.*, (Supm. Ct. Spec. T.) 1 Abb. N. Cas. (N. Y.) 11, 52 How. Pr. (N. Y.) 111, the filing of the petition and bond in the office of the clerk, during the session of the court, with notice thereof to the plaintiff's attorney, was held insufficient to effect a removal, so as to invalidate a subsequent judgment by default. See also *Grow v. Wiman*, (City Ct. Spec. T.) 3 N. Y. St. Rep. 281.

5. *Hazard v. Durant*, 9 R. I. 608, a petition for removal under the Act of 1789, where the court said: "If the law requires a bond for the security of the plaintiffs they are entitled to have that bond in the form best adapted to effect the end proposed. They are entitled to have each surety bound in law. A bond which may subject them to a chancery lawsuit certainly cannot be said to meet this requisition." It was held in *Roberts v. Canington*, 2 Hall (N. Y.) 649, that a joint bond was insufficient under the Act of 1789; but the court erred in declaring that "the plaintiff is entitled, by the express words of the act, to a joint and several bond from the defendant," as the act did not require a bond, but only "good and sufficient surety."

made joint and several by statute,¹ objection to a joint bond would probably not be tenable. Besides, the defect may be waived.² The court may doubtless require that the bond shall be joint and several.³

Bond with Penalty. — The removal act neither prescribes nor prohibits a bond with a penalty, and an instrument in that form is commonly used.⁴ But a penal bond with the amount left blank has been pronounced fatally defective.⁵

To Whom Payable. — The bond is given exclusively for the benefit of the plaintiff in the action, and his name should be inserted therein as obligee.⁶

d. CONDITION OF BOND. — The statute requires a bond for "entering in such Circuit Court, on the first day of its then next session, a copy of the record in such suit, and for paying all costs that may be awarded by the said Circuit Court if said court shall hold that such suit was wrongfully or improperly removed thereto, and also for their appearing and entering special bail in such suit if special bail was originally requisite therein."⁷ The bond need not be drawn literally in the words of the statute; it is sufficient if it expresses in substance the required obligation.⁸ A bond omitting any of the essential conditions may be rejected by the state court,⁹ but a perfect bond is not always regarded as

1. See article PARTIES TO ACTIONS, vol. 15, p. 744.

2. *Hazard v. Durant*, 9 R. I. 608.

3. So stated in *Mix v. Andes Ins. Co.*, 74 N. Y. 57.

4. See Removal Cases, 100 U. S. 463, where the bond is set forth in full; *Miller v. Finn*, 1 Neb. 270; *Blanchard v. Dwight*, 12 Wend. (N. Y.) 192; *Farmers' L. & T. Co. v. Lake St. El. R. Co.*, 173 Ill. 439; and cases cited *infra*, p. 331, note 3.

Where the obligation of the bond conforms to the provisions of the statute, and the state court accepts it, the cause will not be remanded because the bond contains a penalty if the latter is sufficient to cover all the costs likely to accrue. *Com. v. Louisville, Bridge Co.*, 42 Fed. Rep. 241, where the court said: "It may be that a bond without a penalty would be good under the statute."

5. *Burdick v. Hale*, 7 Biss. (U. S.) 96; *Austin v. Gagan*, 39 Fed. Rep. 628, where the bond "contained no amounts of money, an unfilled blank having been left, so that it did not appear for what money the obligors were bound." Compare *Johnson v. F. C. Austin Mfg. Co.*, 76 Fed. Rep. 616, holding that if the state court accepts such a bond and orders a removal, the cause will

not be remanded on account of the defect.

6. *Grow v. Wiman*, (City Ct. Spec. T.) 3 N. Y. St. Rep. 281, holding that a bond made payable to the "people of the state of New York" was defective, but that the defect might be waived. See also *Harris v. Delaware, etc., R. Co.*, 18 Fed. Rep. 833.

7. Act of 1887-1888, 24 U. S. Stat. at L. 554, c. 373; 25 U. S. Stat. at L. 435, c. 866.

8. Thus the Act of 1887-1888 requires a bond for entering a copy of the record in the circuit court "on the first day of its then next session." Under a former removal act providing for a bond to enter the record on the first day of the then next session after the "filing" of the petition, it was held that the court properly approved a bond conditioned to enter the record on the first day of the session next after the "granting" of the petition, when the same session would answer to both the statute and the bond. *Ellis v. Atlantic, etc., R. Co.*, 134 Mass. 338.

9. *Miller v. Finn*, 1 Neb. 270; *Henen v. Baltimore, etc., R. Co.*, 17 W. Va. 898, holding it erroneous to accept such a bond. See also *Probst v. Cowen*, 91 Fed. Rep. 930. But compare cases cited

a jurisdictional requisite.¹

e. AMOUNT OF BOND. — The Act of Congress does not fix the amount of the bond.² In practice it is usually not less than two hundred and fifty dollars.³

infra, I. 30. *i. Defects Amended, Disregarded, or Waived.*

A Precedent of the condition of a bond under the Act of 1875 will be found in *Ellis v. Atlantic*, etc., R. Co., 134 Mass. 339, where it was held sufficient.

Condition for Filing Copy. — A bond omitting the condition to file a copy of the record in the federal court may properly be rejected. *Combs v. Nelson*, 91 Ind. 123.

Where the condition of the bond provided for the entry of appearance by the defendant in the United States District Court instead of the entry of the record in the United States Circuit Court, the bond was held to be fatally defective. *Hayes v. Todd*, 34 Fla. 233.

A bond conditioned that the obligor therein, who was not a party to the suit, should enter a copy of the record, etc., was held utterly insufficient in *Clippinger v. Missouri Valley L. Ins. Co.*, 26 Ohio St. 404.

If a bond in due form is filed, but the time mentioned in the condition therein for filing copies of the record in the federal court has elapsed when the application for removal is presented to the court for consideration, the application will be dismissed. *Clippinger v. Missouri Valley L. Ins. Co.*, 26 Ohio St. 404.

Condition for Appearing. — In *Bell v. Bell*, 3 W. Va. 183, an attempted removal under the Act of 1789, by a nonresident who had been sued by foreign attachment, the bond was held to be fatally defective in omitting the condition for the defendant's "appearing" in the federal court.

A clause in the condition of the bond providing that the defendant shall "do or cause to be done such other and appropriate acts," etc., is a sufficient compliance with the requirement that the bond shall be one for appearing in the federal court. *Cooke v. Seligman*, 7 Fed. Rep. 269.

Condition for Payment of Costs. — A bond containing no provision for payment of costs may be rejected. *Webber v. Bishop*, 13 Fed. Rep. 49; *Torrey v. Grant Locomotive Works*, 14 Blatchf. (U. S.) 269; *Harrold v. Ar-*

lington, 64 Tex. 233; *New Orleans*, etc., R. Co. *v. Rabasse*, 44 La. Ann. 180; *Sheldrick v. Cockcroft*, 27 Fed. Rep. 579. Compare cases cited *infra*, I. 30. *i. Defects Amended, Disregarded, or Waived.*

As to Special Bail. — If there was no special bail in the case the condition in the bond need not mention it. *Removal Cases*, 100 U. S. 472; *Burck v. Taylor*, 39 Fed. Rep. 581; *Erisman v. Pidcock*, (Supm. Ct. Spec. T.) 62 How. Pr. 7 N. Y. 330; *Hayes v. Todd*, 34 Fla. 238.

Special bail need not be put in in the state court, although it is aailable action. *Suydam v. Smith*, 1 Den. (N. Y.) 265.

1. See *infra*, I. 30. *i. Defects Amended, Disregarded, or Waived.*

2. In *Nye v. Northern Cent. R. Co.*, 24 Hun (N. Y.) 555, the court refused to reverse an order of removal where the bond accepted by the court "was not insignificant in amount."

3. The penalty of the bond was two hundred and fifty dollars in *Bondurant v. Watson*, 103 U. S. 284; *Herndon v. Aetna Ins. Co.*, 107 N. Car. 195; and *McNeal Pipe, etc., Co. v. Howland*, 99 N. Car. 204. It was five hundred dollars in *Texas*, etc., R. Co. *v. McAllister*, 59 Tex. 353; *Henen v. Baltimore*, etc., R. Co., 17 W. Va. 886; *Ellis v. Atlantic*, etc., R. Co., 134 Mass. 339; *Henry v. Louisville*, etc., R. Co., 91 Ala. 585; *Shepard v. Conrad*, (Supm. Ct.) 4 Abb. N. Cas. (N. Y.) 254, where the plaintiff claimed forty-eight thousand dollars; and *Com. v. Louisville Bridge Co.*, 42 Fed. Rep. 241. It was one thousand dollars in *Weeks v. Billings*, 55 N. H. 372; *Removal Cases*, 100 U. S. 463; *Clippinger v. Missouri Valley L. Ins. Co.*, 26 Ohio St. 406; *Baltimore*, etc., R. Co. *v. Cary*, 28 Ohio St. 209; *Chambers v. McDougal*, 42 Fed. Rep. 697; *Robb v. Parker*, 3 S. Car. 62; *Schwab v. Coots*, 48 Mich. 117; and *Miller v. Finn*, 1 Neb. 270, in which latter case, however, the amount was held to be inadequate. It was five thousand dollars in *Hatch v. Chicago*, etc., R. Co., 6 Blatchf. (U. S.) 117, and *Mahone v. Manchester*, etc., R. Corp., 11 Mass. 73. A bond with a penalty

f. EXECUTION OF BOND. — The state court will probably refuse to accept a bond not signed by the petitioner,¹ but the federal court may decline to remand the cause on account of the defect,² and will decline if no objection was made in the state

of two thousand dollars was held amply sufficient in amount in *Taylor v. Shew*, 54 N. Y. 77, where the plaintiff sued for less than six hundred dollars. In *Blanchard v. Dwight*, 12 Wend. (N. Y.) 193, it was held that a bond in the penal sum of one thousand dollars was amply sufficient where the defendant had not been held to bail, though the plaintiff laid his damages at fourteen thousand dollars, but the court said it would have been insufficient if the defendant had been held to bail for the amount demanded. In *Dart v. Walker*, (C. Pl. Gen. T.) 43 How. Pr. (N. Y.) 29, an order of removal on condition of filing a bond in the penalty of twenty thousand dollars, with sureties, was affirmed on appeal.

"As a rule of practice I think the court should not approve any sureties unless the amount of the bond is equal to the sum in which the defendant in the action has been held to bail, if bail has been required in the state court." *Per Leonard, P. J.*, in *Jones v. Seward*, 41 Barb. (N. Y.) 273.

In considering an application under the Act of 1789, the court said: "The amount of the surety to be taken is a matter in the discretion of the court to which the petition is presented. It could never be reviewed here [on appeal] unless perhaps in some extraordinary case. In the present instance the surety was a little less than the claim. As a general rule, it would seem just that it should equal the claim and accrued costs." *Bell v. Lycoming Ins. Co.*, 3 Hun (N. Y.) 409, 6 Thomp. & C. (N. Y.) 54.

1. If the bond is not signed by the petitioner for removal, but only by persons not parties to the record, the state court may decline to grant the removal. *Farmers' L. & T. Co. v. Lake St. El. R. Co.*, 173 Ill. 439; *Weed Sewing Mach. Co. v. Smith*, 71 Ill. 204; *Cleveland, etc., R. Co. v. Monaghan*, 140 Ill. 474.

The bond may be signed by attorney. See *Removal Cases*, 100 U. S. 463.

The Bond of a Corporation should be executed by some person authorized to

represent the corporation. See *Mathone v. Manchester, etc., R. Corp.*, 111 Mass. 72. In *Cleveland, etc., R. Co. v. Doerr*, 41 Ill. App. 536, the bond was disapproved because it "was not executed by the president of defendant corporation, nor by one shown to possess authority to execute such instrument for it or on its behalf."

Under the Act of 1879 a bond was not specifically required, and the failure of the petitioner to execute a bond signed by satisfactory sureties was immaterial. *Brown v. Crippin*, 4 Hen. & M. (Va.) 173; *Vandevoort v. Palmer*, 4 Duer (N. Y.) 677.

2. The cause will not be remanded because the bond was not signed by the party, but by another person named therein as principal and by a different person as surety. *Public Grain, etc., Exch. v. Western Union Tel. Co.*, 16 Fed. Rep. 289, 11 Biss. (U. S.) 568. See also *Stevens v. Richardson*, 9 Fed. Rep. 191, 20 Blatchf. (U. S.) 53.

In *People's Bank v. Ætna Ins. Co.*, 53 Fed. Rep. 161, a motion to remand, all that appears on this point is in the following extract from the opinion of the court: "An objection was raised at the hearing to the bond. It is not signed by the defendant, but it is executed by two responsible persons. The Act of Congress says that the party desiring removal must, with his petition, to this end, make and file therewith a bond with good and sufficient surety for his or their entering into the Circuit Court, on the first day of its then next session, a copy of the record, etc. *Strictissimi juris*, if a party make a bond, it should be his bond. But the condition of this bond has already been complied with. It had ample surety. The statute is substantially complied with. The motion to remand is refused."

Acknowledgement. — "The want of acknowledgment or proof of the execution of the bond was a matter of practice for the state court to pass upon, and it will not be reviewed by this court after the state court has accepted the bond." *Cooke v. Seligman*, 7 Fed. Rep. 269.

court.¹ The same observations apply to irregularities in the execution of the bond by sureties.²

g. NUMBER, QUALIFICATION, AND JUSTIFICATION OF SURETIES — Number. — It is not necessary that two persons should sign the bond as sureties.³ The statutory requirement of "good and sufficient surety" is satisfied if there is one surety able to respond to the condition of the bond.⁴

Qualification. — Hence it is error to reject the bond on the ground that one of the sureties is an attorney of the court, and therefore disqualified by the state law and practice.⁵ Moreover, it is competent for the state court to accept as surety an attorney at law, notwithstanding a rule of practice in that court disqualifying him as surety.⁶ If it is necessary that the surety shall be a resident of the state⁷ it is not necessary to sustain the federal jurisdiction that his residence shall be stated in the record.⁸

Justification. — It is a common practice for the sureties to justify,⁹

1. Removal Cases, 100 U. S. 471.

2. Where some of the defendants executed the bond as principals, and other defendants signed as sureties, and the surety's signature was unauthorized, but the state court made no objection to the bond or the surety, and the pecuniary sufficiency of the parties to the bond was unquestionable, the federal court refused to remand the cause. *Chambers v. McDougal*, 42 Fed. Rep. 694.

3. Removal Cases, 100 U. S. 472.

4. Removal Cases, 100 U. S. 472.

A bond with a single surety, and without a seal to his signature, is defective, but may be cured by amendment. *Overman Wheel Co. v. Pope Mfg. Co.*, 46 Fed. Rep. 577.

The Court May Require More than One Surety if one is insufficient. *Mix v. Andes Ins. Co.*, 74 N. Y. 57.

One of the Defendants a Surety. — A merely nominal defendant who need not and does not join in the petition for removal "is as good a surety as anybody else worth the amount of the bond." *Steiner v. Mathewson*, 77 Ga. 657.

5. Removal Cases, 100 U. S. 472.

6. *Probst v. Cowen*, 91 Fed. Rep. 930, where the court said: "It is competent for a court to change or vacate its rules of practice, or to except a particular case from the operation thereof," to which point see generally article RULES OF COURT:

7. Whether a surety should be a resident of the state was left undecided in *Probst v. Cowen*, 91 Fed. Rep. 929. In some of the states, at least, the

practice would require a resident surety. See *Potter v. Richardson*, 1 Mart. N. S. (La.) 276.

8. *Probst v. Cowen*, 91 Fed. Rep. 930.

9. In Removal Cases, 100 U. S. 464, it appears that one of the sureties made affidavit that he was a citizen of the state and worth double the amount of the bond over and above all debts and had property subject to execution. In *Taylor v. Shew*, 54 N. Y. 77, the sureties justified by affidavits annexed to the bond that they were each worth double the amount of the bond over and above all debts and responsibilities, and that one was a householder and the other a freeholder within the state, and both of them residents. In *Schwab v. Coots*, 48 Mich. 117, an affidavit of the surety's responsibility was attached to the bond. The sureties justified in *Nye v. Northern Cent. R. Co.*, 24 Hun (N. Y.) 559; *Herndon v. Etna Ins. Co.*, 107 N. Car. 195; *Howard v. Southern R. Co.*, 122 N. Car. 945.

The Court May Require the sureties to justify. *Mix v. Andes Ins. Co.*, 74 N. Y. 57.

Sufficiency of Justification. — An affidavit by a surety setting forth that "he is worth the sum of over two thousand dollars over and above all his exemptions of every kind, and over and above all his liabilities," was held insufficient because "it does not state that he has any property subject to execution in the district or state, or that he is a resident of the state." *Cleveland, etc., R. Co. v. Monaghan*, 140 Ill. 484.

and a failure to do so may embarrass the applicant for removal so far as the state court has power to exercise a discretion.¹ It is the better opinion, however, that the sureties are not bound to justify unless the plaintiff objects to their sufficiency and a rule to justify is laid upon them.²

h. DETERMINATION OF VALIDITY AND SUFFICIENCY OF BOND — **Power of Court.** — The statute imposes upon the state court precisely the same duty to accept the bond as to accept the petition,³ and perhaps the court has the same power to pass upon the validity of the former as of the latter, subject to the same qualifications.⁴ It has not been finally determined by the federal Supreme Court whether the state court has any authority to pass upon the sufficiency of the bond filed by the petitioner, as respects either its amount or the sufficiency of the surety, and to refuse to accept it, and to suspend the exercise of its jurisdiction if the bond should be found to be in fact insufficient.⁵ But the tendency of the cases holding that all questions of fact must be determined in the federal Circuit Court⁶ renders it probable that the state court will be held to have no such authority and that if the bond is good in form its sufficiency can be finally passed upon only in the federal court.⁷ Nevertheless, the state courts claim and constantly exercise the power.⁸

1. In *Darst v. Bates*, 51 Ill. 449, the court said: "We fail to find that there was any justification of the sureties offered on the bonds which were offered in the court below on the application for removal. The court below was not required to take judicial notice of the sufficiency of the sureties as to solvency, responsibility, residence, etc. But if such was the duty of the court we would presume that in the exercise of that duty he knew the pecuniary condition of the bail and regarded them as insufficient." In *Miller v. Finn*, 1 Neb. 270, an application for removal made to the Supreme Court, one of the reasons assigned by that court for dismissing the petition was that "the sureties have not justified, and we cannot know that they are sufficient." In *Cleveland, etc., R. Co. v. Monaghan*, 140 Ill. 484, it was held that the bond was properly rejected, "there being no evidence as to the responsibility of the makers," where objection to the bond was taken for that reason. See also *Cleveland, etc., R. Co. v. Doerr*, 41 Ill. App. 536.

Waiver of Objection. — An objection that no evidence was given that the sureties were good and sufficient is waived if not made in the state court at the time of the application for re-

moval. *Bates v. Baltimore, etc., R. Co.*, 39 Ohio St. 157.

2. *Empire Transp. Co. v. Richards*, 88 Ill. 406.

3. Act of 1887-1888, 24 U. S. Stat. at L. 554, c. 373; 25 U. S. Stat. at L. 435, c. 866, which provides that "it shall then be the duty of the state court to accept said petition and bond."

4. As to the jurisdiction to pass upon the petition, see *infra*, I. 31. *c. Determination of Sufficiency of Application.*

5. *Roberts v. Chicago, etc., R. Co.*, 48 Minn. 530. In *Removal Cases*, 100 U. S. 457, the court declined to pass upon the question, it being found to be unnecessary.

6. See *infra*, I. 31. *d. Determination of Questions of Fact.*

7. *Roberts v. Chicago, etc., R. Co.*, 48 Minn. 530.

8. *McWhinney v. Brinker*, 64 Ind. 360; *Jones v. Seward*, 41 Barb. (N. Y.) 274; *Henen v. Baltimore, etc., R. Co.*, 17 W. Va. 895. See also *Terre Haute, etc., R. Co. v. Abend*, 9 Ill. App. 309.

"There can be no doubt it is necessary for some court to either fix or approve the bond and its surety before it can be held conclusively sufficient." *Per Campbell, J.*, in *Schwab v. Coots*, 48 Mich. 117. Thus in *Continental L. Ins. Co. v. Kessler*, 84 Ind. 312, objec-

Arbitrary Rejection. — The court cannot arbitrarily reject a bond tendered, and without specifying any cause¹ or giving to the party an opportunity to correct it in any respect in which it is pronounced insufficient.²

It is the Province of the Court and Not of the Clerk to determine all questions relating to the bond;³ but in the ordinary course of procedure the matter is sometimes referred by the court to the clerk or master.⁴

On Appeal in the state courts the sufficiency of the sureties will be presumed if the record shows no objection,⁵ and in any event the exercise of discretion will not be disturbed unless in a clear case of abuse.⁶

On a Motion to Remand in the federal court that court will not enter into any inquiry as to the sufficiency of sureties on a bond accepted by the state court⁷ or rejected by it without objection to the sureties.⁸

i. DEFECTS AMENDED, DISREGARDED, OR WAIVED — In State Court. — A defective bond may be cured by filing a sufficient

tion was made to the removal "on the grounds that the bond had been materially altered since it was signed by some of the sureties."

In *Taylor v. Shew*, 54 N. Y. 78, the court said: "The judge had the right to be satisfied that the sureties were 'good and sufficient,' and if he had any doubt that they were he could have had them brought before him to be examined under oath, or he could have satisfied himself on that point in any of the ways known to the practice in the state courts."

1. *Mix v. Andes Ins. Co.*, 74 N. Y. 57, where the court said: "An orderly administration of justice requires that the defects should be pointed out so that they could be remedied;" *Osgood v. Chicago*, etc., R. Co., 6 Biss. (U. S.) 335; *Grow v. Wiman*, (City Ct. Spec. T.) 3 N. Y. St. Rep. 281. See also *Removal Cases*, 100 U. S. 472.

If a state court declines to accept a sufficient bond and erroneously decides it to be insufficient, the removal is effected nevertheless, and its jurisdiction ceases. *Noble v. Massachusetts Ben. Assoc.*, 48 Fed. Rep. 338.

2. *Taylor v. Shew*, 54 N. Y. 78.

3. *Southern Pac. R. Co. v. Harrison*, 73 Tex. 107; *Hayes v. Todd*, 34 Fla. 242; *Rhode Island Horse Shoe Co. v. Goodenough Horse Shoe Co.*, (Supm. Ct. Spec. T.) 1 Abb. N. Cas. (N. Y.) 13, 52 How. Pr. (N. Y.) 111.

4. In *Suydam v. Smith*, 1 Den. (N. Y.) 265, the court said that to ascertain

the sufficiency of the sureties "there must be a reference to the clerk."

5. *Terre Haute*, etc., R. Co. v. *Abend*, 9 Ill. App. 308; *Empire Transp. Co. v. Richards*, 88 Ill. 406; *Stix v. Keith*, 90 Ala. 121; *Southern Pac. R. Co. v. Harrison*, 73 Tex. 107; *Mix v. Andes Ins. Co.*, 74 N. Y. 57; *Taylor v. Shew*, 54 N. Y. 75; *Chamberlain v. American Nat. L.*, etc., Co., 11 Hun (N. Y.) 374; *Winslow v. Collins*, 110 N. Car. 121; *Henen v. Baltimore*, etc., R. Co., 17 W. Va. 898. See *infra*, I. 44. *f. Presumptions on Appeal.*

6. *Fitz v. Hayden*, 4 Mart. N. S. (La.) 653.

7. *Van Allen v. Atchison*, etc., R. Co., 1 McCrary (U. S.) 598, 3 Fed. Rep. 545; *Dennis v. Alachua County*, 3 Woods (U. S.) 683, where the court declined to consider affidavits filed in the federal court attacking the sufficiency of the parties to the bond. See also *New York Constr. Co. v. Simon*, 53 Fed. Rep. 3.

Presumption of Acceptance. — If the record on removal shows no action of the state court on the petition and bond, it will be presumed that the bond was accepted. *Chattanooga*, etc., R. Co. v. *Cincinnati*, etc., R. Co., 44 Fed. Rep. 457.

8. *Removal Cases*, 100 U. S. 472.

"As no objection was made specifically to the bond which was offered, we are to presume that the security was satisfactory, and that the court refused to withhold further proceedings because

bond before the time for removal has expired,¹ but not afterwards,² even though the court make a *nunc pro tunc* order giving a retroactive effect to the new bond;³ and the court is not bound to stay proceedings to enable the petitioner to amend his bond.⁴

In Federal Court.—In some of the federal courts the filing of a bond in substantial compliance with the statute is deemed a condition precedent to the right of removal.⁵ Others hold that if the state court has accepted the bond and ordered the removal, and the record has been filed in the federal court, the removal is complete, and the cause will be retained, though an amendment may be necessary to make the bond comply with the requisites of the statute.⁶ Defects may also be waived.⁷

a case for removal had not been made." *Yulee v. Vose*, 99 U. S. 545.

1. *Harrold v. Arrington*, 64 Tex. 233; *Chamberlain v. American Nat. L., etc., Co.*, 11 Hun (N. Y.) 374, where the bond was defective for want of a seal; *Deford v. Mehaffy*, 13 Fed. Rep. 481. See also *supra*, p. 323, as to amendments of the petition for removal.

2. *Wilcox, etc., Sewing Mach. Co. v. Follett*, 2 Flipp. (U. S.) 266. See also *supra*, p. 323.

Under the Act of 1789, which required a petition and bond to be filed at the time of entering appearance, if the bond filed with the petition for removal was insufficient the defect could not be remedied by subsequently filing a new and sufficient bond. *Hazard v. Durant*, 9 R. I. 608.

3. *Austin v. Gagan*, 39 Fed. Rep. 626. *Compare Grow v. Wiman*, (City Ct. Spec. T.) 3 N. Y. St. Rep. 283; *Deford v. Mehaffy*, 13 Fed. Rep. 481.

4. *Harrold v. Arrington*, 64 Tex. 233. This case was decided under the Act of 1875, but circumstances might arise so as to make it applicable, if sound, under the Act of 1887-1888; for instance, where the petitioner should insist that the court postpone its ruling on a demurrer or plea in abatement which would terminate the time for removal. See also *Mabley v. Judge*, 41 Mich. 34.

5. *Torrey v. Grant Locomotive Works*, 14 Blatchf. (U. S.) 269; *Webber v. Bishop*, 13 Fed. Rep. 49; *Sheldrick v. Cockcroft*, 27 Fed. Rep. 579. See also *Hayes v. Todd*, 34 Fla. 240; *McMundy v. Connecticut Gen. L. Ins. Co.*, 9 Chicago Leg. N. 324.

6. *Johnson v. F. C. Austin Mfg. Co.*, 76 Fed. Rep. 616, where the bond contained no penal sum; *Dennis v. Alachua County*, 3 Woods (U. S.) 688;

Baker v. Peterson, 4 Dill. (U. S.) 562, note; *Deford v. Mehaffy*, 13 Fed. Rep. 481; *MacNaughton v. South Pac. Coast R. Co.*, 19 Fed. Rep. 883; *Harris v. Delaware, etc., R. Co.*, 18 Fed. Rep. 833, where by mistake the bond was made payable not to the plaintiff, but to a stranger to the record, and on motion the substitution of a new bond was allowed. See also *Dunn v. National Steamship Co.*, 12 N. Y. Wkly. Dig. 190.

"We are of opinion that the jurisdiction of this court in a case removed from a state court does not depend upon the form, nor even upon the substance, of the bond which is presented to and approved by the state court before removal. If the statute in other respects is complied with, and a copy of the record is filed here in accordance with the statute, the removal is complete." *Per McCrary, J.*, in *Beede v. Cheney*, 5 Fed. Rep. 388.

In *Coburn v. Cedar Valley Land, etc., Co.*, 25 Fed. Rep. 793, where a motion to remand was denied, the court said: "The complainants present a motion to remand * * * because the bond is not conditioned to well and truly pay all costs that may be awarded by the Circuit Court of the United States if said court shall hold that said suit was wrongfully or improperly removed thereto. * * * The manner of removal, the amount or form of the bond, is not matter of substance affecting the jurisdiction of this court, and may be waived, or, if insisted on, may be cured by amendment."

7. Where after removal of the cause on a defective bond, the plaintiff accepted a plea of the defendant entitled in the federal court, it was held that he thereby waived the defect in the

j. **SUIT ON BOND.** — In an action on the bond the amount specified therein will be treated as a penalty, and not as liquidated damages,¹ but at least nominal damages are recoverable for a breach.²

31. Proceedings on Petition for Removal — a. PLEADINGS IN ANSWER TO PETITION. — The removal act does not provide for any pleadings by the party opposing a petition for removal, and while it is useless to raise an issue of fact by pleading,³ it is not an uncommon practice to demur to the petition, or to file a pleading of that nature.⁴

bond. *Grow v. Wiman*, (City Ct. Spec. T.) 3 N. Y. St. Rep. 281. See also *Hervey v. Illinois Midland R. Co.*, 3 Fed. Rep. 707.

1. *Henry v. Louisville, etc., R. Co.*, 91 Ala. 585. See also *Welch v. Thorn*, 16 La. 188.

2. The failure to enter a copy of the record in the federal court within the time prescribed by law and the condition of the bond entitles the obligee to nominal damages at least. *Henry v. Louisville, etc., R. Co.*, 91 Ala. 585, where the court said: "We have found no case which declares what damages are recoverable when there is a breach of the condition to enter a 'copy of the record' in the United States court. We can conceive of actual damage — such, for instance, as supervening insolvency of the defendant — which might be recoverable. Injury from mere delay, however, would probably be classed as speculative, furnishing no standard for its measurement, and therefore too uncertain to be a ground of recovery." That a delay in filing the record necessarily creates a liability on the bond, see *Kidder v. Featteau*, 2 Fed. Rep. 617. As bearing upon the amount of damages which are considered to be recoverable on the bond, see also *Miller v. Finn*, 1 Neb. 270, where in the course of its opinion denying an application for removal partly because the bond was deemed inadequate the court said: "This property rents for a large sum, as the record shows, and the defendants are receiving the rents. If this motion [for removal] should be allowed and the defendant failed to remove the cause, it would work a delay of more than six months. The penal sum of one thousand dollars is altogether insufficient to indemnify the complainant for the delay, if the issue should finally be found in his favor."

The Failure to Enter Special Bail in

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the federal court will not enable the plaintiff to recover anything in an action on the bond where the action did not proceed to judgment in the federal court, but was dismissed on the plaintiff's motion; in such a case the plaintiff has suffered no damage from the breach of the obligation to enter special bail. *Welch v. Thorn*, 16 La. 188.

3. See *infra*, I. 31. *d. Determination of Questions of Fact.*

"The question is whether the facts recited in the petition for removal show a ground upon which the right of removal can be lawfully based." *Deere v. Chicago, etc., R. Co.*, 85 Fed. Rep. 878.

"The question is one purely of law, in the nature of a demurrer to the sufficiency of the petition." *Stix v. Keith*, 90 Ala. 124.

The pleading should be only such as to bring to the notice of the court the specific question of the sufficiency of the application as a matter of law apparent on the face of the papers. *Tunstall v. Madison*, 30 La. Ann. 474.

4. Demurrers were filed in *Elliott v. Stocks*, 67 Ala. 292; *Miller v. Lynde*, 2 Root (Conn.) 445; *Darton v. Sperry*, (Conn. 1899) 41 Atl. Rep. 1052; *Hammond v. Buchanan*, 68 Ga. 728; *Bates v. Baltimore, etc., R. Co.*, 39 Ohio St. 157; *Texas, etc., R. Co. v. McAllister*, 59 Tex. 353; *New York, etc., Land Co. v. Martin*, (Tex. Civ. App. 1894) 25 S. W. Rep. 475; *Durham v. Southern L. Ins. Co.*, 46 Tex. 185.

Written objections by answer or in a less formal shape were filed in *Cleveland, etc., R. Co. v. Monaghan*, 140 Ill. 484; *Cleveland, etc., R. Co. v. Doerr*, 41 Ill. App. 535; *Bosler v. Booge*, 54 Iowa 252; *Stone v. Sargent*, 129 Mass. 503; *Broadway Nat. Bank v. Adams*, 130 Mass. 432; *Baltimore, etc., R. Co. v. Cary*, 28 Ohio St. 208; *Railway Pass. Assur. Co. v. Pierce*, 27 Ohio St. 156.

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b. HEARING ON PETITION. — If the petition for removal is presented to the court for consideration,¹ according to the uniform practice there is a hearing on the application the same as on other motions or petitions.² When several applications are presented to the court simultaneously and one of them is a petition for removal accompanied by a proper bond, the latter application must take precedence of the others.³

c. DETERMINATION OF SUFFICIENCY OF APPLICATION — Jurisdiction to Determine. — A state court is not bound to surrender its jurisdiction of a suit on a petition for removal until a case has been made which on its face shows that the petitioner has a right to the transfer,⁴ and the state court is at liberty to determine for itself whether on the face of the record, including the petition and bond for removal, it appears that a removal has been effected.⁵ But an adverse determination involves the risk of

In *Erie R. Co. v. Stringer*, 32 Ohio St. 468, an answer to the petition for removal was filed and a replication thereto. These pleadings are set forth in full in the report. But the trial of the question of fact raised by the pleadings was entirely erroneous according to the doctrine now settled.

In *Fox v. American Casualty Ins., etc., Co.*, 2 Pa. Dist. 158, the defendant filed a sufficient petition and bond for removal, and an order was made staying the proceedings. Exceptions subsequently filed by the plaintiff to the petition and bond were dismissed as "improvidently allowed to be filed."

Precedent of Answer. — In *Jackson v. Gould*, 74 Me. 565, the report sets forth *verbatim* the answer to the petition for removal, wherein the pleader "contests and denies" the right of removal "for the following reasons, to wit," stating them in numbered paragraphs.

1. See *supra*, p. 320.

2. See *Hazard v. Durant*, 9 R. I. 602, and the cases cited *supra*, p. 319, as to notice of the application.

3. *Bragg v. Tibbs*, 44 Ga. 294. Compare *Edgerton v. Webb*, 41 Ga. 417.

4. *Stone v. South Carolina*, 117 U. S. 432, where the court said: "The mere filing of a petition for the removal of a suit which is not removable does not work a transfer."

5. *Cases in Federal Courts.* — *Powers v. Chesapeake, etc.*, R. Co., 169 U. S. 101; *Pennsylvania Co. v. Bender*, 148 U. S. 258; *Crehore v. Ohio, etc. R. Co.*, 131 U. S. 243; *Burlington, etc. R. Co. v. Dunn*, 122 U. S. 516; *Stone v. South Carolina*, 117 U. S. 432; *Gregory v. Hartley*, 113 U. S. 745; *Baltimore, etc.,*

R. Co. v. Koontz, 104 U. S. 14; *Kern v. Huidekoper*, 103 U. S. 490; *Removal Cases*, 100 U. S. 474; *Yulee v. Vose*, 99 U. S. 545; *Phoenix Ins. Co. v. Pechner*, 95 U. S. 186; *Amory v. Amory*, 95 U. S. 187; *Monroe v. Williamson*, 81 Fed. Rep. 984; *Springer v. Howes*, 69 Fed. Rep. 849; *McMullen v. Northern Pac. R. Co.*, 57 Fed. Rep. 17; *Brigham v. C. C. Thompson Lumber Co.*, 55 Fed. Rep. 884; *Noble v. Massachusetts Ben. Assoc.*, 48 Fed. Rep. 338; *Camprelle v. Balbach*, 46 Fed. Rep. 82; *Freeman v. Butler*, 39 Fed. Rep. 3; *Walker v. O'Neill*, 38 Fed. Rep. 374; *Shedd v. Fuller*, 36 Fed. Rep. 609; *Beadleston v. Harpending*, 32 Fed. Rep. 644, which carried the doctrine farther than is permissible by later and controlling cases; *Duff v. Duff*, 31 Fed. Rep. 776; *Keeney v. Roberts*, 12 Sawy. (U. S.) 39, 39 Fed. Rep. 629; *Ex p. Wells*, 3 Woods (U. S.) 128.

Cases in State Courts. — *Ex p. State*, 71 Ala. 363; *Ex p. Grimbail*, 61 Ala. 605; *Security Co. v. Pratt*, 65 Conn. 161; *Darton v. Sperry*, (Conn. 1899) 41 Atl. Rep. 1052; *Hayes v. Todd*, 34 Fla. 233; *Brock v. Doyle*, 18 Fla. 172; *Angier v. East Tennessee, etc., R. Co.*, 74 Ga. 637; *Steiner v. Mathewson*, 77 Ga. 657; *Western Union Tel. Co. v. Griffith*, 104 Ga. 56; *Carswell v. Schley*, 59 Ga. 17; *Farmers' L. & T. Co. v. Lake St. El. R. Co.*, 173 Ill. 439; *Cleveland, etc., R. Co. v. Monaghan*, 140 Ill. 484; *Combs v. Nelson*, 91 Ind. 125; *McWhinney v. Brinker*, 64 Ind. 360; *Indianapolis, etc., R. Co. v. Risley*, 50 Ind. 60; *Baltimore, etc., R. Co. v. New Albany, etc., R. Co.*, 53 Ind. 597; *Stommel v. Timbrel*, 84 Iowa 344;

having all its subsequent proceedings rendered of no avail if on appeal or writ of error it shall ultimately be determined by the United States Supreme Court that when the petition for removal was filed the state should have given up its jurisdiction.¹

Practical Considerations. — Hence it would be plain folly for the state court to treat as *res nova* a question settled by the United States Supreme Court.² Furthermore, the probable ruling of the federal Circuit Court in which the record may be entered may prudently be considered,³ though some of the state courts

Bosler v. Booge, 54 Iowa 252; Delaware R. Constr. Co. v. Davenport, etc., R. Co., 46 Iowa 406; Burch v. Davenport, etc., R. Co., 46 Iowa 449; Lamblin v. Cox, 40 Kan. 311; Cooper v. Condon, 15 Kan. 575; Adams Express Co. v. Milton, 11 Bush (Ky.) 49; State v. Murray, 47 La. Ann. 911; Cole v. La Chambre, 31 La. Ann. 43; Tunstall v. Madison, 30 La. Ann. 471; State v. Johnson, 29 La. Ann. 399; Craven v. Turner, 82 Me. 387; Amy v. Manning, 144 Mass. 153; Broadway Nat. Bank v. Adams, 130 Mass. 433; Mahone v. Manchester, etc., R. Corp., 111 Mass. 74; Roberts v. Chicago, etc., R. Co., 48 Minn. 531; Jackson v. Alabama G. S. R. Co., 58 Miss. 651; Stuart v. Staplehurst Bank, (Neb. 1899) 78 N. W. Rep. 298; Blair v. West Point Mfg. Co., 7 Neb. 147; Bierbower v. Miller, 30 Neb. 171; Howard v. Stewart, 34 Neb. 769; Chandler v. Coe, 56 N. H. 187; National Docks, etc., Junction Connecting R. Co. v. Pennsylvania R. Co., 52 N. J. Eq. 58; National Union Bank v. Dodge, 42 N. J. L. 316; Lalor v. Dunning, (C. Pl. Spec. T.) 56 How. Pr. (N. Y.) 210; Campbell v. Campbell, 53 N. Y. Super. Ct. 308; Cooley v. Lawrence, 5 Duer (N. Y.) 609; Bushnell v. Parker, (Supm. Ct. Gen. T.) 37 N. Y. St. Rep. 298; Howard v. Southern R. Co., 122 N. Car. 953; Lawson v. Richmond, etc., R. Co., 112 N. Car. 390; Tucker v. Inter-States L. Assoc., 112 N. Car. 796; Baird v. Richmond, etc., R. Co., 113 N. Car. 608; State v. Barnes, 5 N. Dak. 350; State v. Southern Pac. Co., 23 Oregon 424; Koshland v. National F. Ins. Co., 31 Oregon 205; James v. Thurston, 6 R. I. 428; Texas, etc., R. Co. v. McAllister, 59 Tex. 349; Texas, etc., R. Co. v. De Milley, 60 Tex. 194; Texas etc., R. Co. v. Kirk, 62 Tex. 231; Texas, etc., R. Co. v. Bloom, 85 Tex. 283; New York, etc., Land Co. v. Martin, (Tex. Civ. App. 1894) 25 S. W. Rep. 475; Guarantee Co. of North America v. Lynchburg First

Nat. Bank, 95 Va. 480; Henen v. Baltimore, etc., R. Co., 17 W. Va. 895; Baltimore, etc., R. Co. v. Pittsburg, etc., R. Co., 17 W. Va. 859; White v. Holt, 20 W. Va. 792.

"We fully recognize the principle heretofore asserted in many cases that the state court is not required to let go its jurisdiction until a case is made which, upon its face, shows that the petitioner can remove the cause as a matter of right." Removal Cases, 100 U. S. 474.

"The fact that the Supreme Court of the United States is the final arbiter in construing a federal statute does not take away from the state court the right and duty to examine the record and see that the case is one proper for removal." Howard v. Stewart, 34 Neb. 769.

Determination of Sufficiency of Bond. — See *supra*, p. 334.

1. See *infra*, I. 37. c. *Validity of Further Proceedings.*

2. See New Orleans v. Sheppard, 10 La. Ann. 269; Jackson v. Alabama G. S. R. Co., 58 Miss. 652; Railway Pass. Assur. Co. v. Pierce, 27 Ohio St. 158, where the court said: "It would be practically useless to adhere to our convictions unless there were reasons to expect that the question, when again presented to that court, would be decided differently."

3. See *infra*, I. 40. g. (2) *Rule of Decision—Prior Decisions in Same Circuit.*

In Robertson v. Kettell, 64 N. H. 430, Doe, C. J., in granting a petition for removal where the removability of the suit was debatable, said: "If the federal court hold the suit to be removable, a verdict and judgment obtained by the plaintiff in the state court would be fruitless. Chesapeake, etc., R. Co. v. White, 111 U. S. 134. The practical question is, not whether we think the case is removable, but what will probably be the opinion of the

would be little inclined to yield their convictions to any authority below the United States Supreme Court.¹

d. DETERMINATION OF QUESTIONS OF FACT — State Court Dispositive of Power. — Some of the earlier expressions of the United States Supreme Court seemed to imply that the state court, after the presentation of a petition for removal, was at liberty to hear evidence and try and determine issues made on the petition,² and upon that subject there was a difference of opinion in the state courts,³

federal court on that subject. The utility of a judgment for the plaintiff here is so doubtful that it is not expedient to put the parties to the expense of a trial before the federal question is decided by the federal court."

In *Stuart v. Staplehurst Bank*, (Neb. 1899) 78 N. W. Rep. 298, the court said: "It is probably better, in all cases where the petition for removal, accompanied by the bond, has been presented, especially if the right of removal is questionable or doubtful, to await in the state court the action of the United States court on the point of the removability of the suit." See also *Ex p. Jones*, 66 Ala. 202.

1. See the vigorous opinion of Gray, C. J., in *Stone v. Sargent*, 129 Mass. 503.

"The state court must decide in the first instance upon the application to remove a case, so as to determine whether it will proceed no further in it, and should not pause in it except when satisfied that the application to remove brings it within the Act of Congress on the subject." *Jackson v. Alabama G. S. R. Co.*, 58 Miss. 651.

In *Chandler v. Coe*, 56 N. H. 187, Foster, C. J., said: "We * * * declare without arrogance or assumption that except by writ of error from the Supreme Court of the United States, whose judgment is conclusive upon all the judicial tribunals of the land, the jurisdiction of our own state courts is not to be reduced to 'very inferior and insignificant proportions.'"

A Motion for Stay of Proceedings to await the action of the federal court, the state court having pronounced the petition for removal insufficient, was denied in *Security Co. v. Pratt*, 65 Conn. 180.

2. See *Gordon v. Longest*, 16 Pet. (U. S.) 97; *Pittsburg, etc., R. Co. v. Ramsey*, 22 Wall. (U. S.) 328. In *Removal Cases*, 100 U. S. 474, the court found it unnecessary to decide whether it is competent for the state court to

institute an inquiry into the truth of the allegation of citizenship as stated in the petition for removal, if such allegations are denied, but held that if they are not disputed, and are not controverted by other parts of the record, the court is not justified in assuming them to be false.

3. The following cases held, or were inclined to hold, that questions of fact could be raised on the petition and rightfully determined by the state court: *Orosco v. Gagliardo*, 22 Cal. 85; *Blair v. West Point Mfg. Co.*, 7 Neb. 147; *Caples v. Central Pac. R. Co.*, 6 Nev. 265; *Clark v. Opdyke*, 10 Hun (N. Y.) 386; *Rogers v. Rogers*, 1 Paige (N. Y.) 184; *Dennistoun v. New York, etc., R. Co.*, 1 Hilt. (N. Y.) 63; *Disbrow v. Driggs*, (N. Y. Super. Ct. Spec. T.) 8 Abb. Pr. (N. Y.) 305, note; *Fisk v. Chicago, etc., R. Co.*, 53 Barb. (N. Y.) 472; *New York Piano Co. v. New Haven Steamboat Co.*, (N. Y. Super. Ct. Spec. T.) 2 Abb. Pr. N. S. (N. Y.) 357; *Kranshaar v. New Haven Steamboat Co.*, 7 Robt. (N. Y.) 357; *De Camp v. New Jersey Mut. L. Ins. Co.*, 2 Sweeny (N. Y.) 489; *Miller v. Kent*, (Supm. Ct.) 60 How. Pr. (N. Y.) 456; *Knickerbocker L. Ins. Co. v. Gorbach*, 70 Pa. St. 150; *Southern Pac. R. Co. v. Harrison*, 73 Tex. 103; *Brown v. Crippin*, 4 Hen. & M. (Va.) 174; *White v. Holt*, 20 W. Va. 792. See also *Allegheny County v. Cleveland, etc., R. Co.*, 51 Pa. St. 228.

The following held that the state had no such power: *Stix v. Keith*, 90 Ala. 121; *Little Rock, etc., R. Co. v. Iredell*, 50 Ark. 388; *Steiner v. Mathewson*, 77 Ga. 657; *Horan v. Strachan*, 82 Ga. 566; *Withers v. Hopkins Place Sav. Bank*, 104 Ga. 89; *Southern R. Co. v. Hudgins*, (Ga. 1899) 33 S. E. Rep. 442; *Sharp v. Gutcher*, 74 Ind. 363; *Byson v. McPherson*, 71 Iowa 437; *Van Horn v. Litchfield*, 70 Iowa 11; *Guinault v. Louisville, etc., R. Co.*, 42 La. Ann. 52; *Tunstall v. Madison*, 30 La. Ann. 474; *Rosenfield v. Adams Express*

and to some extent in the United States Circuit Courts.¹ But it is now settled by the United States Supreme Court that the petition for removal presents to the state court a pure question of law, and that issues of fact thereon can be tried only in the United States Circuit Court.²

Operation and Extent of Rule. — Thus allegations in the petition for removal as to the citizenship of the parties³ or the amount in

Co., 21 La. Ann. 233; Craven v. Turner, 82 Me. 383; Roberts v. Chicago, etc., R. Co., 48 Minn. 528; Miller v. Sunde, 1 N. Dak. 3; Koshland v. National F. Ins. Co., 31 Oregon 205. See also Monroe v. Connecticut River Lumber Co., 66 N. H. 628.

In Louisiana it was held that *prima facie* evidence should at least be offered, before the court surrenders its jurisdiction, but that the opposite party could not introduce evidence or counter-affidavits to controvert the evidence of the petitioner. *State Bank v. Morgan*, 4 Mart. N. S. (La.) 344; *Franciscus v. Surget*, 2 Rob. (La.) 34; *Oakey v. Commercial, etc., Bank*, 14 La. 515; *Stoker v. Leavenworth*, 7 La. 390. See also *New Orleans v. Sheppard*, 10 La. Ann. 268.

1. See *Ruble v. Hyde*, 1 McCrary (U. S.) 513, 3 Fed. Rep. 330; *Rawle v. Phelps*, 2 Flipp. (U. S.) 471; *Ladd v. Tudor*, 3 Woodb. & M. (U. S.) 333, which cases seem to recognize the power of the state court to decide questions of fact. The following hold that the state court can try no questions of fact: *Powers v. Chesapeake, etc., R. Co.*, 65 Fed. Rep. 129, *affirmed* on other grounds 169 U. S. 101; *Postal Tel. Cable Co. v. Southern R. Co.*, 88 Fed. Rep. 803; *Fidelity Trust, etc., Co. v. Newport News, etc., Co.*, 70 Fed. Rep. 403; *Sinclair v. Pierce*, 50 Fed. Rep. 852; *Freeman v. Butler*, 39 Fed. Rep. 3; *Fisk v. Union Pac. R. Co.*, 8 Blatchf. (U. S.) 243, 10 Abb. Pr. N. S. (N. Y.) 457.

2. *Kansas City, etc., R. Co. v. Daughtry*, 138 U. S. 303; *Crehore v. Ohio, etc., R. Co.*, 131 U. S. 240; *Burlington, etc., R. Co. v. Dunn*, 122 U. S. 513 [*reversing Dunn v. Burlington, etc., R. Co.*, 35 Minn. 73], where the petition contained the proper averments of diverse citizenship, and it was held that the state court erred in admitting counter-affidavits to the effect that the petitioner was not a citizen of a state, as alleged in the petition, but of a territory, and thereupon denying the petition and proceeding to trial. The

court said: "The record closes, so far as the question of removal is concerned, when the petition for removal is filed and the necessary security furnished. It presents then to the state court a pure question of law, and that is whether, admitting the facts stated in the petition for removal to be true, it appears on the face of the record, which includes the petition and the pleadings and proceedings down to that time, that the petitioner is entitled to a removal of the suit." In support of the doctrine thus established the court cited *Stone v. South Carolina*, 117 U. S. 430; *Carson v. Hyatt*, 118 U. S. 279; *Carson v. Dunham*, 121 U. S. 421. See also *Pacific R. Removal Cases*, 115 U. S. 15; *Pirie v. Tvedt*, 115 U. S. 44; *Crehore v. Ohio, etc., R. Co.*, 131 U. S. 244.

"The state court is only at liberty to inquire whether, on the face of the record, a case has been made which requires it to proceed no further." *Carson v. Hyatt*, 118 U. S. 279.

"It is singular that any other view was ever entertained. The supremacy of the laws of the United States might in this regard be utterly destroyed by the hostile action of the courts of a subordinate sovereignty, if the fact on which the operation of these laws to give the federal courts jurisdiction depended rested for its final determination on the decision of the tribunals of such subordinate sovereignty." *Per Corliss, C. J.*, in *Miller v. Sunde*, 1 N. Dak. 3.

Estoppel. — Thus the defendant cannot, in his petition for removal, plead facts alleged to constitute an estoppel against the maintenance of the suit, and have an issue thereon tried in the state court. *Hukill v. Maysville, etc., R. Co.*, 72 Fed. Rep. 749.

3. *Kansas City, etc., R. Co. v. Daughtry*, 138 U. S. 302; *Southern R. Co. v. Hudgins*, (Ga. 1899) 33 S. E. Rep. 442; *Little Rock, etc., R. Co. v. Iredell*, 50 Ark. 388. See also *Carson v. Hyatt*, 118 U. S. 287.

controversy¹ or the joining of defendants for the fraudulent purpose of preventing removal,² unless they are nullified as a matter of law by other parts of the record,³ must be accepted as true in fact, though the petition for removal be not verified.⁴ Whether the petition was filed in time can be determined only by the federal court if it depends on a question of fact.⁵ The state court must not try issues of fact even if it decides them correctly.⁶ But a denial of the petition for removal upon facts shown by affidavit controverting the averments in the petition will not cause a reversal by the federal Supreme Court on error to the final judgment if the denial was right as a matter of law.⁷

32. Order Granting Petition for Removal—Order Usually Made.—While no order of removal is essential to confer jurisdiction upon the federal court and divest the state court thereof,⁸ it is the uniform practice to enter an appropriate order if the petition and bond are called to the attention of the court and found to be sufficient to accomplish the purpose.⁹

1. Postal Tel. Cable Co. v. Southern R. Co., 88 Fed. Rep. 803; *Byson v. McPherson*, 71 Iowa 437, an action to recover land which the petitioner for removal alleged to be greater in value than the jurisdictional amount necessary for removal. It was held that an affidavit by the plaintiff controverting the averments of the petition should not have been considered. To precisely the same point see *Van Horn v. Litchfield*, 70 Iowa 11, a suit for specific performance.

2. See *supra*, pp. 203, 204.

3. See *supra*, p. 271.

4. *Kansas City, etc., R. Co. v. Daughtry*, 138 U. S. 302. See also *Miller v. Sunde*, 1 N. Dak. 3. Compare *Carson v. Hyatt*, 118 U. S. 281.

5. See *Fidelity Trust, etc., Co. v. Newport News, etc., Co.*, 70 Fed. Rep. 408.

6. **State Court Without Jurisdiction to Decide Correctly.**—"The state court has no jurisdiction to pass on disputed questions of fact, because there is no mode of reviewing such a decision in the federal courts. If it could decide such controverted questions of fact at all, it must, from the necessity of the case, decide them finally, and thus the jurisdiction of the federal courts would in these cases be at the mercy of the state tribunals. * * * The state court has no jurisdiction to decide a disputed question of fact affecting the right of the federal court to take jurisdiction, even if it correctly decides it." *Per Corliss, J., in State v. Barnes*, 5 N. Dak. 350.

In *Massachusetts* the Supreme Judicial Court held in *Amy v. Manning*, 144 Mass. 153, that the state court was at liberty to try and decide questions of fact arising on a petition for removal, subject to the risk of having its judgment reversed for error by the United States Supreme Court, and that such had been the practice in Massachusetts. But that case was commented upon adversely in *Burlington, etc., R. Co. v. Dunn*, 122 U. S. 515.

7. *Kansas City, etc., R. Co. v. Daughtry*, 138 U. S. 303, where the judgment was affirmed on the ground that the petition for removal was filed too late.

8. See *infra*, I. 37. a. *Simultaneous with Filing of Petition and Bond.*

Hence it is immaterial that the judge who made the order of removal was disqualified on the ground of interest. *Strasburger v. Beecher*, 44 Fed. Rep. 209.

9. "It is doubtless more in accordance with the regularity and propriety of judicial proceedings that the fact of removal should be entered on the records of the court, that the disposition of the cause should be made apparent." *Ex p. Mobile, etc., R. Co.*, 63 Ala. 349. See also *Jones v. Seward*, 41 Barb. (N. Y.) 269; *Winslow v. Collins*, 110 N. Car. 122; *Vandevoort v. Palmer*, 4 Duer (N. Y.) 679.

"The better practice would be to pass an order to remove the case, or to deny such an order, in explicit language." *Jackson v. Mutual L. Ins. Co.*, 60 Ga. 428.

At Chambers. — Since no order of removal is necessary, it is no objection that a removal was ordered at chambers, in vacation.¹

After Expiration of Time for Removal. — Nor is it essential that an order of removal, if made, should be entered before the time for removal has expired, where the petition and bond were presented in apt time.²

Form of Order. — The removal act provides that upon the filing of a sufficient petition and bond for removal "it shall then be the duty of the state court to accept said petition and bond, and proceed no further in such suit."³ In form the order usually expresses compliance with this statutory mandate;⁴ it accepts the petition and bond,⁵ and declares that no further proceedings

An order of removal "is usual." *Merchants' Nat. Bank v. Thompson*, 4 Fed. Rep. 877.

Cases Illustrating the Practice. — It was stated in the reports of the following cases that an order of removal was made:

Alabama. — *Ex p. State*, 71 Ala. 363.

Florida. — *Hayes v. Todd*, 34 Fla. 235.

Georgia. — *Clews v. Mumford*, 78 Ga. 477; *Carswell v. Schley*, 59 Ga. 19; *Withers v. Hopkins Place Sav. Bank*, 104 Ga. 89.

Illinois. — *Kramer v. Ferry*, 27 Ill. App. 480; *Jansen v. Grimshaw*, 125 Ill. 475.

Indiana. — *Baltimore, etc., R. Co. v. New Albany, etc., R. Co.*, 53 Ind. 599.

Kansas. — *Larson v. Cox*, 39 Kan. 632.

Kentucky. — *Hardwick v. Kean*, 95 Ky. 563.

Louisiana. — *Guinault v. Louisville, etc., R. Co.*, 42 La. Ann. 52.

Michigan. — *Le Roux v. Bay Circuit Judge*, 46 Mich. 189.

Minnesota. — *Tilley v. Cobb*, 56 Minn. 296.

Mississippi. — *Jackson v. Alabama G. S. R. Co.*, 58 Miss. 648.

New York. — *Vandevoort v. Palmer*, 4 Duer (N. Y.) 679.

Pennsylvania. — *Wheeden v. Camden, etc., R., etc., Co.*, 2 Phila. (Pa.) 23.

Rhode Island. — *Clark v. Delaware, etc., Canal Co.*, 11 R. I. 37.

See also the precedents cited *infra*, note 5 on this page.

1. *Lund v. Chicago, etc., R. Co.*, 78 Fed. Rep. 385.

2. *La Page v. Day*, 74 Fed. Rep. 977.

3. Act of 1887-1888, 24 U. S. Stat. at L. 554, c. 373; 25 U. S. Stat. at L. 435, c. 866.

4. "There is nothing in the law requiring the state court to make an order of removal. Its only affirmative act is to accept the petition and bond." *Chattanooga, etc., R. Co. v. Cincinnati, etc., R. Co.*, 44 Fed. Rep. 457.

5. In *Commercial, etc., Bank v. Corbett*, 5 Sawy. (U. S.) 175, it was objected that the state court did not, by its order of removal, accept the petition as well as the bond. But the court said: "An order not in terms accepting the bond or petition, but directing a stay of further proceedings, would sufficiently show that the state court had accepted both petition and bond, if such acceptance were a condition precedent to the acquiring of jurisdiction of this court."

"The most that could be said of an order of removal by a state court is that it is evidence that it has accepted the papers filed for removal as sufficient upon their face, and will cease to exercise jurisdiction over the case." *Hayes v. Todd*, 34 Fla. 242.

Precedents of Orders of Removal will be found in the following cases, where the order of removal is set forth in full: *Steiner v. Mathewson*, 77 Ga. 659; *Ramsey v. Coolbaugh*, 13 Iowa 165; *Douglas v. Caldwell*, 65 N. Car. 250; *Setzer v. Douglass*, 91 N. Car. 427; *Friese v. Homeopathic Mut. L. Ins. Co.*, 107 Pa. St. 135; *Robb v. Parker*, 3 S. Car. 63; *Henen v. Baltimore, etc., R. Co.*, 17 W. Va. 884; *Cooke v. Seligman*, 7 Fed. Rep. 263, 17 Blatchf. (U. S.) 452; *Chicago, etc., R. Co. v. McComb*, 17 Blatchf. (U. S.) 373; *Wehl v. Wald*, 17 Blatchf. (U. S.) 345; *Commercial, etc., Bank v. Corbett*, 5 Sawy. (U. S.) 173. See also *Hatch v. Chicago, etc., R. Co.*, 6 Blatchf. (U. S.) 107.

shall be had in the cause.¹ Very frequently it also directs a removal in explicit language and instructs the clerk to furnish a transcript of the record.²

Separate Order Accepting Bond. — Sometimes the court enters an order accepting the bond before hearing the application on its merits,³ and adjudges the bond sufficient even where it overrules the petition for removal.⁴

Stating Grounds of Order. — It has been suggested as good practice to state in the order of removal the grounds upon which it is based.⁵

An Order of Removal on the Ground of a Separable Controversy should extend to the whole suit, and should not merely remove the separable controversy.⁶

Nunc pro Tunc Order. — It is said that when an order of removal is made it should be entered as of the date when the petition for removal was filed.⁷ It would seem, however, that if the petition and bond are not efficacious until presented to the court for its action,⁸ the order should not be entered as of an earlier date.

33. Order Denying Petition for Removal — Order Usually Made. — Where a petition for removal is denied it is the practice, though not necessary,⁹ to enter an order to that effect.¹⁰

1. In *Ex p. Jones*, 66 Ala. 202, an order suspending further proceedings was entered although the petition for removal was denied, it appearing that a motion to remand was pending in the federal court.

No Absolute Right to a Stay Order. — Even if the cause is removable and all the proceedings for removal are regular, the petitioner has no absolute right to demand that the state court enter an order staying further proceedings in the cause. *Bell v. Dix*, 49 N. Y. 233, holding that, such an order being a mere expression of opinion, a refusal to make it was not appealable as affecting a substantial right.

2. See the precedents cited in the last note but one.

3. See *Bryan v. Richardson*, 153 Mass. 157; *Clark v. Opdyke*, 10 Hun (N. Y.) 384, in both of which cases it appears that the bond was accepted and the petition for removal subsequently dismissed.

4. *Craven v. Turner*, 82 Me. 383; *Texas, etc., R. Co. v. McAllister*, 59 Tex. 353. See also the preceding note.

5. *Brownell v. Gordon*, 1 McAll. (U. S.) 208.

A Precedent of an Order of Removal, stating the grounds upon which it was based, will be found in *Cooke v. Seligman*, 7 Fed. Rep. 263, 17 Blatchf. (U. S.) 452.

6. See *Clark v. Chicago, etc., R. Co.*, 11 Fed. Rep. 355; *Atlantic, etc., Fertilizing Co. v. Carter*, 4 Hughes (U. S.) 217, 88 Fed. Rep. 707.

7. *Clark v. Delaware, etc., Canal Co.*, 11 R. I. 37.

"When the state court considers the application for removal so far as to accept or reject petition and bond, if the application be such as authorizes a removal, the removal relates back to the date of the application." *Hall v. Chattanooga Agricultural Works*, 48 Fed. Rep. 601.

"When a removal is granted the cause is to be removed as of the date when the motion is made, and the papers should be certified as of that date." *Western Union Tel. Co. v. Horack*, 9 Ill. App. 311.

In *Miller v. Tobin*, 18 Fed. Rep. 613, Deady, J., said that an order of removal was "at most * * * only a convenient mode of manifesting its [the court's] acceptance of the petition and bond, * * * and took effect by relation from the date of filing the same."

8. See *supra*, p. 320.

9. See *infra*, p. 347.

10. **Precedents of Orders Denying Applications for Removal** will be found in the following cases, where the orders are set forth in full; *Kansas City, etc., R. Co. v. Daughtry*, 138 U. S. 302;

Stating Ground of Order. — The court, if asked so to do, will state in its order of denial the ground of its decision, and the careful practitioner will see that this is done, in order to lay a foundation for review on appeal or error.¹

Dismissal of Application Without Prejudice. — Where the application is denied on the ground that it is premature, the order may be made without prejudice to a renewal of the application at the proper time.²

34. Rehearing of Application. — After denial of a petition for removal a rehearing of the application may be had according to the practice in other cases.³

35. Vacating Order of Removal — Power to Vacate. — If the court conceives that its order of removal was erroneous,⁴ the order may be vacated during the same term⁵ or at a subsequent term⁶

Young v. Oakes, 104 Ga. 62; Phoenix L. Ins. Co. v. Saettel, 33 Ohio St. 279; Hyatt v. McBurney, 18 S. Car. 200, *reversed sub nom.* Carson v. Hyatt, 118 U. S. 279; Beery v. Irick, 22 Gratt. (Va.) 492; Kennedy v. Ehlen, 31 W. Va. 547; Chambers v. McDougal, 42 Fed. Rep. 696.

1. See Schwab v. Coots, 48 Mich. 118, where an order denying the petition for removal was affirmed on a writ of error because the ground of the decision nowhere appeared in the record, and the appellate court was compelled to presume that the denial was based upon some legal ground. See also Chamberlain v. American Nat. L., etc., Co., 11 Hun (N. Y.) 374. In the order refusing a removal which is quoted in Fashnacht v. Frank, 23 Wall. (U. S.) 418, the grounds of the refusal are stated. See also, as indicating the same practice, McKeen v. Ives, 35 Fed. Rep. 802.

2. Shepard v. Conrad, (Supm. Ct.) 4 Abb. N. Cas. (N. Y.) 254.

3. Thus in Danvers Sav. Bank v. Thompson, 133 Mass. 183, the application for removal, presented to a single justice and by him reported to the full court, was denied by the latter. An application for rehearing was likewise presented to a single justice, and the questions arising thereon reported to the full court. It was said that strictly speaking the application for rehearing should have been made to the full court, but the irregularity was disregarded, and upon a showing of certain vital facts of which the petitioner was ignorant at the original hearing, and which had been concealed from him by the plaintiff, the petition for removal was granted.

4. **For Mere Irregularity.** — In Bristol v. Chapman, (Supm. Ct. Gen. T.) 34 How. Pr. (N. Y.) 140, an order vacating an order of removal on the ground that no notice was given of the application for removal, was sustained on appeal, but the case was *disapproved* in Chamberlain v. American Nat. L., etc., Co., 11 Hun (N. Y.) 373. See also Rosenfield v. Condict, 44 Tex. 466; Southern R. Co. v. Hudgins, (Ga. 1899) 33 S. E. Rep. 442.

5. **Erroneous Order of Removal.** — In Henderson v. Cabell, 83 Tex. 545, it was held that the court has ample authority to set aside an erroneous order of removal made during the same term, the record not having been filed in the federal court in the meantime. See also Rosenfield v. Condict, 44 Tex. 466.

In Shepherd v. Young, 1 T. B. Mon. (Ky.) 204, the court made an erroneous order of removal on the petition of a plaintiff claiming land under a grant of the state wherein the suit was brought, and it was held that the order was properly rescinded during the same term.

In Fitz v. Hayden, 4 Mart. N. S. (La.) 653, the court vacated an order of removal upon a showing of the insufficiency of the sureties on the bond for removal, and the action of the court was sustained on appeal, it appearing that the cause had not been actually transferred to the federal court otherwise than by passing the order.

6. An order of removal obtained *ex parte* was vacated as a matter of course in Lalor v. Dunning, (C. Pl. Spec. T.) 56 How. Pr. (N. Y.) 209, upon a showing that it was erroneous, the court remarking that "the decision of a motion is never *res adjudicata*."

with the consent of the parties¹ or where a copy of the record has not been entered in the federal court.² An order of removal conditioned upon the filing of a sufficient bond may be rescinded if no bond is afterwards filed.³ If the court considers that the cause was removable and that the proceedings for removal were regular, it will regard itself as destitute of any legal discretion to vacate the order.⁴

Vacating Order Ineffectual if Cause Properly Removed. — The vacating of an order of removal cannot defeat the jurisdiction of the federal court⁵ or otherwise affect the legal status of the cause⁶ if the cause was removable and the removal proceedings were regular.

After Remand from Federal Court. — The order of removal may of course be vacated if the cause is remanded by the federal court.⁷

Appeals from Orders Vacating or refusing to vacate orders of removal

In *Trester v. Missouri Pac. R. Co.*, 23 Neb. 242, it was held that an order of removal of a cause not legally removable may be vacated by the court at any time.

Notice of Motion. — In *Thatcher v. Rankin*, (Supm. Ct. Spec. T.) 2 How. Pr. N. S. (N. Y.) 459, it was said that where a judge of the court has entered an order accepting the petition and bond, an application to vacate the order, "if made to a judge other than the one who made such decision, must be on notice of motion."

1. In *Larson v. Cox*, 39 Kan. 631, the court had erroneously ordered the cause removed on a petition not filed in time. At a subsequent term it set aside the order of removal and proceeded to trial and judgment, neither party objecting. It did not appear that the record had been entered in the federal court or that either of the parties had appeared in that court. It was held that the court had jurisdiction to render the judgment.

2. In *Lalor v. Dunning*, (C. Pl. Spec. T.) 56 How. Pr. (N. Y.) 212, the court said: "If I thought that in any view the petition could be considered sufficient, the plaintiff would be left to his application to the United States Circuit Court for an order remanding the cause to this court, but it seems to me so utterly lacking in averments necessary to give the Circuit Court jurisdiction that I shall vacate the order."

In *Chandler v. Coe*, 56 N. H. 184, an order vacating an order of removal made at a prior term was sustained where it appeared that the time for removal had expired when the order of removal was made, and the term of the

federal court at which the record could have been entered had not arrived when the order was vacated.

In *Ex p. State*, 71 Ala. 366, it was said that if the petition for removal does not disclose a sufficient ground therefor the order may be recalled as improvidently entered, and the subsequent proceedings of the state court will be valid.

In *Clarkson v. Manson*, (Marine Ct. Spec. T.) 59 How. Pr. (N. Y.) 480, an *ex parte* order of removal was vacated before the record was entered in the federal court, the amount in dispute being held insufficient, which latter point, however, was overruled in the federal court in the same case, *Clarkson v. Manson*, 18 Blatchf. (U. S.) 443, 60 How. Pr. (N. Y.) 45.

In *Bushnell v. Parker*, (Supm. Ct. Gen. T.) 37 N. Y. St. Rep. 298, it was held by a divided court that an order of removal ought not to be vacated on the ground of an alleged defect in the petition for removal and that relief should be sought by a motion to remand in the federal court.

3. *Hayes v. Todd*, 34 Fla. 233.

4. *Livermore v. Jenks*, (Supm. Ct. Spec. T.) 11 How. Pr. (N. Y.) 480; *Rosenfield v. Condict*, 44 Tex. 466.

5. *Clarkson v. Manson*, 4 Fed. Rep. 257, 18 Blatchf. (U. S.) 443, 60 How. Pr. (N. Y.) 45.

6. *Le Roux v. Bay Circuit Judge*, 46 Mich. 189; *Johnson v. Cummings*, 88 Ga. 12.

7. *Johnson v. Gelston*, 3 N. J. L. 245; *Fargo v. McVicker*, (Supm. Ct. Gen. T.) 38 How. Pr. (N. Y.) 1. See also *Illius v. New York, etc., R. Co.*, 13 N. Y. 598; *Winchell v. Coney*, 54 Conn. 32.

are discussed in another section.¹

36. Costs on Granting or Dismissing Application. — Upon Entering an Order of Removal the state court has no jurisdiction to award costs of the motion to the petitioner.²

Upon Dismissing a Petition for Removal it is the common practice of the state court to award the costs of the motion against the petitioner.³

37. Divestiture of Jurisdiction of State Court — *a. SIMULTANEOUS WITH FILING OF PETITION AND BOND* — *In General.* — It has already been shown that a case is not removed unless the record shows it to be removable.⁴ But it is equally well settled that if the cause is removable, and the statute for its removal has been complied with, no order of the state court for its removal is necessary to confer jurisdiction on the federal court, and no refusal of such an order can prevent that jurisdiction from attaching; and that upon the filing of a sufficient petition and bond in the state court, the suit being removable under the statute, the jurisdiction of the state court ceases *ipso facto*, and that of the federal court immediately attaches.⁵ Failure to file a copy of

1. See *infra*, I, 44. b. 3. *Of Miscellaneous Orders.*

2. *Penrose v. Penrose*, 1 Fed. Rep. 479.

Power of State Court to Award Costs on Remand. — Where the state court, after presentation of a sufficient petition and bond for removal, proceeds to judgment notwithstanding, and the judgment is affirmed by the highest state court, but reversed on error by the United States Supreme Court, with directions to accept the removal bond and "proceed no further in the cause," it is doubtful if the state court has any power to award costs to the plaintiff in error. *Tugman v. National S. S. Co.*, 30 Fed. Rep. 802.

3. See, for instance, *Merwin v. Wexel*, (C. Pl. Spec. T.) 49 How. Pr. (N. Y.) 116; *Levy v. O'Neil*, (C. Pl. Spec. T.) 14 Abb. Pr. N. S. (N. Y.) 65. But the order would certainly be invalid if the cause should be actually removed to the federal court and the jurisdiction of that court sustained. See *infra*, I, 37. *Validity of Further Proceedings.*

4. See *supra*, p. 297.

5. *Wabash Western R. Co. v. Brow*, 164 U. S. 279; *Pennsylvania Co. v. Bender*, 148 U. S. 258; *Marshall v. Holmes*, 141 U. S. 595; *Manning v. Amy*, 140 U. S. 140; *Crehore v. Ohio*, etc., R. Co., 131 U. S. 243; *Barlington*, etc., R. Co. *v. Dunn*, 122 U. S. 513; *Stone v. South Carolina*, 117 U. S. 432;

St. Paul, etc., R. Co. *v. McLean*, 108 U. S. 216; *National Steamship Co. v. Tugman*, 106 U. S. 122; *Turner v. Farmers' L. & T. Co.*, 106 U. S. 555; *Baltimore*, etc., R. Co. *v. Koontz*, 104 U. S. 5; *Kern v. Huidekoper*, 103 U. S. 490; *Pittsburg*, etc., R. Co. *v. Ramsey*, 22 Wall. (U. S.) 328; *Kanouse v. Martin*, 15 How. (U. S.) 198; *Gordon v. Longest*, 16 Pet. (U. S.) 97; *Probst v. Cowen*, 91 Fed. Rep. 931; *Mecke v. Valley Town Mineral Co.*, 89 Fed. Rep. 115, 211; *Postal Tel. Cable Co. v. Southern R. Co.*, 88 Fed. Rep. 803; *Eisenmann v. Delemar's Nevada Gold Min. Co.*, 87 Fed. Rep. 248; *Creagh v. Equitable L. Assur. Soc.*, 83 Fed. Rep. 850; *Snohomish County v. Puget Sound Nat. Bank*, 81 Fed. Rep. 519; *Monroe v. Williamson*, 81 Fed. Rep. 977; *Fox v. Southern R. Co.*, 80 Fed. Rep. 947; *Hawkins v. Peirce*, 79 Fed. Rep. 454; *Lund v. Chicago*, etc., R. Co., 78 Fed. Rep. 385; *Springer v. Howes*, 69 Fed. Rep. 849; *Shepherd v. Bradstreet*, 65 Fed. Rep. 143; *Wills v. Baltimore*, etc., R. Co., 65 Fed. Rep. 532; *Waite v. Phoenix Ins. Co.*, 62 Fed. Rep. 769; *Wilcox*, etc., *Guano Co. v. Phoenix Ins. Co.*, 60 Fed. Rep. 933; *McMullen v. Northern Pac. R. Co.*, 57 Fed. Rep. 17; *Brigham v. C. C. Thompson Lumber Co.*, 55 Fed. Rep. 884; *State v. Coosaw Min. Co.*, 45 Fed. Rep. 811; *Brown v. Murray*, 43 Fed. Rep. 616; *Chambers v. McDougal*, 42 Fed. Rep. 696; *Pelzer Mfg. Co. v.*

the record in the federal Circuit Court does not reinvest the state-

St. Paul F. & M. Ins. Co., 40 Fed. Rep. 186; *Torrent v. S. K. Martin Lumber Co.*, 37 Fed. Rep. 728; *Kansas City, etc., R. Co. v. Interstate Lumber Co.*, 36 Fed. Rep. 11; *Shedd v. Fuller*, 36 Fed. Rep. 609; *Wilson v. Western Union Tel. Co.*, 34 Fed. Rep. 562; *Lawton v. Blitch*, 30 Fed. Rep. 641; *Young v. Merchants' Ins. Co.*, 29 Fed. Rep. 274; *Friedman v. Israel*, 26 Fed. Rep. 804; *McCullough v. Large*, 20 Fed. Rep. 309; *Wellman v. Howland Coal, etc., Works*, 19 Fed. Rep. 51; *Miller v. Tobin*, 18 Fed. Rep. 609; *Texas, etc., R. Co. v. Rust*, 17 Fed. Rep. 275; *Clark v. Chicago, etc., R. Co.*, 11 Fed. Rep. 357; *New York Silk Mfg. Co. v. Paterson Second Nat. Bank*, 10 Fed. Rep. 204; *Akerly v. Vilas*, 1 Abb. (U. S.) 286, 2 Biss. (U. S.) 110; *Osgood v. Chicago, etc., R. Co.*, 6 Biss. (U. S.) 330; *Fisk v. Union Pac. R. Co.*, 6 Blatchf. (U. S.) 391, 8 Blatchf. (U. S.) 247; *Hatch v. Chicago, etc., R. Co.*, 6 Blatchf. (U. S.) 105; *Connor v. Scott*, 4 Dill. (U. S.) 243; *Clippinger v. Missouri Valley L. Ins. Co.*, 1 Flipp. (U. S.) 456; *Commercial, etc., Bank v. Corbett*, 5 Sawy. (U. S.) 175; *Mahoney Min. Co. v. Bennett*, 4 Sawy. (U. S.) 290; *Cobb v. Globe Mut. L. Ins. Co.*, 3 Hughes (U. S.) 452; *Dennis v. Alachua County*, 3 Woods (U. S.) 689; *Taylor v. Rockefeller*, (U. S. Cir. Ct. 1878) 6 Rep. 226; *Ellerman v. New Orleans, etc., R. Co.*, 2 Woods (U. S.) 120; *The Two Orphans*, 2 Cent. L. J. 730; *Stix v. Keith*, 90 Ala. 121; *Little Rock, etc., R. Co. v. Iredell*, 50 Ark. 388; *Southern Pac. R. Co. v. Superior Ct.*, 63 Cal. 607; *Security Co. v. Pratt*, 65 Conn. 179; *Winchell v. Coney*, 54 Conn. 32; *Hayes v. Todd*, 34 Fla. 233; *Carswell v. Schley*, 59 Ga. 19; *Tarver v. Ficklin*, 60 Ga. 373; *Cumberland Gap Bldg., etc., Assoc. v. Wells*, 99 Ga. 228; *Western Union Tel. Co. v. Horack*, 9 Ill. App. 309; *Terre Haute, etc., R. Co. v. Abend*, 9 Ill. App. 304; *Louisville, etc., R. Co. v. Roehling*, 11 Ill. App. 264; *Kramer v. Ferry*, 27 Ill. App. 480; *Sharp v. Gutcher*, 74 Ind. 357; *Ohle v. Chicago, etc., R. Co.*, 64 Iowa 600; *Van Horn v. Litchfield*, 70 Iowa 11; *Chambers v. Illinois Cent. R. Co.*, 104 Iowa 238; *Larson v. Cox*, 39 Kan. 633; *Stoker v. Leavenworth*, 7 La. 390; *Craven v. Turner*, 82 Me. 387; *Edwards Mfg. Co. v. Sprague*, 76 Me. 53; *Stone v. Sargent*, 129 Mass. 503; *Glens Falls Ins. Co. v. Judge*, 21 Mich. 582; *Le Roux v. Bay Circuit Judge*, 46 Mich. 189; *Scheffer v. National L. Ins. Co.*, 25 Minn. 534; *St. Anthony Falls Water-power Co. v. King Wrought-iron Bridge Co.*, 23 Minn. 186; *Roberts v. Chicago, etc., R. Co.*, 48 Minn. 529; *Illinois Cent. R. Co. v. Le Blanc*, 74 Miss. 641; *Hill v. Henderson*, 6 Smed. & M. (Miss.) 356; *Beery v. Chicago, etc., R. Co.*, 64 Mo. 534; *Colvin v. Six*, 79 Mo. 201; *Herrford v. Aetna Ins. Co.*, 42 Mo. 151; *Stuart v. Staplehurst Bank*, (Neb. 1899) 78 N. W. Rep. 298; *National Union Bank v. Dodge*, 42 N. J. L. 321; *Shaft v. Phoenix Mut. L. Ins. Co.*, 67 N. Y. 546; *Bell v. Dix*, 49 N. Y. 236; *Holden v. Putnam F. Ins. Co.*, 46 N. Y. 5; *Stevens v. Phoenix Ins. Co.*, 41 N. Y. 149; *Livermore v. Jenks*, (Supm. Ct. Spec. T.) 11 How. Pr. (N. Y.) 479; *Lalor v. Dunning*, (C. Pl. Spec. T.) 56 How. Pr. (N. Y.) 210; *Amory v. Amory*, 36 N. Y. Super. Ct. 525; *Campbell v. Campbell*, 53 N. Y. Super. Ct. 309; *Ulster County Sav. Inst. v. New York Fourth Nat. Bank*, (Supm. Ct. Gen. T.) 8 N. Y. Supp. 162; *Flourance v. Butler*, (N. Y. Super. Ct. Spec. T.) 9 Abb. Pr. N. S. (N. Y.) 65; *Howard v. Southern R. Co.*, 122 N. Car. 953; *Tucker v. Inter-States L. Assoc.*, 112 N. Car. 797; *Winslow v. Collins*, 110 N. Car. 119; *McNeal Pipe, etc., Co. v. Howland*, 99 N. Car. 202; *State v. Barnes*, 5 N. Dak. 350; *Miller v. Sunde*, 1 N. Dak. 1; *Erie R. Co. v. Stringer*, 32 Ohio St. 476; *Pelzer Mfg. Co. v. Sun Fire Office*, 36 S. Car. 213; *Blum v. Thomas*, 60 Tex. 160; *Durham v. Southern L. Ins. Co.*, 46 Tex. 182; *Texas, etc., R. Co. v. Bloom*, 85 Tex. 283; *Parker v. Clarkson*, 39 W. Va. 196.

"If the case be one of which the federal court has jurisdiction under the Act of Congress, upon compliance with its provisions with respect to the procedure for removing the cause the jurisdiction of the state court is *ipso facto* determined; but on the other hand, if the cause be one of which the federal court has not jurisdiction under the Act of Congress, or the proceedings to remove it are not in compliance with the requirements of the statute, the state court retains its jurisdiction over the suit, notwithstanding a petition and bond be filed for that purpose."

court with jurisdiction.¹ Whether divestiture of the jurisdiction of the state court is accomplished by merely filing the petition and bond, without actually presenting them to the court, has been considered in another section.²

Removal for Prejudice or Local Influence. — But the filing of a petition in the federal Circuit Court for removal on the ground of prejudice or local influence³ does not affect the jurisdiction of the state court until the federal court orders a removal.⁴

b. INHIBITION OF FURTHER PROCEEDINGS. — When a sufficient case for removal is made in the state court, the rightful jurisdiction of that court is at an end, and no further proceedings can properly be had there unless in some manner its jurisdiction is restored.⁵ No subsequent amendment of the pleadings in the state court by reducing the amount demanded⁶ or by dismissing a defendant⁷ or by making a new defendant⁸ or otherwise⁹ can have any force or effect. The plaintiff cannot take a valid judgment by default,¹⁰ nor with the consent of the court dismiss his

National Union Bank v. Dodge, 42 N. J. L. 318.

1. See *infra*, I. 38. b. (7) *Effect of Laches in Filing*.

2. See *supra*, p. 320.

3. See *supra*, p. 254.

4. Patten v. Cilley, 67 N. H. 520. See also *supra*, p. 262.

5. The Act of 1887-1888, 24 U. S. Stat. at L. 554, c. 373; 25 U. S. Stat. at L. 435, c. 866, provides that it shall be the duty of the state court to accept the petition and bond "and proceed no further in such suit." See in support of the text Baltimore, etc., R. Co. v. Koontz, 104 U. S. 14; Pelzer Mfg. Co. v. St. Paul F. & M. Ins. Co., 40 Fed. Rep. 185; Sharp v. Whiteside, 19 Fed. Rep. 150.

Subsequent Answer or Plea. — The filing of an answer in the state court after removal will not be considered in the federal court for any purpose. Mecke v. Valley Town Mineral Co., 89 Fed. Rep. 114.

A plea in the state court after removal cannot be considered in determining the amount in controversy. Sturgeon River Boom Co. v. Sawyer Lumber Co., 89 Fed. Rep. 113.

Modification of a Prior Order. — Where the plaintiff discontinued his action as to one of several defendants and then removed the cause as to the remaining defendants under the Act of 1875, it was held that the state court retained full power and jurisdiction to modify the order of discontinuance so as to make it without prejudice to the right of the dismissed defendant on an

undertaking given by the plaintiff on obtaining an injunction. Benedict v. Dixon, 47 N. Y. Super. Ct. 379.

6. Amendment Reducing Ad Damnum. — After the jurisdiction of the state court has been ousted by the filing of a sufficient petition and bond for removal, no amendment by the plaintiff reducing the amount of his demand below the jurisdictional limit of the federal court can defeat the removal or affect the case in any manner. Kanouse v. Martin, 15 How. (U. S.) 208; Waite v. Phoenix Ins. Co., 62 Fed. Rep. 770; Stephens v. St. Louis, etc., R. Co., 47 Fed. Rep. 530; Louisville, etc., R. Co. v. Roehling, 11 Ill. App. 264; Beery v. Chicago, etc., R. Co., 64 Mo. 535; Stanley v. Chicago, etc., R. Co., 62 Mo. 508; Geiger v. Union Mut. L. Ins. Co., (Marine Ct.) 1 City Ct. (N. Y.) 237. See also Weed Sewing Mach. Co. v. Smith, 71 Ill. 206.

7. Insurance Co. of North America v. Delaware Mut. Ins. Co., 50 Fed. Rep. 257.

8. Probst v. Cowen, 91 Fed. Rep. 931.

9. Wellman v. Howland Coal, etc., Works, 19 Fed. Rep. 51.

Eliminating Separable Controversy. — The plaintiff cannot defeat a removal on the ground of a separable controversy by striking out of his bill the prayer for relief which creates the separable controversy. Jones v. Foreman, 66 Ga. 381.

10. Mattoon v. Hinkley, 33 Ill. 209; Stoker v. Leavenworth, 7 La. 390.

suit¹ or suffer a nonsuit.² No order made by the state court after a removal has been effected by the filing of the petition and bond can be invoked as a ground for an application to remand.³ It has been held that the state court is so completely shorn of its jurisdiction of the subject-matter of the suit⁴ that if the federal court dismisses the suit for want of jurisdiction,⁵ or nonsuits the plaintiff,⁶ he cannot maintain a new suit in the state court on the same cause of action.

C. VALIDITY OF FURTHER PROCEEDINGS — On Direct Attack. — If the case is removable and the removal proceedings are regular, every subsequent exercise of jurisdiction by the state court, including its judgment, if one is rendered, is erroneous, and may be reversed on appeal or error by the appellate state court⁷ or by the Supreme Court of the United States,⁸ or the erroneous

1. *Chambers v. Illinois Cent. R. Co.*, 104 Iowa 238; *Mahoney Min. Co. v. Bennett*, 4 Sawy. (U. S.) 291.

2. *Western Union Tel. Co. v. Horack*, 9 Ill. App. 309; *Beery v. Chicago, etc., R. Co.*, 64 Mo. 533; *Shepherd v. Bradstreet Co.*, 65 Fed. Rep. 142.

3. *New York Silk Mfg. Co. v. Paterson Second Nat. Bank*, 10 Fed. Rep. 204, where, after removal on application of a defendant in attachment, he was allowed to withdraw his appearance to the attachment by the state court and thereupon moved in the federal court to remand the cause, but the motion was denied.

4. "The suit and the subject-matter of the suit are both transferred to the federal court." *Kern v. Huidekoper*, 103 U. S. 491. "Not a vestige of the suit or its subject-matter rightfully remains in the state court." *Friedman v. Israel*, 26 Fed. Rep. 804.

5. *Baltimore, etc., R. Co. v. Fulton*, 59 Ohio St. 575, where the court propounded for itself the question "whether, the cause having been duly removed to the federal court, the plaintiff could, after it had been disposed of in that court, otherwise than on the merits, again for any purpose resort to the state court for relief on the same cause of action," and answered in the negative.

6. *Cox v. East Tennessee, etc., R. Co.*, 68 Ga. 446, quoted with approval in *Baltimore, etc., R. Co. v. Fulton*, 59 Ohio St. 575. But observe that *Powers v. Chesapeake, etc., R. Co.*, 65 Fed. Rep. 129, was a case where, after denial of a motion to remand, the plaintiff dismissed his action in the federal court and brought a new suit in the

state court, which was afterwards removed to the federal court, and jurisdiction thereof was entertained and sustained, but without noticing this point. *Powers v. Chesapeake, etc., R. Co.*, 169 U. S. 92.

In *Yawkey v. Richardson*, 9 Mich. 528, the plaintiff sued a nonresident defendant, who procured an order for the removal of the cause. Thereupon the plaintiff discontinued the suit in the state court and instituted a new suit therein for the same cause of action against the original defendant and one who was a citizen and resident of the state. On the trial the plaintiff introduced a stipulation by the resident defendant authorizing the entry of a discontinuance. The court allowed the discontinuance and proceeded to judgment against the resident defendant. On error the judgment was reversed for abuse of judicial discretion in allowing the discontinuance, and no new trial was granted.

7. *Stix v. Keith*, 90 Ala. 121; *Western Union Tel. Co. v. Horack* 9 Ill. App. 311; *Terre Haute, etc., R. Co. v. Abend*, 9 Ill. App. 308; *Louisville, etc., R. Co. v. Roehling*, 11 Ill. App. 266; *Roberts v. Chicago, etc., R. Co.*, 48 Minn. 527; *St. Anthony Falls Water-power Co. v. King Wrought-Iron Bridge Co.*, 23 Minn. 188. See also the preceding section.

Judgment for Costs Reversed. — In *Williams v. Adkins*, 6 Coldw. (Tenn.) 615, a judgment for costs accruing in the cause up to the time of removal rendered against the defendant on whose petition a removal had been ordered was reversed on appeal.

8. See *infra*, I. 45. *Review by United*
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proceeding may be vacated by the state court on motion¹ or in proper cases enjoined by the federal court.² On the other hand, the jurisdiction and control of the state court over the suit are terminated only on the concurrence of the conditions that the cause be one that in its nature is removable into the federal court, and that the petition for removal and the proceedings thereunder show compliance with the Act of Congress;³ and further proceedings in the state court are perfectly valid if it shall ultimately be decided by the federal Supreme Court that the cause was not properly removed,⁴ except possibly where certiorari has issued

States Supreme Court on Error to State Court.

"If the state court proceeds after a petition for removal it does so at the risk of having its final judgment reversed, if the record on its face shows that when the petition was filed that court ought to have given up its jurisdiction." *Stone v. South Carolina*, 117 U. S. 432.

Judgment on Bail Bond. — A judgment by the state court against sureties on a bail bond rendered subsequent to the removal is invalid. *Davis v. South Carolina*, 107 U. S. 601.

1. Order of Reference Vacated. — "The order, consequently, which was afterwards made by this court directing the action to be tried before a referee and appointing a receiver therein was entirely unauthorized, and * * * a motion was a very proper proceeding, even though it was void, to vacate and set it aside." *Erismann v. Pidcock*, (Supm. Ct. Spec. T.) 62 How. Pr. (N. R.) 330.

The State Court Will Set Aside Its Judgment if it becomes convinced that the removal deprived it of jurisdiction. *Roberts v. Chicago, etc., R. Co.*, 48 Minn. 527; *Merriam v. Dunbar*, 11 Neb. 208; *Grow v. Wiman*, (City Ct. Spec. T.) 3 N. Y. St. Rep. 281; *North American L. & T. Co. v. Colonial, etc., Mortg. Co.*, 3 S. Dak. 590.

2. See *infra*, I. 43. c. Injunction to Restrain Further Proceedings After Removal.

3. National Union Bank v. Dodge, 42 N. J. L. 319, where the court said: "The theory that the jurisdiction of the state court is suspended temporarily by the filing of a petition for the removal of the cause, accompanied by a sufficient bond, is without judicial support." But where the state court declined to order a removal, and upon motion for leave to file copies of the

record and docket the cause in the federal court the latter made an order granting leave, it was held that it thereby adjudicated the question of removal in favor of its jurisdiction so that a subsequent judgment against the defendant in the state court, rendered after the production of competent evidence of the proceedings in the federal court, must be reversed and pronounced void, although the cause was still pending and undecided in the federal court. *Northern Pac. R. Co. v. McMullen*, 86 Wis. 561, where, however, the state court was evidently of the opinion that the cause had been properly removed. See also *Jansen v. Grimshaw*, 125 Ill. 468, holding that an order of removal suspends all power or jurisdiction over the cause until jurisdiction is restored by a remand from the federal court back to the state court, and that in the meantime the court has no power to make any order in the cause. And see *Parker v. Clarkson*, 39 W. Va. 184.

4. No authorities need be cited to the proposition in the text in respect of the federal courts other than the decisions of the United States Supreme Court affirming the judgments of state courts when the former adjudges the proceedings insufficient to effect a removal. See *infra*, I. 45. Review by United States Supreme Court on Error to State Court.

In *National Union Bank v. Dodge*, 42 N. J. L. 319, after the court denied a petition for removal the plaintiff served interrogatories on the defendant according to the local practice, and, the cause being remanded by the federal court, the plaintiff obtained a rule to show cause why the defendant should not be attached for contempt in refusing to answer. The rule to show cause was made absolute. The case also held that the fact that a writ of

from the federal to the state court.¹ Therefore, assuming that no removal has been effected, proceedings in the state court subsequent to the denial of a petition for removal may be properly entitled in that court.²

On Collateral Attack.—It is commonly declared that the subsequent unauthorized proceedings in the state court are not only erroneous, but *coram non judice*, and void,³ but some of the state courts dissent from this view to the extent of holding that the judgment of the state court cannot be collaterally attacked outside of the federal courts.⁴

error was, in due season, sued out of the Supreme Court of the United States to review the action of the federal Circuit Court in making the order of remand did not debar the plaintiff from proceeding to compel the defendant to answer the interrogatories.

1. In *Stone v. South Carolina*, 117 U. S. 433, the court said: "What effect the writ of certiorari provided for in section 7 of the Act of 1875 to require the state court to make return of the record to the Circuit Court would have upon the further power of the state court to proceed we do not now decide, as no such writ was issued in this case." *Stone v. South Carolina*, 117 U. S. 433.

"If the cause be stayed by certiorari out of the federal court * * * any step therein by the plaintiff thereafter will, for that reason, be treated as a nullity or be set aside as irregular." *National Union Bank v. Dodge*, 42 N. J. L. 321.

2. *National Union Bank v. Dodge*, 42 N. J. L. 318.

3. *La Page v. Day*, 74 Fed. Rep. 978; *Burke v. Bunker Hill, etc., Co.*, 46 Fed. Rep. 650; *McCullough v. Large*, 20 Fed. Rep. 310; *Lawton v. Blitch*, 30 Fed. Rep. 641; *Young v. Merchants' Ins. Co.*, 29 Fed. Rep. 274; *Akerly v. Vilas*, 1 Abb. (U. S.) 286; *Gordon v. Longest*, 16 Pet. (U. S.) 97; *Cox v. East Tennessee, etc., R. Co.*, 68 Ga. 448; *Louisville, etc., R. Co. v. Roehling*, 11 Ill. App. 266; *Sharp v. Gutchner*, 74 Ind. 364; *Ramsey v. Coolbaugh*, 13 Iowa 172; *Rosenfield v. Adams Express Co.*, 21 La. Ann. 234; *State v. Johnson*, 29 La. Ann. 403; *Herryford v. Aetna Ins. Co.*, 42 Mo. 151; *Bell v. Dix*, 49 N. Y. 237; *Leutze v. Butterfield*, (C. Pl. Gen. T.) 1 Abb. N. Cas. (N. Y.) 368; *Livermore v. Jenks*, (Supm. Ct. Spec. T.) 11 How. Pr. (N. Y.) 479; *Kulp v. Ricketts*, 5 Phila. (Pa.) 308;

Miller v. Sunde, 1 N. Dak. 1; *Baltimore, etc., R. Co. v. Fulton*, 59 Ohio St. 575.

In *Kern v. Huidekoper*, 103 U. S. 485, the application for removal was denied by the state court, but a transcript of the record was nevertheless filed in the federal court. The state court proceeded to final judgment, which was thereupon pleaded in the federal court as a bar. It was held that a demurrer to the plea was properly sustained on the ground that the cause had been properly removed to the federal court. The court said: "After the filing in the United States Circuit Court * * * of the record of the proceedings in the state court, the latter lost all jurisdiction over the case, and, being without jurisdiction, its subsequent proceedings and judgment were not, as some of the state courts have ruled, simply erroneous, but absolutely void." Citing *Gordon v. Longest*, 16 Pet. (U. S.) 97; *Home L. Ins. Co. v. Dunn*, 19 Wall. (U. S.) 214; *Virginia v. Rives*, 100 U. S. 313. See further, to the point that if the cause is properly removed any judgment afterwards rendered therein is not *res judicata* so as to conclude the defendant on the trial of the merits in the federal court, *Missouri v. Tiedermann*, 10 Fed. Rep. 22.

"If the application should have been granted, the subsequent proceedings were without validity." *Gaines v. Fuentes*, 92 U. S. 17.

"The duty of the state court was to proceed no further in the cause. Every order thereafter made in that court was *coram non judice* unless its jurisdiction was actually restored." *National Steamship Co. v. Tugman*, 106 U. S. 122.

4. *Johnson v. Brewers F. Ins. Co.*, 51 Wis. 570, practically the only direct authority on that point. *Approved in*

d. PETITIONER FOR REMOVAL PARTICIPATING IN FURTHER PROCEEDINGS. — By making a defense in the state court after that court has declined to surrender jurisdiction and forced him to trial, the defendant does not lose or impair his right to insist that the case has been lawfully removed into the federal court.¹ He may also appeal from an order denying his petition for removal² or from the final judgment of the state court³ without prejudice to his rights. Nor is it necessary for the defendant to plead in abatement or otherwise object to the further jurisdiction of the state court⁴ or to answer or plead therein in any manner.⁵ But it is customary in some of the states, especially in *New York*, for the defendant to plead the removal proceedings in abatement⁶ or to accentuate his objection by filing in the

Southern Pac. R. Co. v. Superior Ct., 63 Cal. 607. See also *Blair v. West Point Mfg. Co.*, 7 Neb. 153.

1. *Powers v. Chesapeake, etc.*, R. Co., 169 U. S. 103, *affirming* 65 Fed. Rep. 129; *Baltimore, etc.*, R. Co. v. Koontz, 104 U. S. 14; *Kern v. Huidekoper*, 103 U. S. 492; *New Orleans, etc.*, R. Co. v. Mississippi, 102 U. S. 135; *Removal Cases*, 100 U. S. 475; *Kanouse v. Martin*, 15 How. (U. S.) 198; *Home L. Ins. Co. v. Dunn*, 19 Wall. (U. S.) 214; *Niecke v. Valley Town Mineral Co.*, 89 Fed. Rep. 114, 211; *Ward v. San Diego Land, etc.*, Co., 79 Fed. Rep. 665; *Waite v. Phoenix Ins. Co.*, 62 Fed. Rep. 769; *McMullen v. Northern Pac. R. Co.*, 57 Fed. Rep. 17; *State v. Sullivan*, 50 Fed. Rep. 593; *Strasburger v. Beecher*, 44 Fed. Rep. 209; *Chambers v. McDougal*, 42 Fed. Rep. 696; *Baltimore, etc.*, R. Co. v. Ford, 35 Fed. Rep. 170; *Richards v. Rock Rapids*, 31 Fed. Rep. 506; *Stix v. Keith*, 90 Ala. 121; *Little Rock, etc.*, R. Co. v. Iredell, 50 Ark. 388; *New Orleans v. Seixas*, 35 La. Ann. 37; *Leutz v. Butterfield*, (C. Pl. Gen. T.) 52 How. Pr. (N. Y.) 378; *Stanley v. Chicago, etc.*, R. Co., 62 Mo. 151; *Herryford v. Aetna Ins. Co.*, 42 Mo. 153; *Erie R. Co. v. Stringer*, 32 Ohio St. 468; *Hadley v. Dunlap*, 10 Ohio St. 1; *Koshland v. National F. Ins. Co.*, 31 Oregon 205; *Northern Pac. R. Co. v. McMullen*, 86 Wis. 501.

Thus in *National Steamship Co. v. Tugman*, 106 U. S. 122, it was held that the petitioner did not waive his rights by subsequently answering to an order requiring the issues to be heard and determined by a referee selected by the parties, and by appearing and contesting the case as well before the

referee as in the state courts up to final judgment. "It was at liberty, its right to removal being ignored by the state court, to make defense in that tribunal in every mode recognized by the laws of the state, without forfeiting or impairing, in the slightest degree, its right to a trial in the court to which the action had been transferred, or without affecting, to any extent, the authority of the latter court to proceed."

Where the cause has been docketed in the federal court, and due notice given to the plaintiff, it is no answer to a motion to dismiss for want of prosecution that the defendant has proceeded to trial and judgment in the state court. *McMullen v. Northern Pac. R. Co.*, 57 Fed. Rep. 16.

2. *Richards v. Rock Rapids*, 31 Fed. Rep. 506.

3. *Powers v. Chesapeake, etc.*, R. Co., 169 U. S. 103.

4. *Kanouse v. Martin*, 15 How. (U. S.) 198.

5. *Herryford v. Aetna Ins. Co.*, 42 Mo. 153. But it is obviously the better policy for the defendant to contest the case if it is forced to trial in the state court, unless he is absolutely certain of the validity of his removal proceedings, as a judgment against him must be upheld in case it is ultimately decided by the United States Supreme Court that no removal was legally effected.

6. See *Mix v. Andes Ins. Co.*, 74 N. Y. 55; *Shaft v. Phoenix Mut. L. Ins. Co.*, 67 N. Y. 546; *Taylor v. Shew*, 54 N. Y. 75; *Ayres v. Western R. Corp.*, 45 N. Y. 261; *Stevens v. Phoenix Ins. Co.*, 41 N. Y. 149; *Ulster County Sav. Inst. v. New York Fourth Nat. Bank*,

state court a certified copy of an order of the federal court, if one has been made, refusing to remand the cause.¹

38. Acquisition of Jurisdiction by Federal Court — a. JURISDICTION BEFORE TIME FOR FILING RECORD — (1) For Granting Provisional Remedies, etc. — It has already been stated that the jurisdiction of the state court immediately ceases upon the filing of the petition and bond for removal, if the case be a removable one, and that *eo instanti* the jurisdiction of the federal court attaches.² It is now the undisputed doctrine in the Circuit Courts that it is competent for the federal court to receive the record before the return day, and to act upon it on the application of either party for such interlocutory proceedings as are necessary to preserve the property and the rights involved in the litigation from injury.³

(2) *For Granting Motion to Remand or for Determination of Merits — Motion to Remand.* — In some of the Circuit Courts it is held that the federal court may take jurisdiction to hear and grant a motion to remand upon the filing of the transcript of record before the return day, written notice of the motion being given to the adverse party.⁴

For Determination of Merits. — According to the weight of authority an application for relief should not be granted before the return day of the removal proceedings where the result would be finally

(Supm. Ct. Gen. T.) 8 N. Y. Supp. 162; *De Camp v. New Jersey Mut. L. Ins. Co.*, 2 Sweeny (N. Y.) 481; *Leutze v. Butterfield*, (C. Pl. Gen. T.) 1 Abb. N. Cas. (N. Y.) 367; *Lalor v. Dunning*, (C. Pl. Spec. T.) 56 How. Pr. (N. Y.) 213; *Sharp v. Gletcher*, 74 Ind. 357; *Indianapolis, etc., R. Co. v. Risley*, 50 Ind. 60; *Texas, etc., R. Co. v. McAllister*, 59 Tex. 354; *Kennedy v. Woolfolk*, 1 Overt. (Tenn.) 453.

A Precedent of an Answer in Abatement will be found in *Ayres v. Western R. Corp.*, 45 N. Y. 261, where the answer alleging the removal proceedings, and held sufficient in form and substance, is set forth in full. See also *Indianapolis, etc., R. Co. v. Risley*, 50 Ind. 60.

1. See *Stix v. Keith*, 90 Ala. 121; *Dunn v. Burlington, etc., R. Co.*, 35 Minn. 74.

2. See *supra*, p. 347.

3. *Hamilton v. Fowler*, 83 Fed. Rep. 321, which contains an exhaustive discussion of the whole subject by Judge Hammond; *Mahoney Min. Co. v. Bennett*, 4 Sawy. (U. S.) 289, granting a restraining order; *Matter of Barnesville, etc., R. Co.*, 4 Fed. Rep. 10, 2 McCrary (U. S.) 216; *Commercial, etc., Bank v. Corbett*, 5 Sawy. (U. S.) 172, where a receiver was appointed; *Port-*

land v. Oregonian R. Co., 6 Fed. Rep. 321, where an injunction was modified upon terms; *Texas, etc., R. Co. v. Rust*, 17 Fed. Rep. 275, where an injunction was dissolved and an order appointing a receiver vacated.

Due and Regular Notice of the contemplated proceeding, such as may be prescribed by the rules of practice or otherwise, should be given to the adverse party. *Hamilton v. Fowler*, 83 Fed. Rep. 326.

4. *Hartford, etc., R. Co. v. Montague*, 94 Fed. Rep. 227; *Delbanco v. Singletary*, 40 Fed. Rep. 177, where such procedure was authorized by a rule of court; *Mills v. Newell*, 41 Fed. Rep. 529; *Thompson v. Chicago, etc., R. Co.*, 60 Fed. Rep. 773, where the cause was remanded two months before the next session of the court; *Anderson v. Appleton*, 32 Fed. Rep. 857. *Contra*, *Kansas City, etc., R. Co. v. Interstate Lumber Co.*, 36 Fed. Rep. 9.

Postponing Action on Motion. — In *Frink v. Blackinton Co.*, 80 Fed. Rep. 306 (First Circuit), the court, while inclined to hold that it had power to remand before the return day, declined to hazard the chance of error, and ordered the motion to stand over to the next term.

to determine the whole merits of the controversy.¹ But some of the courts hold that where the record is filed before the return day the court acquires the fullest power to proceed with the case, and may do anything that could be done in any other case pending in the court except to enter a final judgment or decree.²

b. FILING COPY OF RECORD — (1) Duty to File and Who May File. — The removal act provides for filing "a copy of the record in such suit" in the court to which the cause is removed;³ and until that is done the federal court will have no jurisdiction to proceed in the cause.⁴ The act makes no provision for filing a copy of the record by any other person than the party removing the cause.⁵ Nevertheless, if he neglects to file it the adverse party may do so.⁶

(2) *Time for Filing.* — Under the statute a party who removes a cause is bound only by the conditions of his bond to file the transcript and have the cause docketed in the federal court on the first day of the next succeeding term.⁷ But a rule of court in some of the circuits authorizes either party to have the transcript filed and the cause docketed immediately after the petition and bond have been filed in the state court.⁸

(3) *What Constitutes Record.* — The term "record" as used in the statute is held to include, besides the petition for removal and any order of the state court made thereon, the process, pleadings, depositions, and other proceedings on file in the cause

1. *Hamilton v. Fowler*, 83 Fed. Rep. 321, following *New Orleans City R. Co. v. Crescent City R. Co.*, 5 Fed. Rep. 160, in which case an application to dissolve an injunction before the return day of the removed case was denied where a dissolution of the injunction would have been a final determination of the whole merits of the case, and could not be granted without changing the status of the parties with reference to the thing to be finally adjudged. See also *Matter of Barnesville, etc.*, R. Co., 4 Fed. Rep. 10, 2 *McCrary* (U. S.) 216.

2. See *Consolidated Traction Co. v. Guarantor's Liability, etc., Co.*, 78 Fed. Rep. 657 (Third Circuit), granting an order to plead, and following *Arthur v. New England Mut. L. Ins. Co.*, 7 Rep. 329, 2 Fed. Cas. No. 565, in the same circuit.

3. Act of 1887-1888, 24 U. S. Stat. at L. 554, c. 373; 25 U. S. Stat. at L. 435, c. 866.

4. See *Hamilton v. Fowler*, 83 Fed. Rep. 325.

5. *It Is Not the Duty of the Clerk of the State Court to transmit the copy of the record to the clerk of the federal court;*

that duty is imposed upon the petitioner for removal. *Hatcher v. Wadley*, 84 Fed. Rep. 913; *Miller v. Wattier*, 24 Fed. Rep. 49.

6. *Consolidated Traction Co. v. Guarantor's Liability, etc., Co.*, 78 Fed. Rep. 657; *Delbanco v. Singletary*, 40 Fed. Rep. 177; *Reineman v. Ball*, 33 Fed. Rep. 692; *Anderson v. Appleton*, 32 Fed. Rep. 855; *Judge v. Anderson*, 19 Fed. Rep. 885; *Texas, etc., R. Co. v. Rust*, 17 Fed. Rep. 275; *Hyde v. Phoenix Ins. Co.*, 2 Dill. (U. S.) 525; *McBratney v. Usher*, 1 Dill. (U. S.) 371; *Fisk v. Union Pac. R. Co.*, 6 Blatchf. (U. S.) 362. In *Thompson v. Chicago, etc., R. Co.*, 60 Fed. Rep. 773, it was filed by a defendant who did not join in the petition for removal. Some of the foregoing cases were decided under the authority of an express rule of court.

7. See the condition of the removal bond *supra*, p. 330.

8. *Creagh v. Equitable L. Assur. Soc.*, 83 Fed. Rep. 849 (Ninth Circuit), quoting the rule in that circuit. And such is the settled practice in the Second Circuit. *Hartford, etc., R. Co. v. Montague*, 94 Fed. Rep. 227.

at the time of removal,¹ but not depositions or other proceedings taken subsequent to the removal.²

Original Record. — If the state court voluntarily furnishes the party with the original record it may be filed in the place of a copy.³

(4) *Authentication of Record.* — The record must be duly certified.⁴ A certificate by the clerk under the seal of the court is sufficient without a certificate of the judge.⁵ If the clerk does not certify that copies of the entire proceedings are included in the papers, it is not a ground for remand, but upon suggestion of a diminution of record the court may grant a certiorari to obtain copies of the entire record.⁶

(5) *Effect of Filing Incomplete Copy.* — If the transcript of the record filed in the federal court is not complete, objection should be made by suggestion of a diminution of the record;⁷ it is not a ground for motion to remand the cause to the state court.⁸

(6) *Notice of Filing.* — A rule of court in some of the circuits requires written notice of the filing of the transcript to be given to the adverse party;⁹ but failure to comply with the rule constitutes no ground for remanding the cause.¹⁰

(7) *Effect of Laches in Filing.* — It is well settled that a failure to file the record in the federal court within the time required by statute is not fatal to the jurisdiction, and that the federal court may, in its discretion, for good cause shown, accept the transfer after the time specified in the statute,¹¹ imposing such

1. McBratney v. Usher, 1 Dill. (U. S.) 367; Miller v. Tobin, 18 Fed. Rep. 609.

Journal Entries in the cause properly constitute a part of the record. Probst v. Cowen, 91 Fed. Rep. 929.

2. Miller v. Tobin, 18 Fed. Rep. 609.

3. Miller v. Wattier, 24 Fed. Rep. 49, holding that if by mistake the clerk of the state court should furnish an original instead of a copy he may, on application, have it restored, and a copy substituted.

4. Martin v. Kanouse, 1 Blatchf. (U. S.) 149. See also Probst v. Cowen, 91 Fed. Rep. 931.

For a Form of Certificate see Commercial, etc., Bank v. Corbett, 5 Sawy. (U. S.) 173.

5. Osgood v. Chicago, etc., R. Co., 6 Biss. (U. S.) 330.

6. Dennis v. Alachua County, 3 Woods, (U. S.) 683.

7. Probst v. Cowen, 91 Fed. Rep. 931, and other cases cited in the next note.

8. Probst v. Cowen, 91 Fed. Rep. 931; Cook v. Whitney, 3 Woods (U. S.) 715; Dennis v. Alachua County, 3 Woods (U. S.) 683.

9. See Rule 79 in the Ninth Circuit, quoted in Chiatovich v. Hanchett, 78 Fed. Rep. 194.

10. Chiatovich v. Hanchett, 78 Fed. Rep. 193.

11. St. Paul, etc., R. Co. v. McLean, 108 U. S. 212; Baltimore, etc., R. Co. v. Koontz, 104 U. S. 16; Removal Cases, 100 U. S. 457; New Orleans, etc., R. Co. v. Mississippi, 102 U. S. 135; Duncan v. Gegan, 101 U. S. 812; National Steamship Co. v. Tugman, 106 U. S. 118; Hamilton v. Fowler, 83 Fed. Rep. 321; Eisenmann v. Delema's Nevada Gold-Min. Co., 87 Fed. Rep. 248; Lucker v. Phoenix Assur. Co. 66 Fed. Rep. 162; Stoutenburgh v. Wharton, 18 Fed. Rep. 1; McLean v. St. Paul, etc., R. Co., 16 Blatchf. (U. S.) 309; Jackson v. Mutual L. Ins. Co., 3 Woods (U. S.) 413; Hall v. Brooks, 14 Fed. Rep. 113; Woolridge v. McKenna, 8 Fed. Rep. 650.

Sufficiency of Excuse. — Where the petitioner for removal was kept by his adversary, and against his will, in the state court, and forced to a trial there on the merits, it was held that he might, after having obtained in the

terms as may be just and proper in the premises.¹ But if the petitioner for removal inexcusably fails to enter the record and docket the cause in time, the suit may be properly remanded for want of due prosecution under the removal.²

c. MOTION TO DOCKET CAUSE. — No motion to docket the cause upon filing a copy of the record is necessary,³ though it is said to be customary to make a formal motion to that effect on the first day of the term.⁴

39. Nature, Extent, and Exercise of Jurisdiction Acquired — *a.* IN GENERAL. — When a removal is effected the federal court takes the case in the condition in which it was at the time of removal.⁵

regular course of procedure a reversal of the judgment and an order for the allowance of the removal, enter the cause in the Circuit Court notwithstanding the term of that court had gone by during which under other circumstances the record should have been entered. *Baltimore, etc., R. Co. v. Koontz*, 104 U. S. 5. To the same point see *Winchell v. Coney*, 27 Fed. Rep. 482. For other cases of particular excuses held sufficient see *Woolridge v. McKenna*, 8 Fed. Rep. 650; *Eisenmann v. Delemar's Nevada Gold-Min. Co.*, 87 Fed. Rep. 248; *Rowell v. Hill*, 28 Fed. Rep. 433, 24 Blatchf. (U. S.) 136; *Pierce v. Corrigan*, 77 Fed. Rep. 657, where counsel was mistaken as to the term of court; *Lucker v. Phoenix Assur. Co.*, 66 Fed. Rep. 161; *Burgunder v. Browne*, 59 Fed. Rep. 497; *Henderson v. Cabell*, 43 Fed. Rep. 257; *Kidder v. Featteau*, 2 Fed. Rep. 616.

By Rule of Court. — Provision for filing the record after the day appointed, and thereupon giving notice to the adverse party, is made by rule of court in some of the circuits. See Rule 78 in the Ninth Circuit, quoted in *Eisenmann v. Delemar's Nevada Gold-Min. Co.*, 87 Fed. Rep. 249.

1. *Lucker v. Phoenix Assur. Co.*, 66 Fed. Rep. 162; *Pierce v. Corrigan*, 77 Fed. Rep. 657; *Eisenmann v. Delemar's Nevada Gold-Min. Co.*, 87 Fed. Rep. 248.

2. *Baltimore, etc., R. Co. v. Koontz*, 104 U. S. 5; *St. Paul, etc., R. Co. v. McLean*, 108 U. S. 212; *Hatcher v. Wadley*, 84 Fed. Rep. 913, where twelve terms had been passed without adequate excuse; *McGregor v. McGillis*, 30 Fed. Rep. 388, where fifteen months had elapsed. Other cases where excuses were held insufficient are *Hall v. Brooks*, 14 Fed. Rep. 113;

Clippinger v. Missouri Valley L. Ins. Co., 1 Flipp. (U. S.) 456; *McLean v. St. Paul, etc., R. Co.*, 17 Blatchf. (U. S.) 363, 16 Blatchf. (U. S.) 309; *Bright v. Milwaukee, etc., R. Co.*, 14 Blatchf. (U. S.) 214; *Broadnax v. Eisner*, 13 Blatchf. (U. S.) 366.

3. *Glover v. Shepperd*, 15 Fed. Rep. 833.

4. *Glover v. Shepperd*, 15 Fed. Rep. 833.

In the Sixth, Seventh, and Eighth Circuits a motion to docket the cause seems to be the uniform practice where the state court made no order of removal. *Freeman v. Butler*, 39 Fed. Rep. 1; *Foster v. Chesapeake, etc., R. Co.*, 47 Fed. Rep. 376; *Chicago, etc., R. Co. v. Lake Shore, etc., R. Co.*, 10 Biss. (U. S.) 122; *Farmers' L. & T. Co. v. Chicago, etc., R. Co.*, 9 Biss. (U. S.) 133; *Buell v. Cincinnati, etc., Constr. Co.*, 9 Fed. Rep. 351; *Hack v. Chicago, etc., R. Co.*, 23 Fed. Rep. 356; *In re Jarnecke Ditch*, 69 Fed. Rep. 161; *Shumway v. Chicago, etc., R. Co.*, 4 Fed. Rep. 385; *Daugherty v. Western Union Tel. Co.*, 61 Fed. Rep. 138; *Boggs v. Willard*, 3 Biss. (U. S.) 256; *Velie v. Manufacturers Acc. Indemnity Co.*, 40 Fed. Rep. 545; *Ketchum v. Black River Lumber Co.*, 4 Fed. Rep. 139; *American Nat. Bank v. National Ben., etc., Co.*, 70 Fed. Rep. 420; *Hakes v. Burns*, 40 Fed. Rep. 33; *Kern v. Huidekoper*, 103 U. S. 487, a case arising in the Seventh Circuit, where on motion of the petitioner for removal the federal Circuit Court had entered an order docketing the cause and declaring that it had jurisdiction thereof by reason of the removal.

5. *Duncan v. Gegan*, 101 U. S. 810; *Mecke v. Valley Town Mineral Co.*, 89 Fed. Rep. 114; *Adams v. Heckscher*, 80 Fed. Rep. 743. See also *Fleitas v. Meraux*, 47 La. Ann. 232.

The entire jurisdiction of the state court is transferred to the federal court, which will proceed to administer the state laws and ascertain and adjust the legal rights of the parties as fully and completely as could have been done in the state court of original jurisdiction.¹ The removal does not divest the plaintiff of any of the substantial rights vested in him by the state law or deprive him of the benefit of any special proceeding by which he sought to enforce them in the state court in the manner and form provided by the state statutes.² If the state court had no jurisdiction of the subject-matter of the suit the federal court acquires none by removal;³ nor is the scope of the action enlarged by removal.⁴

b. MOTION TO QUASH SERVICE OF PROCESS — Petition for Removal Not an Appearance. — The federal Circuit and Supreme Courts held in numerous cases that when in a petition for removal it was expressed that the defendant appeared specially and for the sole purpose of presenting the petition, the application could not be treated as submitting the defendant to the jurisdiction of

1. *Elliott v. Shuler*, 50 Fed. Rep. 457; *Sutro v. Simpson*, 14 Fed. Rep. 370.

"It is not the purpose of the statutes of the United States which authorize the removal of causes from a state court to a federal court to deprive either party of any substantial right, but to secure to the parties all such rights which could be claimed in the state courts when capable of enforcement under the settled federal practice." *Smale v. Mitchell*, 143 U. S. 406.

Dismissal of Removed Appeal. — Where a proceeding for condemnation of land begun in a Nebraska county court before commissioners of assessment was appealed to the district court and thence removed to the federal court, the federal court, exercising the power which the state district court would have exercised had the case not been removed, dismissed the appeal on the ground that it was not taken within sixty days as prescribed by statute. *Clinton v. Missouri Pac. R. Co.*, 122 U. S. 469.

Process Against Defendant Not Originally Served. — It was held in *Fallis v. McArthur*, 1 Bond (U. S.) 100, that where an action is removed by one of several defendants who alone has been served with process, the plaintiff is entitled to process in the federal court against the defendants not served in the state court.

In *Vandevoort v. Palmer*, 4 Duer (N.

Y.) 679, an action against members of a partnership all of whom were non-residents, but only one of whom was served with process, the latter removed the cause on his sole application, and the court remarked that the cause could proceed in the federal court "in the same manner as in this court. Other parties may be brought in if the plaintiff can serve them, or if not, the action may proceed" against the removing defendant alone.

Jurisdiction of Garnishment Proceedings. — The removal of a suit draws to the federal court jurisdiction over ancillary proceedings against garnishees. *Ahlhauser v. Butler*, 50 Fed. Rep. 705.

2. *Elliott v. Shuler*, 50 Fed. Rep. 454, a removal of a proceeding by a personal representative in the state probate court to sell land of his decedent for the payment of debts. See also *Kansas City, etc., R. Co. v. Interstate Lumber Co.*, 37 Fed. Rep. 3; *Banigan v. Worcester*, 30 Fed. Rep. 392. Compare *Dey v. Chicago, etc., R. Co.*, 45 Fed. Rep. 87.

3. *Fidelity Trust Co. v. Gill Car Co.*, 25 Fed. Rep. 737. See also *Simpkins v. Lake Shore, etc., R. Co.*, 19 Fed. Rep. 802, 21 Blatchf. (U. S.) 554.

4. *Hummel v. Moore*, 25 Fed. Rep. 380, sustaining a demurrer to a set-off pleaded by the defendant which demanded judgment for a sum beyond the jurisdiction of the state court from which the cause was removed.

the state court for any other purpose; ¹ but many of the Circuit Courts held that a petition for removal in general terms was a waiver of all objections to jurisdiction over the person. ² It is now settled by the Supreme Court that the filing of a petition for removal, whether the defendant appears specially for that purpose or not, does not amount to a general appearance, but to a special appearance only, ³ and does not preclude the defendant from specially appearing in the federal court after removal and by plea or by motion to quash objecting to the jurisdiction over his person acquired by an insufficient service of process. ⁴

1. *Goldey v. Morning News*, 156 U. S. 526, where the court said: "The necessary conclusion appears to this court to be that the defendant's right to object to the insufficiency of the service of the summons was not waived by filing the petition for removal in the guarded form in which it was drawn up, and by obtaining a removal accordingly. And it is gratifying to know that this conclusion is in accord with the general current of decisions in the Circuit Courts of the United States." Citing *Parrott v. Alabama Gold L. Ins. Co.*, 5 Fed. Rep. 391; *Blair v. Turtle*, 1 McCrary (U. S.) 372; *Atchison v. Morris*, 11 Biss. (U. S.) 191; *Small v. Montgomery*, 5 McCrary (U. S.) 440 [*explaining Sweeney v. Coffin*, 1 Dill. (U. S.) 73]; *Hendrickson v. Chicago*, etc., R. Co., 22 Fed. Rep. 569; *Elgin Canning Co. v. Atchison*, etc., R. Co., 24 Fed. Rep. 866; *Kauffman v. Kennedy*, 25 Fed. Rep. 785; *Miner v. Markham*, 28 Fed. Rep. 387; *Perkins v. Hendryx*, 40 Fed. Rep. 657; *Clews v. Woodstock Iron Co.*, 44 Fed. Rep. 31; *Bentlif v. London*, etc., Finance Corp., 44 Fed. Rep. 667; *Reifsnider v. American Imp. Publishing Co.*, 45 Fed. Rep. 433; *Forrest v. Union Pac. R. Co.*, 47 Fed. Rep. 1; *O'Donnell v. Atchison*, etc., R. Co., 49 Fed. Rep. 689; *Ahlhauser v. Butler*, 50 Fed. Rep. 705; and *McGillin v. Claffin*, 52 Fed. Rep. 657. See also *Golden v. Morning News*, 42 Fed. Rep. 112; *Richmond v. Brookings*, 48 Fed. Rep. 241; *Brooks v. Dun*, 51 Fed. Rep. 140; *Morris v. Graham*, 51 Fed. Rep. 53; *Hutton v. Joseph Bancroft*, etc., Co., 77 Fed. Rep. 481; *Kinne v. Lant*, 68 Fed. Rep. 436; *Small v. Montgomery*, 17 Fed. Rep. 865; *Wabash Western R. Co. v. Brow*, 65 Fed. Rep. 950; *Garner v. Providence Second Nat. Bank*, 66 Fed. Rep. 369.

2. *Wabash Western R. Co. v. Brow*,

65 Fed. Rep. 947, 31 U. S. App. 192 [*reversed* 164 U. S. 271]; *Pollard v. Dwight*, 4 Cranch (U. S.) 421; *Sayles v. North-western Ins. Co.*, 2 Curt. (U. S.) 213; *Bushnell v. Kennedy*, 9 Wall. (U. S.) 393; *Sweeney v. Coffin*, 1 Dill. (U. S.) 75; *Edwards v. Connecticut Mut. L. Ins. Co.*, 20 Fed. Rep. 452; *Tallman v. Baltimore*, etc., R. Co., 45 Fed. Rep. 156; *Hinds v. Keith*, 13 U. S. App. 222; *New York Constr. Co. v. Simon*, 53 Fed. Rep. 6; *Caskey v. Chenoweth*, 23 U. S. App. 384; *Long v. Long*, 73 Fed. Rep. 369; *Schwab v. Mabley*, 47 Mich. 512; *Kinne v. Lant*, 68 Fed. Rep. 439.

3. *Wabash Western R. Co. v. Brow*, 164 U. S. 271 [*reversing* 31 U. S. App. 192]; *National Acc. Soc. v. Spiro*, 164 U. S. 281, where the following question, certified from the Circuit Court of Appeals, was answered in the negative: "Does a defendant, by filing a petition in a state court for removal of the cause to the United States court, in general terms, unaccompanied by a plea in abatement, and without specifying or restricting the purpose of his appearance, thereby waive objection to the jurisdiction of the court for want of sufficient service of the summons?"

4. *Wabash Western R. Co. v. Brow*, 164 U. S. 271; *Collins v. American Spirit Mfg. Co.*, 96 Fed. Rep. 133; *Mecke v. Valley Town Mineral Co.*, 89 Fed. Rep. 114, where an action against a nonresident corporation was dismissed for absence of proper service of process; *Ashley v. Quintard*, 90 Fed. Rep. 84; *Purdy v. Muller*, 81 Fed. Rep. 513; *Adams v. Heckscher*, 80 Fed. Rep. 742; *Garner v. Providence Second Nat. Bank*, 66 Fed. Rep. 369; *Hawkins v. Peirce*, 79 Fed. Rep. 452. *Compare Hinds v. Keith*, 57 Fed. Rep. 10.

Property Fraudulently Decoyed Within Reach of Process.—A defendant in a replevin suit does not, by removing

Waiver of Objection. — But such defect of jurisdiction is waived by filing an answer in the state court before the removal,¹ though not by an answer filed in that court after removal,² and a defendant may lose his right to object by laches in making his objection in the federal court.³

Motion First Made in State Court. — Where a removal is had pending a motion in the state court to quash the service of process, the motion may be renewed in the federal court after removal;⁴ but if the motion was denied by the state court the defendant will be concluded thereby, at least where no new evidence is produced, on a renewal of the motion in the federal court,⁵ unless the denial of the motion was without prejudice to its renewal after removal.⁶

c. TIME TO PLEAD. — The defendant may file his pleading in the state court before or at the time when he files his petition and bond for removal.⁷ If he does not do so, his time to answer or plead in the federal court, according to the practice in the Eighth Circuit, it seems, will begin to run only from the filing of the record in that court.⁸ In the Fourth and Second Circuits

the cause, waive his right to have the service set aside on the ground that the property replevied was decoyed within the jurisdiction of the state court by a fraudulent device or trick of the plaintiff. *Moynahan v. Wilson*, 2 Flipp. (U. S.) 130.

Amendment of Officer's Return. — Whether the officer may be allowed to amend his return in the federal court so as to show legal service of process has been decided both in the negative. *Hawkins v. Peirce*, 79 Fed. Rep. 452; *McGillin v. Claffin*, 52 Fed. Rep. 657; *Tallman v. Baltimore*, etc., R. Co., 45 Fed. Rep. 156; and in the affirmative, *Richmond v. Brookings*, 48 Fed. Rep. 242; *Stalker v. Pullman's Palace-Car Co.*, 81 Fed. Rep. 989 (Ninth Circuit), where the ruling upon the defendant's motion to set aside the service of process made in the state court was withheld to afford the plaintiff an opportunity to give notice of his motion to amend the return of service of such process.

Motion in State Court After Remand. — In *Farmer v. National L. Assoc.*, 138 N. Y. 265, the defendant corporation removed the cause to the federal court. It was subsequently remanded to the state court, where the defendant for the first time moved to set aside the service of summons on the ground of a fatal defect therein. The court held that the defendant had waived the defect and submitted itself to the juris-

diction of the state court by its proceedings for removal. The case of *Wabash Western R. Co. v. Brow*, 164 U. S. 271, above cited in this note, had not then been decided, but it is doubtful if the state court would have ruled differently with that case before it, for the court said that "the reasons for the rule" declared in the federal courts "cease to exist when the question arises in the state court, and it cannot there be observed consistently with a proper respect for its own authority."

1. *Mecke v. Valley Town Mineral Co.*, 89 Fed. Rep. 115.

2. *Mecke v. Valley Town Mineral Co.*, 89 Fed. Rep. 114.

3. *Wertheim v. Continental R., etc., Co.*, 20 Blatchf. (U. S.) 508.

4. *Donahue v. Calumet Fire-Clay Co.*, 94 Fed. Rep. 23; *Kauffman v. Kennedy*, 25 Fed. Rep. 785.

5. *Bragdon v. Perkins-Campbell Co.*, 82 Fed. Rep. 338; *Allmark v. Platt Steamship Co.*, 76 Fed. Rep. 615. *Compare Porter Land, etc., Co. v. Bas-*

kin, 43 Fed. Rep. 323.

6. *Miner v. Markham*, 28 Fed. Rep. 387.

7. See *supra*, p. 293.

8. *Webster v. Crothers*, 1 Dill. (U. S.) 301.

Accelerating Time. — In some of the circuits the plaintiff may file a copy of the record before the next term of the federal court after removal, and there-

the time to answer or plead runs against the defendant up to the date of removal, is suspended until the record is filed, and again becomes current for the remainder of the original period.¹

d. FOLLOWING STATE PRACTICE. — The relation of state to federal practice at law and in equity will be considered at large in the article UNITED STATES COURTS.

At Law the provisions of positive statutes of the United States control.² In the absence of such provisions the practice in the state whence the cause was removed prevails.³ But the adoption of the state practice will not be allowed to defeat the jurisdiction

upon the defendant may be ruled to plead. *Consolidated Traction Co. v. Guarantors' Liability, etc., Co.*, 78 Fed. Rep. 657 (Third Circuit). *Contra*, *Torrent v. S. K. Martin Lumber Co.*, 37 Fed. Rep. 727.

Time Extended to Specified Day. — Where the defendant's time to answer was extended to a day certain, instead of a certain number of days, and the cause was removed before the day arrived, but the day had passed when the record was filed in the federal court, it was held that an order requiring him to plead forthwith was proper. *Phoenix Ins. Co. v. Charleston Bridge Co.*, 65 Fed. Rep. 628.

1. *Pelzer Mfg. Co. v. St. Paul F. & M. Ins. Co.*, 40 Fed. Rep. 185; *Heidecker v. Red Star Line Steamship Co.*, 32 Fed. Rep. 706.

2. **The Mode of Procuring Testimony** is regulated by Act of Congress, which precludes recourse to any system or mode of proof established by state laws. In *Ex p. Fisk*, 113 U. S. 713, while the cause was in progress in the state court, the plaintiff obtained an order that the defendant be examined and his deposition be taken as a party before trial according to the provisions of the New York Code of Civil Procedure. In obedience to the order the defendant appeared, and his examination had been partly completed when the cause was removed into the federal court, where a further order was obtained in order that his examination should be completed. (See *Fogg v. Fisk*, 19 Fed. Rep. 235.) He was committed for contempt in disobeying the order, but released by the Supreme Court on habeas corpus, the decision being based on section 861 of the United States Revised Statutes, which enacts that "the mode of proof in the trial of actions at common law shall be by oral testimony and examination of witnesses in open court, except as here-

inafter provided." And in *Pierce v. Union Pac. R. Co.*, 47 Fed. Rep. 709, an action for death by wrongful act, it was held that the federal court could not compel the defendant to answer interrogatories attached to the plaintiff's petition in pursuance of a state statute. The court said: "We are not justified in granting an order for the procurement of the testimony of a witness by any mode other than his production in open court, unless it is shown that he comes within some of the exceptions provided for in the statutes of the United States — as, for instance, that the witness lives at a distance greater than one hundred miles from the place of trial, or that he is ancient or infirm, or is about to leave the United States or to enter upon a sea voyage."

Security for Costs. — After removal the defendant will have the benefit of a rule in the federal Circuit Court providing that a defendant is not compelled to answer until his demand of security for costs has been complied with, although by the state practice the suit was one where security for costs could not have been required. *Henning v. Western Union Tel. Co.*, 40 Fed. Rep. 658.

Change of Venue. — After removal there can be no transfer of trial to another division of the federal district by way of conforming to a state statute providing for a change of venue. *O'Donnell v. Atchison, etc., R. Co.*, 49 Fed. Rep. 689.

3. See Rev. Stat. U. S., § 914, and article UNITED STATES COURTS.

Right to Jury Trial. — Where a receiver of a federal court is sued at law in a state court, as authorized by Act of Congress, and removes the cause to a federal court, the plaintiff is entitled to a jury trial therein if he would have been so entitled in the state court. *Vany v. Receiver*, 67 Fed. Rep. 379.

of the federal court which has lawfully attached by removal.⁴

In Equity. — The distinction between law and equity in the federal courts is preserved both in substance and in procedure,² and the pleading and practice in the state courts in equity cases are not, as a general rule, followed in the federal courts.³

e. FILING NEW PLEADINGS, RECASTING PLEADINGS, AND REPLEADER — When Necessary. — Where the case made by the pleadings in the state court is in its nature an action at law, it must, when removed to the federal court, proceed as such,⁴ and no pleadings other than or different from those in the state court are necessary.⁵ Where the suit in the state court is in its nature a suit in equity it must proceed as an equity cause on its removal into the federal court.⁶ Where the suit in the state court unites legal and equitable grounds of relief or of defense, as authorized by the statutes of the state, it may in the federal court be recast into two cases, one at law and one in equity, and in such case a repleader is necessary.⁷

1. *Phelps v. Oaks*, 117 U. S. 236, holding that where, in pursuance of the requirements of the state statute, a new party has been admitted as a defendant, the fact that his citizenship is the same as that of the plaintiff will not necessitate a remand of the case to the state court.

2. **Counterclaim in Equity.** — If the defendant in an equity cause sets up a demand in reconvention of such a nature that it cannot be recognized in the federal equity practice, the demand may be dismissed out of the case after removal. *Lacroix v. Lyons*, 27 Fed. Rep. 403. See also *Brande v. Gilchrist*, 18 Fed. Rep. 465.

Equitable Defense in Action at Law. — A defendant in an action at law cannot after removal avail himself of an equitable defense pleaded in the state court. *Northern Pac. R. Co. v. Paine*, 119 U. S. 565.

3. See generally article UNITED STATES COURTS.

Answer as Cross-bill. — But the federal court will be assiduous to preserve the rights of parties on removal exactly as they existed in the state court, so far as it is possible and consistent with the federal statutes and exigencies of federal equity practice; and where by the state equity practice an answer may perform the office of a cross-bill a defendant who has filed an answer praying for equitable relief need not file a cross-bill for the same matters after removal in the federal court. *Detroit v. Detroit City R. Co.*, 55 Fed. Rep. 569.

4. *Perkins v. Hendryx*, 23 Fed. Rep. 419. See also *Thompson v. Railroad Companies*, 6 Wall. (U. S.) 134; *Thorne v. Towanda Tanning Co.*, 15 Fed. Rep. 291; *North Alabama Development Co. v. Orman*, 55 Fed. Rep. 18.

5. *North Alabama Development Co. v. Orman*, 55 Fed. Rep. 18; *Bills v. New Orleans, etc., R. Co.*, 13 Blatchf. (U. S.) 227; *West v. Smith*, 101 U. S. 263; *Merchants, etc., Nat. Bank v. Wheeler*, 13 Blatchf. (U. S.) 218; *Dart v. McKinney*, 9 Blatchf. (U. S.) 359. See also *Akerly v. Vilas*, 3 Biss. (U. S.) 332; *Toucey v. Bowen*, 1 Biss. (U. S.) 81; *Ætna Ins. Co. v. Weide*, 9 Wall. (U. S.) 677; *Thompson v. Railroad Companies*, 6 Wall. (U. S.) 134; *Rev. Stat. U. S.*, § 914; and article UNITED STATES COURTS.

6. *Perkins v. Hendryx*, 23 Fed. Rep. 419. As to whether a case purely in equity can be converted into one at law after removal, see *Steinkuhl v. York*, 2 Flipp. (U. S.) 376; *Pilla v. German School Assoc.*, 23 Fed. Rep. 700.

7. *Perkins v. Hendryx*, 23 Fed. Rep. 419; *La Mothe Mfg. Co. v. National Tube Works Co.*, 15 Blatchf. (U. S.) 432; *Hurt v. Hollingsworth*, 100 U. S. 100; *Whittenton Mfg. Co. v. Memphis, etc., River Packet Co.*, 19 Fed. Rep. 273; *In re Foley*, 76 Fed. Rep. 390; *Bacon v. Felt*, 38 Fed. Rep. 873; *Phelps v. Elliott*, 26 Fed. Rep. 881; *Pilla v. German School Assoc.*, 23 Fed. Rep. 700; *Toucey v. Bowen*, 1 Biss. (U. S.) 82. See also *Carrington v. Florida R. Co.*, 9 Blatchf. (U. S.) 467; *Fisk v. Union Pac. R. Co.*, 8 Blatchf. (U. S.)

After Demurrer Sustained. — In a proper case the plaintiff may be allowed to amend and reframe his pleadings after demurrer sustained.¹

Repleader by Order of Court. — If the pleadings are not voluntarily recast to conform to the federal practice,² the court may enter an appropriate order for that purpose.³

f. PRESERVATION OF PROCEEDINGS HAD IN STATE COURT — (1) *Status of Prior Rulings in State Court* — **In General.** — All orders and other proceedings in the state court in force at the time of removal remain in full force until they are dissolved or modified in the federal court.⁴ While the federal Circuit Court does not sit as a court of errors, and cannot as such review and reverse the interlocutory orders and decisions of the state court made before removal,⁵ and some of the Circuit Courts are inclined to accept all prior decrees and orders as binding adjudications in the cause,⁶ others hold that after removal the Circuit Court has the same power over the rulings made in the state court that it has over its own past rulings and orders made in cases commenced originally before it, and the same power that the state court would have had if the cause had not been removed,⁷ and may set aside and modify them when it satisfac-

299, holding that the plaintiff cannot be required to elect whether he will proceed at law or in equity; *Steinkuhl v. York*, 2 Flipp. (U. S.) 376; *Coosaw Min. Co. v. South Carolina*, 144 U. S. 564; *Lacroix v. Lyons*, 27 Fed. Rep. 403; *Detroit v. Detroit City R. Co.*, 55 Fed. Rep. 574.

Code Complaint Preserved as Bill in Equity. — If a code complaint is substantially in the form of a bill in equity, except the address and some other merely formal parts, there is no ground for requiring it to be recast. *Phelps v. Elliott*, 26 Fed. Rep. 883.

1. *Perkins v. Hendryx*, 23 Fed. Rep. 418.

2. See *Edgerton v. Gilpin*, 3 Woods (U. S.) 280; *Barrow v. Hunton*, 99 U. S. 81.

3. *Whittenton Mfg. Co. v. Memphis, etc., River Packet Co.*, 19 Fed. Rep. 273, where a motion to replead was granted; *La Mothe Mfg. Co. v. National Tube Works Co.*, 15 Blatchf. (U. S.) 432. See also *Kellam v. Keith*, 144 U. S. 568; *Hanrick v. Hanrick*, 153 U. S. 194; *Texas Transp. Co. v. Seeligson*, 122 U. S. 519.

On Motion to Remand. — It is doubtful whether the court has power upon a mere motion to remand, to order the plaintiff to recast his pleadings for the purpose of separating legal and equi-

table claims. *Ladd v. West*, 55 Fed. Rep. 353; *Stevens v. Richardson*, 9 Fed. Rep. 196, where the court said that "if this is to be done at all it should be done only as the result of pleading."

4. Act of 1875, 18 U. S. Stat. at L. 471, § 4; *Bryant v. Thompson*, 27 Fed. Rep. 881; *Phelps v. Canada Cent. R. Co.*, 20 Blatchf. (U. S.) 450.

5. *Bragdon v. Perkins-Campbell Co.*, 82 Fed. Rep. 338; *Bryant v. Thompson*, 27 Fed. Rep. 881.

6. *Cleaver v. Traders' Ins. Co.*, 40 Fed. Rep. 711; *Brooks v. Farwell*, 4 Fed. Rep. 166, 2 McCrary (U. S.) 220; *Smith v. Schwed*, 6 Fed. Rep. 455; *Sutro v. Simpson*, 14 Fed. Rep. 372; *Milligan v. Lalance, etc., Mfg. Co.*, 21 Blatchf. (U. S.) 408. See also *Williams v. Conger*, 125 U. S. 397; *Duncan v. Gegan*, 101 U. S. 810.

In *Hulbert v. Russo*, 64 Fed. Rep. 8, it was remarked that if the defendant's proceedings were stayed in the state court until certain motion costs imposed upon him were paid he might remain subject to the stay in the federal court after removal.

7. *Bryant v. Thompson*, 27 Fed. Rep. 881; *Sharp v. Whiteside*, 19 Fed. Rep. 156; *Garden City Mfg. Co. v. Smith*, 1 Dill. (U. S.) 305. See also *Ex p. Fisk*, 113 U. S. 725.

torily appears that they were erroneous; ¹ but it will not ordinarily do so unless some evidence is presented in addition to that adduced before the state judge or cogent reasons exist which did not appear upon the previous argument. ²

Ruling on Demurrer. — A decision of the state court on a demurrer will, as a general rule, be treated as binding upon the federal court in the same cause. ³

(2) *Attachments and Bonds.* — By Act of Congress all attachments and bonds survive removal of the suit. ⁴ The federal court has authority to issue such orders as are necessary to make its jurisdiction effectual, ⁵ and may dissolve the attachment

1. *Bryant v. Thompson*, 27 Fed. Rep. 881.

2. *Bryant v. Thompson*, 27 Fed. Rep. 881, where the federal court denied a motion to discharge a receiver which had been refused by the state court; *Loomis v. Carrington*, 18 Fed. Rep. 97; *Bragdon v. Perkins-Campbell Co.*, 82 Fed. Rep. 338; *Garden City Mfg. Co. v. Smith*, 1 Dill. (U. S.) 307. See also *Phelps v. Canada Cent. R. Co.*, 20 Blatchf. (U. S.) 451.

3. *Lookout Mountain R. Co. v. Houston*, 44 Fed. Rep. 449; *Davis v. St. Louis, etc., R. Co.*, 25 Fed. Rep. 786.

4. The Act of 1875, 18 U. S. Stat. at L. 471, § 4, provides that "when any suit shall be removed from a state court to a Circuit Court of the United States any attachment or sequestration of the goods or estate of the defendant had in such suit in the state court shall hold the goods or estate so attached or sequestered to answer the final judgment or decree in the same manner as by law they would have been held to answer final judgment or decree had it been rendered by the court in which such suit was commenced; and all bonds, undertakings, or security given by either party in such suit prior to its removal shall remain valid and effectual, notwithstanding said removal." See generally *State v. Peck*, 32 W. Va. 606; *Bills v. New Orleans, etc., R. Co.*, 13 Blatchf. (U. S.) 227; *Creagh v. Equitable L. Assur. Soc.*, 83 Fed. Rep. 849.

In *Removals under the Act of 1789* it was decided that an attachment made on any mesne process before removal, though the warrant for the attachment was not issued at the same time with the summons, would hold the property to answer the final judgment in the federal court. *Barney v. Globe Bank*, 5 Blatchf. (U. S.) 107. *Contra*, *New*

England Screw Co. v. Bliven, 3 Blatchf. (U. S.) 240.

Determination of Priorities. — Where several attachment suits by different plaintiffs against one defendant were removed into the same federal court, it was held that the rights of the parties in respect to the nature, extent, and order of priority of liens would be administered in the same way as they would have been had the causes remained in the state court. *Bankers', etc., Tel. Co. v. Chicago Carpet Co.*, 28 Fed. Rep. 398.

Levies Subsequent to Removal. — In *Mack v. Jones*, 31 Fed. Rep. 189, the first of successive attachment suits wherein the writs had been levied on a single fund was removed to the federal court, which dismissed the attachment. The plaintiff's contention that the fund should be returned to the state court to answer the liens of the other levies there in force was overruled and the fund directed to be paid to the defendant, on the ground that "the subsequent attachments did not operate as a lien on the fund which the plaintiffs here had previously attached, the case standing in all respects as if originally commenced here, under the very language of the removal acts; and therefore there could be no lien on this fund in this court in favor of subsequent attachments in another court, however it might have been if the removed case had been one of the later levies instead of the first one made."

5. **Sheriff Ordered to Deliver to Marshal.** — In *Friedman v. Israel*, 26 Fed. Rep. 801, an attachment suit was removed by the defendant, and the federal court ordered the state sheriff to deliver the attached property to the marshal of the federal court, it appearing that the validity of the attachment

though a motion to dissolve was denied by the state court.¹

(3) *Receiverships*. — A receiver appointed in a suit prior to its removal is responsible to the federal court after removal and may be compelled to account therein.² The federal court will rescind an *ex parte* order of the state court appointing a receiver where it is shown that the order was improvidently granted or should no longer remain in force.³

(4) *Injunctions*. — The Act of Congress provides that all injunctions in force at the time of removal shall remain in full force and effect until dissolved or modified by the federal court.⁴ The federal court has undoubted power to dissolve or modify such an injunction,⁵ even where the state court has overruled a motion to dissolve.⁶ But a motion to dissolve in the federal court upon the same papers upon which the injunction was granted can be made only after leave theretofore applied for and obtained.⁷ Nor will the injunction be dissolved as the result of a reconsideration of any question of pleading or practice decided by the state court when it granted the injunction.⁸

(5) *Inchoate Proceedings*. — An unfinished proceeding to take a deposition falls with a removal.⁹ A pending and unadjudicated contempt proceeding in the suit cannot be carried to completion

and the rights and privileges of the plaintiff in respect to the property were at issue in the suit.

Sale of Perishable Property. — In *New York Silk Mfg. Co. v. Paterson Second Nat. Bank*, 10 Fed. Rep. 204, perishable property held under an attachment by the sheriff was ordered to be sold under the provisions of the state statute.

1. *Garden City Mfg. Co. v. Smith*, 1 Dill. (U. S.) 305.

2. *Hinckley v. Gilman, etc.*, R. Co., 100 U. S. 153.

3. *McHenry v. New York, etc.*, R. Co., 25 Fed. Rep. 114; *Texas, etc.*, R. Co. v. *Rust*, 17 Fed. Rep. 275.

4. Act of 1875, 18 U. S. Stat. at L. 471, § 4.

Under Act of 1789. — When a cause was removed under the Act of 1789 an injunction issued before its removal fell *ipso facto* for the reason that the twelfth section of that act, while it was careful to preserve the lien of an attachment issued before the removal, in certain cases, did not preserve an injunction. *Hatch v. Chicago, etc.*, R. Co., 6 Blatchf. (U. S.) 105; *Northwestern Distilling Co. v. Corse*, 4 Biss. (U. S.) 514; *McLeod v. Duncan*, 5 McLean (U. S.) 342.

5. *Carrington v. Florida R. Co.*, 9 Blatchf. (U. S.) 469; *Smith v. Schwed*,

6 Fed. Rep. 456. See also *Watson v. Bondurant*, 2 Woods (U. S.) 166; *Boatmen's Sav. Bank v. Wagenspack*, 4 Woods (U. S.) 130.

In the following cases the injunction was dissolved or modified: *Van Wert County v. Peirce*, 90 Fed. Rep. 764; *New York Constr. Co. v. Simon*, 53 Fed. Rep. 1; *Van Hoorebeke v. U. S.*, 46 Fed. Rep. 459; *Sioux City, etc.*, R. Co. v. *Chicago, etc.*, R. Co., 27 Fed. Rep. 770; *Coburn v. Cedar Valley Land, etc., Co.*, 25 Fed. Rep. 791, holding that eleven days' notice of the motion to dissolve was sufficient; *Texas, etc.*, R. Co. v. *Rust*, 17 Fed. Rep. 275; *Portland v. Oregonian R. Co.*, 6 Fed. Rep. 321.

6. *Sharp v. Whiteside*, 19 Fed. Rep. 156.

7. *Carrington v. Florida R. Co.*, 9 Blatchf. (U. S.) 469.

8. *Smith v. Schwed*, 6 Fed. Rep. 455, holding that it would not be dissolved merely because the bill was not sufficiently verified.

9. In *Arnold v. Kearney*, 29 Fed. Rep. 820, where the deposition of a witness had been taken in shorthand, but before his testimony was written out the cause was removed, the federal court held that it had no power to compel the witness to sign and swear to the deposition.

in the federal court.¹ It is otherwise, however, where a contempt proceeding is in the nature of a civil remedy, and a party has been adjudged guilty by the state court, and the penalty imposed.²

g. COSTS BEFORE AND AFTER REMOVAL. — Costs accrued in the state court prior to the removal are taxable upon final judgment in the federal court.³ A federal statute deprives the plaintiff of costs in an original action in the federal Circuit Court if he recovers less than five hundred dollars,⁴ but it does not apply to removed cases, and the defendant therein may be adjudged to pay costs in the federal court if the plaintiff recovers an amount which would have carried costs had the judgment been rendered in the state court.⁵

40. Remand of Cause to State Court — *a.* POWER AND DUTY TO REMAND — (1) *For Want of Jurisdiction* — (a) **In General.** — An Act of Congress requires the Circuit Court to remand or dismiss a suit removed from a state court whenever it shall appear that the court has no jurisdiction thereof, or that parties have been collusively joined for the purpose of removal.⁶ There

1. *Kirk v. Milwaukee Dust Collector Mfg. Co.*, 26 Fed. Rep. 501, where the federal court vacated an order granted by the state court to show cause why the defendant should not be punished for violation of an injunction, the cause having been removed before the contempt proceeding was heard by the state court. *Distinguishing Williams Mower, etc., Co. v. Raynor*, 7 Biss. (U. S.) 245, cited in the following note. See also *Ex p. Fisk*, 113 U. S. 713.

2. *Williams Mower, etc., Co. v. Raynor*, 7 Biss. (U. S.) 245.

3. *Cleaver v. Traders' Ins. Co.*, 40 Fed. Rep. 863; *Wolf v. Connecticut Mut. L. Ins. Co.*, 1 Flipp. (U. S.) 377. But compare *Clare v. National City Bank*, 14 Blatchf. (U. S.) 445.

Witness Fees for witnesses subpoenaed in the state court after the filing of the petition for removal will not be allowed as part of the costs, but the costs of witnesses attending at the taking of depositions before the removal of the cause are allowable even if the depositions were not actually used. *Young v. Merchants' Ins. Co.*, 29 Fed. Rep. 273.

An Indorser of the Original Writ who is made liable for costs under the state statute remains liable after removal. *Pullman's Palace-Car Co. v. Washburn*, 66 Fed. Rep. 790.

Costs on Petition for Removal. — After a removal has been effected no order of the state court in the cause will be

recognized by the federal court. Thus where the state court granted an order of removal and awarded costs of the motion to the petitioner, the federal court denied a motion to stay proceedings therein until such costs were paid. *Penrose v. Penrose*, 1 Fed. Rep. 479.

4. Rev. Stat. U. S., § 968, which provides that "when, in a Circuit Court, a plaintiff in an action at law originally brought there, or a petition in equity, other than the United States, recovers less than the sum or value of five hundred dollars, exclusive of costs, in a case which cannot be brought there unless the amount in dispute, exclusive of costs, exceeds said sum or value, * * * he shall not be allowed, but, at the discretion of the court, may be adjudged to pay, costs."

5. *Kreager v. Judd*, 5 Fed. Rep. 27; *Ellis v. Jarvis*, 3 Mason (U. S.) 457; *Field v. Schell*, 4 Blatchf. (U. S.) 435. Compare *Coggill v. Lawrence*, 2 Blatchf. (U. S.) 304.

6. Act of 1875, 18 U. S. Stat. at L. 472, § 5, which provides as follows: "If, in any suit commenced in a Circuit Court or removed from a state court to a Circuit Court of the United States, it shall appear to the satisfaction of said Circuit Court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within

is a lack of jurisdiction within the meaning of the statute whenever the record fails to show a ground for removal, or when it is made to appear that none exists,¹ or when the proceeding is not of such a nature as to be removable on any ground.² The fact that the state court ordered the removal is of no consequence.³ But the court will not remand a cause on the alleged ground that it may be more conveniently tried in the state court.⁴

(b) **At Any Time.**—It is the right and duty of the court to remand the cause when a want of jurisdiction appears at any time.⁵ The suit need not be retained until brought to a formal trial or hearing on the merits.⁶ On the other hand, it may be remanded on the hearing or trial,⁷ or even after judgment.⁸

the jurisdiction of said Circuit Court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said Circuit Court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require."

1. Since the majority of the cases in federal courts which are cited in this article were remanded to the state court, it is necessary to refer to the sections only which treat of the grounds of removal.

2. *Filer v. Levy*, 17 Fed. Rep. 610.

See *supra*, p. 166 *et seq.*

Suit Not Within Equitable Jurisdiction of Federal Court.—Where a suit in equity is sustainable in the state court, but the relief sought is not within the judicial power of the federal court as a court of equity, the suit, if removed, will be remanded and not dismissed. *Cates v. Allen*, 149 U. S. 460.

3. *Gold-Washing, etc., Co. v. Keyes*, 96 U. S. 199; *Stevens v. Nichols*, 130 U. S. 231; *Crehore v. Ohio, etc., R. Co.*, 131 U. S. 240; *Jackson v. Allen*, 132 U. S. 27; *Rosenbaum v. Bauer*, 120 U. S. 459; *Yarde v. Baltimore, etc., R. Co.*, 57 Fed. Rep. 913; *Traders' Bank v. Tallmadge*, 9 Fed. Rep. 363; *Walker v. O'Neill*, 38 Fed. Rep. 374; *Frisbie v. Chesapeake, etc., R. Co.*, 59 Fed. Rep. 369; *Kaiser v. Illinois Cent. R. Co.*, 6 Fed. Rep. 1; *Maine v. Gilman*, 11 Fed. Rep. 214; *Ferguson v. Ross*, 38 Fed. Rep. 161; *Ex p. State*, 71 Ala. 363.

"The order of removal made in the state court is not conclusive upon the question of jurisdiction in the federal court. Notwithstanding this removal, this court must determine for itself whether it can take jurisdiction of the

cause. This proposition has, I believe, never been disputed, and is expressly affirmed in *Gale v. Babcock*, 4 Wash. (U. S.) 345; *Ward v. Arredondo*, 1 Paine (U. S.) 414; *Illius v. New York, etc., R. Co.*, 13 N. Y. 598." *Field v. Lownsdale*, 1 Deady (U. S.) 289.

4. *Spies v. Chicago, etc., R. Co.*, 32 Fed. Rep. 713.

5. See the statute quoted *supra*, p. 366, note 6.

"The order to remand can be made at any time during the pendency of the cause when it shall appear there is no jurisdiction." *Per Waite, C. J.*, in *Ayres v. Wiswall*, 112 U. S. 190. See also *Cameron v. Hodges*, 127 U. S. 326; *Egerton v. Starin*, 91 Fed. Rep. 932; *Wyly v. Richmond, etc., R. Co.*, 63 Fed. Rep. 487.

6. *Rosenbaum v. Bauer*, 120 U. S. 459; *Webber v. Bishop*, 13 Fed. Rep. 49; *Anderson v. Appleton*, 32 Fed. Rep. 857; *Magee v. Union Pac. R. Co.*, 2 Sawy. (U. S.) 447; *Indiana v. Lake Erie, etc., R. Co.*, 85 Fed. Rep. 1, where the cause was remanded on motion after the argument and overruling of a demurrer to the complaint; *Teas v. Albright*, 13 Fed. Rep. 406, where the cause was remanded after testimony was taken and the cause was put on the calendar for final hearing.

7. *Ryan v. Young*, 9 Biss. (U. S.) 63; *Collins v. Wellington*, 31 Fed. Rep. 246; *Richmond, etc., R. Co. v. Findley*, 32 Fed. Rep. 641; *Dennistoun v. Draper*, 5 Blatchf. (U. S.) 339, where the court said that if when the evidence is closed it shall appear that the cause was not cognizable by the federal court, the jury should be instructed that the court has no jurisdiction, and the court should remand the cause.

8. See *infra*, I. 40. f. (3) *Time for Motion*.

(2) *For Irregularities in Removal Proceedings.* — Various irregularities in the proceedings for removal which are or are not grounds for remanding the cause have been incidentally but sufficiently considered in preceding parts of this article.¹ It is said that since the Act of 1875 greater indulgence has been granted in respect of mere formal defects and irregularities in the removal papers than was previously allowed.²

If the Petition and Bond Were Not Filed in Time, the objection, though not strictly jurisdictional, inasmuch as it may be waived,³ will be fatal to the jurisdiction when seasonably taken.⁴

(3) *After Elimination of Grounds of Removal — Reducing Ad Damnum.* — A plaintiff cannot, after removal, defeat the jurisdiction by amending his *ad damnum* so as to claim an amount less than the jurisdictional limit of the federal court.⁵

Removal for Diverse Citizenship. — But the cause must be remanded where diverse citizenship upon which the removal was founded is eliminated by a voluntary dismissal as to the removing defendant⁶ or as the result of sustaining a demurrer for want of parties.⁷

Removal for Separable Controversy. — Where one of several defendants removes a suit on the ground of a separable controversy and the plaintiff discontinues in the federal court as to that defendant,⁸

1. **Formal Defects in Petition for Removal,** see *supra*, p. 317.

Defects in Bond for Removal, see *supra*, p. 335.

Presenting Petition to State Court, see *supra*, p. 320 *et seq.*

Delay in Filing Record, see *supra*, p. 356.

2. *Sutherland v. Jersey City, etc., R. Co.*, 22 Fed. Rep. 357.

3. See *infra*, l. 40. b. (3) *For Delay in Filing Petition for Removal.*

4. See cases cited *supra*, p. 285.

5. See *supra*, p. 349, note 6.

6. *Iowa Homestead Co. v. Des Moines Nav., etc., Co.*, 8 Fed. Rep. 97; *Bane v. Keefer*, 66 Fed. Rep. 610.

Intervention of New Defendant. — Where a case has been properly removed the admission by intervention in the federal court, under the provisions of the state statute, of another defendant whose citizenship would have prevented a removal had he been an original party to the suit, will not arrest or interfere with the jurisdiction of the federal court already established by the removal. *Phelps v. Oaks*, 117 U. S. 236, which was an action of ejectment removed by the plaintiff, under the Act of 1875. After removal the defendant pleaded that he was a mere tenant, and the landlord, upon his own petition, was

admitted as a defendant, according to the practice prescribed by the state statute. The landlord was a citizen of the same state with the plaintiff. It was held that a motion to remand upon the ground that the suit did not then really and substantially involve a controversy properly within the jurisdiction of the federal court, according to the sense of the Act of March 3, 1875, § 5, 18 U. S. Stat. at L. 472, was properly denied. It was also held that the court might permit the landlord to control the defense as *dominus litis*, raising and conducting such issues as his own rights and interests might dictate. See also *Shropshire v. Lyle*, 31 Fed. Rep. 694.

7. Where a suit in equity was removed on the ground of diverse citizenship, and a demurrer was sustained for want of necessary defendants to the bill as originally framed, and the plaintiff amended by introducing the proper parties, some of whom were citizens of the same state with the plaintiff, it was held that the suit should be remanded and not dismissed. *Perry v. Clift*, 32 Fed. Rep. 801.

8. *Texas Transp. Co. v. Seeligson*, 122 U. S. 519. See also *Bane v. Keefer*, 66 Fed. Rep. 610.

Rule Qualified. — Where a cause is removed on the ground of a separable

or the alleged separable controversy is settled by the parties thereto,¹ or otherwise disappears in the progress of the suit,² the cause must be remanded.

Removal for Federal Question. — A cause removed on the ground of a federal question must be remanded when it ceases to present a federal question.³ But the federal court will not, on a mere motion to remand, eliminate the question from the case by premature decision of it, and then remand the suit on the theory that there is no longer a federal controversy in the case.⁴

b. WAIVER OF RIGHT OF REMAND. — (1) *For Want of Jurisdiction.* — Since the federal court cannot take jurisdiction of a cause by the mere consent of parties,⁵ the right to have the cause remanded for want of jurisdiction cannot be waived by lapse of time nor by any proceedings taken in the cause in the federal court.⁶

controversy and the defendant whose presence created the separable controversy is dismissed by the plaintiff, the cause will not be remanded if the remaining controversy is between citizens of different states and is one of which the federal court would have jurisdiction had the suit been originally brought in that court. *Bacon v. Felt*, 38 Fed. Rep. 873, *distinguishing Texas Transp. Co. v. Seeligson*, 122 U. S. 519.

1. *Torrence v. Shedd*, 144 U. S. 527, where, after the report of a master to whom the cause had been referred by the federal Circuit Court, the parties to the alleged separable controversy filed a stipulation adjusting all the matters in dispute between them. Thereupon the party who had obtained a removal of the cause, and was one of the parties to the stipulation, filed a motion to remand the cause, and it was held that under the Act of March 3, 1875, c. 137, 18 U. S. Stat. at L. 472, the motion should have been granted.

2. "If at any time during the pendency of the suit the case should be so changed by amendments, or by reforming the pleadings, under the direction of the court, as to present only one really indivisible controversy between the parties, the jurisdiction of the court would cease." *Long v. Buford*, 24 Fed. Rep. 249.

On the Hearing. — If it appears from an examination of the evidence upon the hearing of the cause in the federal court that there was in fact no separable controversy, the cause will be remanded to the state court. *Ryan v. Young*, 9 Biss. (U. S.) 63, where it ap-

peared that the party who procured the removal had, prior to the removal, sold all of his interest to a codefendant who could not have removed the suit.

3. In *Magee v. Union Pac. R. Co.*, 2 Sawy. (U. S.) 447, a cause was removed under the Act of 1875 before answer on a petition alleging a federal question. After removal the defendant filed its answer, wherein no federal question appeared, and thereupon the cause was remanded upon motion of the plaintiff.

After Demurrer Sustained. — Where a federal question is shown on the face of the record, and a motion to remand is therefore denied, and subsequently an order sustaining a demurrer eliminates the federal question, the cause will be remanded. *Hamblin v. Chicago, etc., R. Co.*, 43 Fed. Rep. 401.

4. *Lowry v. Chicago, etc., R. Co.*, 46 Fed. Rep. 85.

5. See *supra*, p. 302.

6. *Indiana v. Lake Erie, etc., R. Co.*, 85 Fed. Rep. 2; *Frisbie v. Chesapeake, etc., R. Co.*, 57 Fed. Rep. 1; *Southworth v. Reid*, 36 Fed. Rep. 451; *Bronson v. St. Croix Lumber Co.*, 35 Fed. Rep. 634; *Indiana v. Tolleston Club*, 53 Fed. Rep. 18; *Wabash R. Co. v. Barbour*, 73 Fed. Rep. 513; *Mexican Nat. R. Co. v. Davidson*, 157 U. S. 201; *Ayers v. Watson*, 113 U. S. 598; *Mansfield, etc., R. Co. v. Swan*, 111 U. S. 379; *Martin v. Baltimore, etc., R. Co.*, 151 U. S. 690.

Davies v. Lathrop, 21 Blatchf. (U. S.) 164, 13 Fed. Rep. 565, and *Carrington v. Florida R. Co.*, 9 Blatchf. (U. S.) 467, cannot now be considered as of authority. See *Glover v. Shepperd*, 15 Fed. Rep. 839.

(2) *For Formal Irregularities.* — By omitting to make a motion to remand, the plaintiff waives all objections which it is competent for him to waive,¹ such as mere informalities in the petition or bond.²

(3) *For Delay in Filing Petition for Removal.* — When the petition and bond for removal are not filed in time, a motion to remand upon that ground, if promptly made, must be granted.³ But application for removal in due time is a modal and formal, not a jurisdictional, requirement, and objection that the application was too late may be waived, either expressly or by implication.⁴ The party at whose instance the removal was effected⁵ or a party who consented to the removal⁶ cannot object that the application therefor was not made in time. Long and unexplained delay in making a motion to remand will amount to a waiver;⁷ and ordinarily if the plaintiff appears in the federal court and replies to the defendant's pleading on the merits,⁸ or

Federal Question. — Whether a defendant who has removed a cause on the ground that a federal question is involved, and appealed to the Supreme Court from an adverse judgment of the Circuit Court of Appeals on the merits, can then for the first time insist that the judgment should be reversed and the cause remanded because the plaintiff's case showed no federal question, was a query suggested, but not decided, in *Spokane Falls, etc., R. Co. v. Ziegler*, 167 U. S. 65. In *Texas, etc., R. Co. v. Cody*, 166 U. S. 606, it appears that an objection was entertained under those precise circumstances, though the objection was overruled as untenable on its merits.

1. *Tod v. Cleveland, etc., R. Co.*, 65 Fed. Rep. 147.

2. See *supra*, pp. 317, 335, and Canal, etc., *Sis. R. Co. v. Hart*, 114 U. S. 660.

3. *Martin v. Baltimore, etc., R. Co.*, 151 U. S. 687. In *Bowers v. Supreme Council, etc.*, 45 Fed. Rep. 81, it was held that a case not removed in time must be remanded whether motion to that effect be made or not, but this is certainly not the general practice.

4. *Ayers v. Watson*, 113 U. S. 598; *Powers v. Chesapeake, etc., R. Co.*, 169 U. S. 98; *Pacific R. Removal Cases*, 115 U. S. 17; *Paxson v. Cunningham*, 63 Fed. Rep. 134; *Speckart v. German Nat. Bank*, 85 Fed. Rep. 12; *Collins v. Stott*, 76 Fed. Rep. 613.

Stipulation Extending Time to Plead. — It was held in *Dwyer v. Peshall*, 32 Fed. Rep. 497, that whether an oral stipulation extending the time to answer would estop the plaintiff from

moving to remand the cause on the ground that the petition was not filed in time was a question not necessary to discuss, since the court itself was not estopped and would be astute on its own motion to remand cases not seasonably removed. But compare *Winberg v. Berkeley County R., etc., Co.*, 29 Fed. Rep. 721, where the court said: "The plaintiff cannot complain of delay as unreasonable to which he consented in advance by his own stipulation." In *Allmark v. Platte Steamship Co.*, 76 Fed. Rep. 614, where "the plaintiff's attorney signed a stipulation extending the time to answer and to move, and before the extension of the time to answer fixed by the stipulation had expired, the cause was removed," it was held that the plaintiff could not contend in the federal court that the time to answer had expired.

5. *Ayers v. Watson*, 113 U. S. 599; *Northern Pac. R. Co. v. Austin*, 135 U. S. 315, *quoted* with approval in *Powers v. Chesapeake, etc., R. Co.*, 169 U. S. 99.

6. *Connell v. Smiley*, 156 U. S. 339.

7. *Miller v. Kent*, 20 Blatchf. (U. S.) 508, 18 Fed. Rep. 561, where the plaintiff delayed for over a year.

Motion at Next Term. — In *Young v. Andes Ins. Co.*, 1 Flipp. (U. S.) 599, it was held that a remand on the ground that the petition for removal was not filed in time was not waived by neglecting to make the motion to remand until the next term after the record was filed in the federal court, the plaintiff having done nothing in the cause prior to his motion.

8. *Collins v. Stott*, 76 Fed. Rep. 613,

takes any other positive step in the cause,¹ the result is the same. The objection cannot be taken in the federal Circuit Court after the cause has proceeded to trial therein,² nor for the first time in the Circuit Court of Appeals³ or Supreme Court.⁴

c. **ESTOPPEL TO RESIST REMAND.** — It has been held that a petitioner for removal who applies to the state court for an order of removal, and, the petition being denied, appeals to the highest court of the state, which upon full consideration unanimously affirms the ruling, and who thereafter files the record in the federal court, cannot successfully resist a motion to remand to the state court.⁵

holding, however, that where the plaintiff was ignorant of the legal construction of his act, and did not unreasonably delay his application to withdraw his pleading after realizing the situation, he would not be considered as having waived his right to remand.

1. *Young v. Andes Ins. Co.*, 1 Flipp. (U. S.) 602.

In *First Littleton Bridge Corp. v. Connecticut River Lumber Co.*, 71 Fed. Rep. 225, the court stated the circumstances and held that the plaintiff had not by unreasonable delay or otherwise waived his right to have the cause remanded. But the court said: "The actual entry of a general appearance by the plaintiff, or proceedings by it or its attorneys, in open court, prior to the filing of the petition to remand, * * * would probably have taken effect as a waiver by force of law."

In *Baltimore, etc., R. Co. v. Ford*, 35 Fed. Rep. 170, the plaintiff appeared in the federal court and, without making any objection to its jurisdiction, demanded a trial and amended his declaration after demurrer sustained, and the case was dismissed on a demurrer to the amended declaration. It was held that he was precluded from objecting that the removal was too late in answer to a bill to enjoin further proceedings by him in the cause in the state court.

In *Wyly v. Richmond, etc., R. Co.*, 63 Fed. Rep. 487, an equity case was removed for prejudice or local influence under the Act of 1887-1888. By consent of counsel it was transferred by the court to the equity side and referred to a special master, before whom it had been pending for more than a year when a motion to remand was made on the ground that the removal was too late. It was held that the objection could not be entertained.

2. In *French v. Hay*, 22 Wall. (U. S.) 238 [cited with approval in *Martin v. Baltimore, etc., R. Co.*, 151 U. S. 688], the case had been removed under the Act of March 2, 1867, c. 196, (14 U. S. Stat. at L. 558), re-enacted in Rev. Stat. U. S., § 639, cl. 3, which required the petition to be filed "before the trial or final hearing" in the state court. The federal court denied a motion to remand, made, as the report states, because the act "had not been complied with in respect to time and several other important particulars," and the Supreme Court on appeal approved its action, and, speaking by Mr. Justice Swayne, said: "The objection made in the court below touching the removal of the case from the state court, and which objection has been renewed here, was not made in the court below until the testimony was all taken, the case was ready for hearing, and nearly three years had elapsed since the transfer was made. The objection came too late. Under the circumstances it must be held to have been conclusively waived." *Taylor v. Longworth*, 14 Pet. (U. S.) 172, was referred to as in point.

3. *Newman v. Schwerin*, 61 Fed. Rep. 865; *Knight v. International, etc., R. Co.*, 61 Fed. Rep. 87.

4. *Martin v. Baltimore, etc., R. Co.*, 151 U. S. 673, where the record showed a motion to remand in the Circuit Court, but not on the ground of delay in the application for removal; *Connell v. Smiley*, 156 U. S. 335.

5. *Springer v. Howes*, 69 Fed. Rep. 849, where Seymour, J., said: "It seems to me proper that when a party to a litigation has deliberately and voluntarily intrusted a matter which either of two tribunals has a right to decide, to one of them, he should not be allowed, in case of an adverse decision,

d. REMAND ON STIPULATION. — A suit regularly removed from a state court will not be remanded merely upon the consent of the parties.¹

e. CONTROVERTING ALLEGATIONS OF FACT — (1) *By Plea in Abatement.* — When the petition and bond for removal were filed in proper time, and the petition makes a clear case on its face for a removal, and there is nothing in the record to contradict the facts therein set forth, if the plaintiff wishes to put them in issue it is the established practice in most of the circuits to do so by filing a plea in abatement to the jurisdiction in the federal court, and not by a mere motion to remand.²

to resort to the other." *Beadleston v. Harpending*, 32 Fed. Rep. 644, *per* Benedict, J., was a stronger case to the same point, since no appeal had been taken from the denial of the petition. In both cases the removal was sought on the ground of a separable controversy, the state courts holding that the controversy disclosed by the plaintiff's pleading was indivisible.

1. *Lawton v. Blitch*, 30 Fed. Rep. 641, where the court said: "The jurisdiction of the state court is extinguished by the removal of the cause, if it be properly removed. The jurisdiction then is in this court precisely as if it had commenced here, and this court cannot give it status anew in the state court, without express authority of law so to do, and there is no such warrant in the Act of Congress. * * * The case may be dismissed here and commenced anew in the state court, but to remand it is quite another proceeding." *Compare Farmers' L. & T. Co. v. Chicago, etc., R. Co.*, 9 Biss. (U. S.) 134, where Drummond, J., after considerable hesitation, remanded a cause upon stipulation of the parties, though it was conceded that the cause had been properly removed, but he imposed the condition that when it was returned to the state court "all the proceedings and acts done by which the cause was sought to be removed to this court should be withdrawn from the state court, and it should stand without any petition or bond pending in court."

2. *Hoyt v. Wright*, 4 Fed. Rep. 168; *Ketchum v. Black River Lumber Co.*, 4 Fed. Rep. 139; *McDonald v. Salem Capital Flour-Mills Co.*, 31 Fed. Rep. 577; *Johnson v. Accident Ins. Co.*, 35 Fed. Rep. 374; *Lecroix v. Lyons*, 27 Fed. Rep. 403; *Filer v. Levy*, 17 Fed. Rep. 609; *Wolcott v. Sprague*, 55 Fed.

Rep. 546; *Fisk v. Union Pac. R. Co.*, (U. S. Cir. Ct.) 10 Abb. Pr. N. S. (N. Y.) 457; *Dennistoun v. Draper*, 5 Blatchf. (U. S.) 339; *Chicago, etc., R. Co. v. Minnesota, etc., R. Co.*, 29 Fed. Rep. 338; *Kessinger v. Hinkhouse*, 27 Fed. Rep. 884; *Clarkhuff v. Wisconsin, etc., R. Co.*, 26 Fed. Rep. 467, where the court said: "It may be averred as an extrinsic fact, by such a plea, that both parties are citizens of the same state, or that the value in controversy is less than five hundred dollars [now two thousand dollars], or that any other fact exists showing a want of jurisdiction, notwithstanding the allegations to the contrary in the petition for removal;" *Short v. Chicago, etc., R. Co.*, 34 Fed. Rep. 227; *Arrowsmith v. Nashville, etc., R. Co.*, 57 Fed. Rep. 170; *Fisk v. Henarie*, 32 Fed. Rep. 421; *Smith v. Chicago, etc., R. Co.*, 30 Fed. Rep. 722; *Mahin v. Pfeiffer*, 27 Fed. Rep. 893; *Scott v. Texas Land, etc., Co.*, 41 Fed. Rep. 225; *Allen v. Ryerson*, 2 Dill. (U. S.) 503; *Gribble v. Pioneer Press Co.*, 15 Fed. Rep. 689; *Turton v. Union Pac. R. Co.*, 3 Dill. (U. S.) 366; *Bruce v. Gibson*, 9 Fed. Rep. 540; *Goodnow v. Litchfield*, 4 McCrary (U. S.) 215; *Chicago, etc., R. Co. v. Ohle*, 117 U. S. 124; *Conn v. Chicago, etc., R. Co.*, 48 Fed. Rep. 177; *Rumsey v. Call*, 28 Fed. Rep. 769.

Precedent of Plea in Abatement. — In *Sherwood v. Newport News, etc., Co.*, 55 Fed. Rep. 1, the allegations of diverse citizenship were traversed by a sworn plea in abatement supported by affidavit, both of which are quoted in the report of the case.

Sufficiency of Plea. — In *McDonald v. Salem Capital Flour-Mills Co.*, 31 Fed. Rep. 577, a suit in equity was removed to the federal court on petition of a defendant. The case was not removable

By Direction of Court. — If the judge has reason to doubt the existence of the jurisdictional facts, he may examine the parties

unless one Kelly, a plaintiff, was a citizen of a state other than Oregon, where the suit was instituted. The petition for removal alleged that he was a citizen of Rhode Island residing in London, England. In the federal court a co-plaintiff filed a plea in abatement alleging that Kelly was a citizen of Oregon, residing temporarily in London, England. The plea was set down for argument and overruled, the court saying: "This plea is clearly open to the objection that it is argumentative — not positive and direct, as it should be. Story Eq. Pl., § 662; Lewis Eq. Dr. 222. The petition alleges that Kelly is a citizen of Rhode Island, 'residing' — not temporarily — 'in England.' In answer to this, the plea alleges that 'Kelly is a citizen of Oregon, temporarily residing in England.' He cannot be a citizen of both states at the same time, and therefore argumentatively the plea takes issue with the petition on this point. But in addition to stating the contradictory fact, the plea must directly negative or traverse all the inconsistent facts and circumstances, and directly aver that Kelly is not a citizen of Rhode Island, and is not a resident of England." In another part of the opinion the court remarked that a plea negating the existence of diverse citizenship "does not require to be supported by an answer."

Johnson v. Accident Ins. Co., 35 Fed. Rep. 374, was an action brought by one Gertie Johnson in a state court against the Accident Insurance Company of North America. The cause was then removed to the Circuit Court of the United States for the Western District of Michigan on a petition of the defendant alleging that the plaintiff was a citizen of the state of Michigan, and the defendant a corporation organized and existing under the laws of the Dominion of Canada. The plaintiff then filed the following verified plea, in the nature of a plea in abatement, to the petition: "And the said Gertie Johnson, plaintiff in this suit, by Wheeler, Bishop & Blodgett, her attorneys, comes, and prays judgment of the said defendant's petition for the removal of this cause from the Circuit Court for the county of Mason, state of Michigan, to this court, and whether

this court will further retain jurisdiction of this cause, because she says that, at the time and before the commencement of her said action in the said Circuit Court for the county of Mason, she, the said plaintiff was a citizen of Finland, and a subject of the czar of Russia, and that she never was a citizen of the state of Michigan, nor a citizen of any of the states or territories of the United States; and, further, that the said defendant, at the time of the commencement of said suit as aforesaid, and ever since, has been and now is a foreign corporation formed and existing under and by virtue of the laws of the Dominion of Canada, as appears from said defendant's petition for the removal of this cause to this court; and this the said Gertie Johnson is ready to verify. Wherefore she prays judgment as aforesaid, and that this cause may be remanded to said Circuit Court for the county of Mason." In sustaining the foregoing plea on demurrer the court said: "In behalf of the defendant it is urged that the plea is not sufficient in matters of form when tested by the strict technical rules which at common law regulated pleas in abatement. I do not deem it necessary to determine whether or not this contention is well founded, for I am satisfied that this plea should not be tested by such rules. It is not such a pleading as should be looked upon with disfavor by the court, but is one which simply tenders an issue upon a material question of fact; and it fairly and with sufficient certainty sets forth allegations as to matters of fact which, if proven, would clearly negative the jurisdiction of this court. The function which such a plea performs is a substantive one, designed only for bringing forward an issue of fact in which the other party may join, and so a trial be had. An order overruling the demurrer must therefore be entered. An opportunity, however, should be given the defendant to accept the issue tendered. Ten days will be allowed in which the allegations of the plea as to the citizenship of the plaintiff may be traversed. In default thereof an order will be entered remanding the cause."

Plaintiff Not Estopped. — A plaintiff's allegation of citizenship or residence in

upon that question, or direct a plea in abatement to be filed and heard, in order to settle the question at the outset.¹

After Denial of Motion to Remand. — The denial of a motion to remand is no prejudice to the filing of a plea in abatement raising an issue of fact.²

Submitted on Stipulation. — A plea in abatement is sometimes submitted on an agreed statement of facts.³

(2) *By Petition to Remand or by Affidavits.* — In some of the circuits allegations of jurisdictional facts may be put in issue by a petition to remand containing a denial thereof,⁴ and in others it seems that a motion to remand accompanied by affidavits is sufficient for the purpose.⁵

(3) *Burden of Proof.* — Where the jurisdictional allegations in the petition for removal are denied in the federal Circuit Court, the burden of proof on the trial of that issue of fact is cast upon the petitioner for removal.⁶

his pleading in the state court does not estop him from alleging the contrary in the federal court in denial of the allegations of the petition for removal. *Egerton v. Starin*, 91 Fed. Rep. 932.

Controverting Averment of Jurisdictional Amount. — If a sufficient amount in dispute is shown by direct averment in the petition for removal and not elsewhere controverted, the cause will not be remanded on motion; the averment should be challenged by special plea or affidavit. *Langdon v. Hillside Coal, etc., Co.*, 41 Fed. Rep. 609.

Insufficiency of Surety. — In *Probst v. Cowen*, 91 Fed. Rep. 931, the court said: "If as a matter of fact the surety is not good and sufficient, and the petition for removal, having been filed in vacation, has never been presented to the state court, and that court has had no opportunity to pass upon the sufficiency of the petition for removal or the bond, these facts should be presented by a plea in abatement and might make a case requiring the remanding of the cause."

1. *Gribble v. Pioneer Press Co.*, 15 Fed. Rep. 689.

2. *Egerton v. Starin*, 91 Fed. Rep. 932; *Goodnow v. Litchfield*, 4 McCrary (U. S.) 217.

3. *Turton v. Union Pac. R. Co.*, 3 Dill. (U. S.) 366.

4. *Curnow v. Phoenix Ins. Co.*, 44 Fed. Rep. 305. See also *Egerton v. Starin*, 91 Fed. Rep. 932, where the court appointed a master to take testimony upon the question of fact; *Powers v. Chesapeake, etc., R. Co.*, 65 Fed. Rep. 129; *Rivers v. Bradley*, 53 Fed.

Rep. 305; *Carson v. Dunham*, 121 U. S. 425.

5. *Poppenhauser v. India-Rubber Comb Co.*, 14 Fed. Rep. 707; *Chiato-vich v. Hanchett*, 78 Fed. Rep. 196. See also *Wolff v. Archibald*, 14 Fed. Rep. 369; *La Page v. Day*, 74 Fed. Rep. 977; *Duncan v. Associated Press*, 81 Fed. Rep. 417, where a motion to remand was made and heard on accompanying affidavits as well as evidence controverting the allegations of citizenship in the petition for removal; *Baughman v. National Water-Works Co.*, 46 Fed. Rep. 5; *Carson v. Hyatt*, 118 U. S. 279.

As to Time of Filing Petition. — In *Waite v. Phoenix Ins. Co.*, 62 Fed. Rep. 769, the question arose on a motion to remand whether the petition for removal was filed prior in time to the allowance of an amendment reducing the amount claimed by the plaintiff below the jurisdiction of the federal court, and the federal court granted time for the parties to take testimony on that issue, reserving final action upon the motion to remand until the coming in of the proof.

Waiver of Right of Removal. — In *Hudson River R., etc., Co. v. Day*, 54 Fed. Rep. 545, the cause was remanded on motion, on the ground that the right of removal had been waived by proceedings in the state court contemporaneous with and subsequent to the filing of the petition for removal.

6. *Carson v. Dunham*, 121 U. S. 421, holding that where the removal was on the alleged ground of diverse citizenship and the fact was denied by an-

f. MOTION TO REMAND — (1) *Necessity of Motion*. — There are some objections that are waived if not taken by a motion to remand.¹ But where the objection is jurisdictional and cannot be waived² it is the duty of the court to take notice thereof and remand the cause of its own motion.³ And the Circuit Court of Appeals or the Supreme Court, on appeal or error after final judgment or decree, will reverse the same and order the cause to be remanded though no objection be taken in the court below or in the appellate court.⁴

(2) *Who May Make Motion*. — It is immaterial who makes a motion to remand.⁵ It is usually made by the plaintiff in the suit, but may be made by a defendant who did not join in the petition for removal;⁶ and when it is based upon a strictly jurisdictional defect the cause must be remanded though the motion be made by the petitioner for removal.⁷

(3) *Time for Motion*. — Where the ground of the motion is not a mere irregularity which has been waived,⁸ the motion to remand may be made at any time,⁹ even after trial and judg-

swer to the petition, the case must be remanded unless the petitioner affirmatively proved the necessary facts. See also *Kansas City, etc., R. Co. v. Daughtry*, 138 U. S. 303; and *supra*, p. 340.

1. See *supra*, pp. 370, 371.

2. See *supra*, p. 369..

3. *Indiana v. Tolleston Club*, 53 Fed. Rep. 18; *Kaeiser v. Illinois Cent. R. Co.*, 6 Fed. Rep. 2; *Keeney v. Roberts*, 12 Sawy. (U. S.) 39, 39 Fed. Rep. 629.

"This court * * * will be astute on its own motion to decline the consideration of cases which under the federal statutes have not been properly relegated to its jurisdiction." *Dwyer v. Peshall*, 32 Fed. Rep. 498.

Hence, though no motion to remand has been made, the court may decline to grant an interlocutory order in the cause, if satisfied that the federal court has no jurisdiction. *Webber v. Bishop*, 13 Fed. Rep. 49.

No Appearance by Plaintiff. — In *Creagh v. Equitable L. Assur. Soc.*, 88 Fed. Rep. 1, the cause had been set for trial and there was no appearance by the plaintiff or any motion or pleading questioning the jurisdiction, but the court remanded the cause for want of jurisdiction.

4. *Mutual Reserve Fund L. Assoc. v. Farmer*, 77 Fed. Rep. 932; *Robbins v. Ellenbogen*, 71 Fed. Rep. 4; *Thurber v. Muller*, 67 Fed. Rep. 373; *Barth v. Coler*, 60 Fed. Rep. 466; *Southwestern Tel., etc., Co. v. Robinson*, 48 Fed.

Rep. 769; *Grand Trunk R. Co. v. Twitchell*, 59 Fed. Rep. 728; *Tod v. Cleveland, etc., R. Co.*, 65 Fed. Rep. 147; *Burnham v. Leoti First Nat. Bank*, 53 Fed. Rep. 165; *Craswell v. Belanger*, 56 Fed. Rep. 529; *Mattigny v. Northwestern Virginia R. Co.*, 158 U. S. 57; *Neel v. Pennsylvania Co.*, 157 U. S. 153; *Kellam v. Keith*, 144 U. S. 568; *Graves v. Corbin*, 132 U. S. 571; *Cameron v. Hodges*, 127 U. S. 325; *Connell v. Smiley*, 156 U. S. 340; *Everhart v. Huntsville College*, 120 U. S. 223; *Jackson v. Allen*, 132 U. S. 27; *Crehore v. Ohio, etc., R. Co.*, 131 U. S. 240; *Peper v. Fordyce*, 119 U. S. 469; *Claffin v. Commonwealth Ins. Co.*, 110 U. S. 81; *Grace v. American Cent. Ins. Co.*, 109 U. S. 283.

5. See *supra*, p. 367.

6. *Thompson v. Chicago, etc., R. Co.*, 60 Fed. Rep. 773; *Springer v. Howes*, 69 Fed. Rep. 849.

7. *Torrence v. Shedd*, 144 U. S. 527; *Mansfield, etc., R. Co. v. Swan*, 111 U. S. 382; *Ferguson v. Ross*, 38 Fed. Rep. 161; *Wabash R. Co. v. Barbour*, 73 Fed. Rep. 513; *Gombert v. Lyon*, 80 Fed. Rep. 305. See also *Connell v. Smiley*, 156 U. S. 335.

8. See *supra*, p. 370.

9. See *supra*, p. 367.

On Trial. — In *Robertson v. Scottish Union, etc., Ins. Co.*, 68 Fed. Rep. 173, the motion was made on the trial after the court had rendered a written opinion on the admissibility of evidence.

ment,¹ before the end of the term at which the judgment was rendered.²

(4) *Form and Contents of Motion.* — The proper practice when a motion to remand is made is to file a petition in writing setting forth the grounds for the remand.³ The cause may be remanded on grounds not specified in the written motion or petition,⁴ unless the ground not stated is a mere irregularity,⁵ but the court will perhaps decline to decide questions not argued.⁶ It is said that the motion should always be in form a motion "to remand," and not "to dismiss."⁷

(5) *Notice of Motion.* — The motion to remand is usually made upon notice.⁸

Filing the Record for the Purpose of Remand prior to the time fixed by law for filing it, see *supra*, p. 354.

1. In *Chandler v. Attica*, 22 Fed. Rep. 625, and *Ferguson v. Ross*, 38 Fed. Rep. 161, it was made on a motion for a new trial. In *Lazensky v. Supreme Lodge, etc.*, 32 Fed. Rep. 417, the cause was remanded on motion after trial and judgment because the record did not show that the requisite jurisdictional amount was involved.

2. *Ayres v. Wiswall*, 112 U. S. 189, where the order vacating all the proceedings had in the federal court and remanding the cause is set forth in full.

3. *Lucker v. Phoenix Assur. Co.*, 66 Fed. Rep. 161, where the court said that such petition "should be traversed or otherwise pleaded to by the resisting party."

4. *Beede v. Cheeney*, 5 Fed. Rep. 388, where a motion to remand on the sole ground of a defect in the bond was denied, but the cause was remanded on the ground of insufficient allegations of citizenship in the petition for removal, and the court said: "Although the motion does not present that question, the court is bound as to that jurisdictional matter, and to take notice of it without any formal motion." In *Tracy v. Morel*, 88 Fed. Rep. 801, the only ground stated in the motion to remand was that the petition was not filed in time. It was held that the objection was not tenable, but the cause was remanded on the ground that diverse citizenship of the parties was not shown by the record. The court refrained from deciding whether on the motion to remand the truth of the allegation in the petition for removal that defendants had been fraudulently joined could properly be investigated.

Forms of Written Motions will be found in *Henderson v. Cabell*, 43 Fed. Rep. 257; *Chiatovich v. Hanchett*, 78 Fed. Rep. 193; *De Loy v. Traveler's Ins. Co.*, 59 Fed. Rep. 320; *Minnett v. Milwaukee, etc., R. Co.*, 3 Dill. (U. S.) 461; *In re Foley*, 80 Fed. Rep. 949; *Probst v. Cowen*, 91 Fed. Rep. 929.

5. **Mere Irregularity.** — The court may properly decline to remand for a mere irregularity not specified in the motion. *Canal, etc., St. R. Co. v. Hart*, 114 U. S. 660. See also to the point that when a remand is sought on the ground that the petition was not filed in time it should be specified in the motion, *Martin v. Baltimore, etc., R. Co.*, 151 U. S. 673.

6. *La Page v. Day*, 74 Fed. Rep. 978.

7. *Northern Pac. Terminal Co. v. Lowenberg*, 18 Fed. Rep. 341, holding that a motion to "dismiss" for want of jurisdiction is proper only in cases originally brought in the federal court. But the motion to dismiss was treated as a motion to remand. See, however, the following cases where a suit of which the federal court had no jurisdiction, and where the state court had made no order of removal, was dismissed, and a motion to dismiss was declared to be the proper form: *Merchants' Nat. Bank v. Brown*, 17 Fed. Rep. 161, 4 Woods (U. S.) 263; *Webber v. Humphreys*, 5 Dill. (U. S.) 223; *Osgood v. Chicago, etc., R. Co.*, 6 Biss. (U. S.) 330; *Waggener v. Cheek*, 2 Dill. (U. S.) 560. See also *Pettus v. Georgia R., etc., Co.*, 3 Woods (U. S.) 620.

8. **Notice of Motion** was given in *Stadleman v. White Line Towing Co.*, 92 Fed. Rep. 209, and in *Plymouth Gold Min. Co. v. Amador, etc., Canal Co.*, 118 U. S. 269, where the notice is set forth in the statement of the case.

g. HEARING AND DETERMINATION OF MOTION TO REMAND

—(1) *Determined by Face of Record.* — A motion to remand, as distinguished from a plea in abatement, must be determined by what appears on the face of the record.¹ Ordinarily the petition for removal must be accepted by the federal court as a true *prima facie* statement of the jurisdictional facts;² but the court may look at the whole record and therein find that the alleged facts giving jurisdiction to the federal court did not exist, notwithstanding the statement of the petition for removal to the contrary.³

Submitted on Agreed Facts. — A motion to remand is frequently heard upon a stipulation as to the facts.⁴

1. *Clarkhuff v. Wisconsin, etc., R. Co.*, 26 Fed. Rep. 466; *McLane v. Leicht*, 27 Fed. Rep. 887; *Goodnow v. Litchfield*, 4 McCrary (U. S.) 217; *Mahin v. Pfeiffer*, 27 Fed. Rep. 893. See also *Mackeye v. Mallory*, 6 Fed. Rep. 743, 19 Blatchf. (U. S.) 165, 61 How. Pr. (N. Y.) 24.

Assignment of Cause of Action. — Hence, on a motion to remand, it cannot be urged that the plaintiff has assigned the cause of action to one whose citizenship is the same as that of the defendant. *Smith v. Chicago, etc., R. Co.*, 30 Fed. Rep. 722.

The Record is primarily the petition for removal and secondarily the pleadings in the state court. *McLane v. Leicht*, 27 Fed. Rep. 887. It does not include the record of proceedings after removal, either in the state court (see *supra*, p. 349), or in the federal court. Thus where the diverse citizenship of the parties did not appear in the removal papers or elsewhere in the record filed in the federal court, the Circuit Court of Appeals ordered the cause to be remanded without considering averments of citizenship in the bond filed with the petition for a writ of error, or statements in the evidence included in a bill of exceptions. *Grand Trunk R. Co. v. Twitchell*, 59 Fed. Rep. 730.

It seems that on a motion to remand where no question of fact is in dispute the plaintiff's pleadings may be produced and treated as a part of the record, although, according to the state practice, they were not filed in the state court nor certified to the federal court with the removal papers. *Anderson v. Appleton*, 32 Fed. Rep. 857.

Affidavits filed in the state court in support of a motion for a temporary

injunction are no part of the record. *McLane v. Leicht*, 27 Fed. Rep. 887.

Error in Record. — In opposition to a motion to remand, the removing party cannot be allowed to sustain the jurisdiction of the federal court by showing error in the record sent up from the state court by *ex parte* affidavits. *Smith v. Western Union Tel. Co.*, 79 Fed. Rep. 132. But see *Stephens v. St. Louis, etc., R. Co.*, 47 Fed. Rep. 530.

Burden of Proof. — It results from the rule which requires the record to show affirmatively the jurisdiction of the federal court that upon a motion to remand based only upon the record the burden of convincing the court rests upon the party opposing the motion. *Long v. Buford*, 24 Fed. Rep. 248.

2. *Clarkhuff v. Wisconsin, etc., R. Co.*, 26 Fed. Rep. 468; *Goodnow v. Litchfield*, 4 McCrary (U. S.) 215. See also *Kessinger v. Hinkhouse*, 27 Fed. Rep. 884.

"Upon a motion to remand the court must take the facts to be as the same are set forth in the petition for removal, aided by reference, when necessary, to the pleadings to ascertain the character of the action." *Smith v. Chicago, etc., R. Co.*, 30 Fed. Rep. 722.

3. *Clarkhuff v. Wisconsin, etc., R. Co.*, 26 Fed. Rep. 465, where the court said: "If for example the suit should be upon a note or bill or penal bond for two or three hundred dollars, without any other cause of action, the court might doubtless reject as unfounded a statement in the petition for removal showing the amount in controversy to be over five hundred dollars [now two thousand dollars]. So ordinarily if the plaintiff's petition should claim damages to an amount less than five hundred dollars."

4. See *Pacific R. Co. v. Missouri*

(2) *Rule of Decision—Prior Decisions in Same Circuit.*—A decision by a circuit justice on a question of jurisdiction or of practice in removal proceedings, where the point has not been decided by the Supreme Court, will be followed by the circuit and district judges in the same circuit.¹ A like regard is paid by the district judges to the decisions of the circuit judge in the same circuit;² and rulings in the same circuit, by whomsoever made, are usually,³ but not always,⁴ followed.

(3) *Cause Remanded Where Jurisdiction Doubtful.*—When it is settled that the jurisdiction of the federal court in a removed cause is doubtful, it is an established paradox that all doubt as to what the court should do is dispelled, and the cause will be remanded.⁵

Pac. R. Co., 5 McCrary (U. S.) 374; Scott v. Texas Land, etc., Co., 41 Fed. Rep. 225; Sherwood v. Newport News, etc., Co., 55 Fed. Rep. 1.

1. Garner v. Providence Second Nat. Bank, 66 Fed. Rep. 370; Kellogg v. Hughes, 3 Dill. (U. S.) 359, where Circuit Judge Dillon referred to a prior decision by Circuit Justice Miller as having "the force of an authoritative adjudication." Blackwell v. Braun, 1 Fed. Rep. 352.

2. Carson, etc., Lumber Co. v. Holtzclaw, 39 Fed. Rep. 885; Minnick v. Union Ins. Co., 40 Fed. Rep. 369; Penrose v. Penrose, 17 Blatchf. (U. S.) 333; Van Brunt v. Corbin, 14 Blatchf. (U. S.) 496, where the district judge said that the prior decision "now furnishes the law for this circuit;" McLane v. Leicht, 27 Fed. Rep. 888, the prior decision being followed "without respect to our own views;" Kessinger v. Hinkhouse, 27 Fed. Rep. 885; Wilson v. Winchester, etc., R. Co., 82 Fed. Rep. 16; Huskins v. Cincinnati etc., R. Co., 37 Fed. Rep. 507.

In Commercial, etc., Bank v. Corbett, 5 Sawy. (U. S.) 174, counsel urged the district judge to adopt a view contrary to that expressed by the circuit judge in a prior case in another district of the same circuit, but the court said: "Regarded simply as a question of power, I presume it cannot be denied that the Circuit Court for Nevada, presided over by the district judge, has the power to disregard a decision of the circuit judge made in the California district. A district judge while sitting alone in the Circuit Court has the same power as any other judge sitting in the same court. Robinson v. Satterlee, 3 Sawy. (U. S.) 134. While this is so, I do not think the dis-

trict judge should forget that if the circuit judge were present, his opinion would control. When his opinion has been embodied in a judicial decision it ought not to be departed from without most cogent reasons."

3. Garner v. Providence Second Nat. Bank, 66 Fed. Rep. 369; Durkee v. Illinois Cent. R. Co., 81 Fed. Rep. 2; Wolcott v. Aspen Min., etc., Co., 34 Fed. Rep. 822; Monroe v. Williamson, 81 Fed. Rep. 988; Brodhead v. Shoemaker, 44 Fed. Rep. 526; Consolidated Traction Co. v. Guarantors' Liability, etc., Co., 78 Fed. Rep. 657. See also Wilcox, etc., Guano Co. v. Phoenix Ins. Co., 60 Fed. Rep. 931.

4. Frisbie v. Chesapeake, etc., R. Co., 59 Fed. Rep. 369; Kansas City, etc., R. Co. v. Interstate Lumber Co., 37 Fed. Rep. 3.

5. Per Caldwell, J., in Fitzgerald v. Missouri Pac. R. Co., 45 Fed. Rep. 812, where that experienced judge said that the benefit of a reasonable doubt should never be given to the jurisdiction of the federal court in removal cases; Johnson v. Wells, 91 Fed. Rep. 4; Concord Coal Co. v. Haley, 76 Fed. Rep. 882; Springer v. Howes, 69 Fed. Rep. 849; Oakley v. Taylor, 64 Fed. Rep. 249; Hutcheson v. Bigbee, 56 Fed. Rep. 329; In re Cilley, 58 Fed. Rep. 989; Adams v. May, 27 Fed. Rep. 908; Kessinger v. Vannatta, 27 Fed. Rep. 890; Sanger v. Seymour, 25 Fed. Rep. 290; Wolff v. Archibald, 14 Fed. Rep. 369; Levy v. Laclede Bank, 18 Fed. Rep. 194; Trafton v. Nougues, 4 Sawy. (U. S.) 184, an excellent case; Deakin v. Lea, 11 Biss. (U. S.) 27.

"In questions of doubt as to jurisdiction, the federal courts should remand. They should not be covetous, but miserly, of jurisdiction." Per

h. ORDER GRANTING OR DENYING MOTION TO REMAND. — Upon granting or refusing a motion to remand, the court enters an appropriate order.¹ An order remanding a suit which was removed on the ground of a separable controversy returns the entire suit.²

i. VACATING ORDER GRANTING OR DENYING MOTION TO REMAND — Order of Remand. — The court has control over an order of remand during the term at which it is entered, and may

Brewer, J., in *State v. Bradley*, 26 Fed. Rep. 292.

"Cases in which our jurisdiction is in doubt should be remanded to the court from which they are removed. It is only where jurisdiction is clear that we hold cases under the removal acts. This rule results naturally enough from a system which contemplates that the great majority of rights shall be established and regulated in the state courts, and provides only for federal jurisdiction in special and limited instances. * * * Where such doubt exists it would seem to be for the greater interests of all concerned that the controversy should remain with the court where jurisdiction is not doubted than to be prolonged in a court which doubts its jurisdiction and where after long litigation in respect to the merits the doubt may resolve into a certainty and all go for naught." *Per Aldrich, J.*, in *Concord Coal Co. v. Haley*, 76 Fed. Rep. 883.

The injustice and hardship likely to result from resolving doubts in favor of the removability of cases are illustrated by *Graves v. Corbin*, 132 U. S. 571.

It should be noted, however, that several of the foregoing cases were decided when by the federal statute an order of remand was reviewable on appeal or error by the United States Supreme Court, and therefore the order did not deprive the defendant of an opportunity to have the question adjudged by that court; and the circumstance that relief against an erroneous order could be thus obtained was frequently pointed out as a good reason for resolving doubts against the party removing. Thus in *Wilson v. St. Louis, etc., R. Co.*, 22 Fed. Rep. 3, Mr. Justice Miller said that it was "with less hesitation" that he ordered the cause to be remanded from the fact that the correctness of the order could be speedily determined on writ of error to the Supreme Court, where the cause

would be advanced and heard out of its order. Now, however, by the Act of 1887-1888, the order of remand is not reviewable directly or indirectly by the Supreme Court, and the defendant will be absolutely concluded by the order. See *infra*, I. 46. *a. Appealability of Orders and Review of Final Judgment.* And in *Johnson v. F. C. Austin Mfg. Co.*, 76 Fed. Rep. 616, the court allowed the amendment of a defective allegation of citizenship, remarking that it was "the more inclined in that direction from the fact that if there is error, the party has the right to have the record reviewed by the Court of Appeals, whereas an order remanding the cause leaves to the party feeling aggrieved no remedy whatever."

1. **Precedents of Orders of Remand** will be found in *Thacher v. McWilliams*, 47 Ga. 308, quoting the order of remand made by the federal court, which contained a direction to the clerk to forward a certified copy of the order to the state court; *Akers v. Akers*, 117 U. S. 198, containing the text of an order of remand with costs against the petitioner for removal; *Ayres v. Wiswall*, 112 U. S. 189, quoting the order of remand made after hearing and final decree.

A **Precedent of an Order Denying a Motion to Remand** will be found in *Meissner v. Buek*, 28 Fed. Rep. 164.

2. This follows the doctrine that removal on that ground carries the entire case and not merely the separable controversy, into the federal court. See *supra*, p. 234. In removals under the separable controversy act of 1866, the removal transferred only the petitioner's separate controversy (see *supra*, p. 232), and if the state court ordered the whole cause removed, the federal court would retain the removable controversy and remand the remainder of the suit to the state court. *Field v. Lowndale*, 1 Deady (U. S.) 289.

vacate it,¹ except, perhaps, where the remanding order has been executed by filing it in the state court.²

Order Refusing to Remand.—The denial of a motion to remand is always subject to reconsideration, and the cause may be subsequently remanded.³ But an adverse ruling upon a motion to remand will not ordinarily be disturbed on a renewal of the motion before another judge.⁴

j. COSTS ON REMAND OR DISMISSAL—(1) *Power to Award Costs*—**Power of Circuit Court.**—Prior to the Act of 1875 the rule had been never to allow costs where a case was dismissed or remanded for want of jurisdiction appearing upon the face of the record.⁵ The Act of 1875 provided that upon dismissal of the suit or remand to the state court the Circuit Court "shall make such order as to costs as shall be just."⁶ This provision was expressly left in force by the Act of 1887-1888.⁷

Power of Supreme Court and Circuit Court of Appeals.—Where a judgment

1. *Freeman v. Butler*, 39 Fed. Rep. 821; *Birdseye v. Shaeffer*, 37 Fed. Rep. 821; *Galesburg v. Galesburg Water Co.*, 27 Fed. Rep. 321, where an order of remand was set aside on a rehearing. See also *Hamlet v. Fletcher*, 24 Fed. Rep. 305; *Greene v. Klinger*, 10 Fed. Rep. 689; *Wilkinson v. Delaware, etc.*, R. Co., 23 Fed. Rep. 561; *Shearing v. Trumbull*, 75 Fed. Rep. 33.

After Expiration of the Term it seems that the order cannot, or at least will not, be vacated. *McLean v. St. Paul, etc.*, R. Co., 17 Blatchf. (U. S.) 367.

2. *Freeman v. Butler*, 39 Fed. Rep. 821, where the court found it unnecessary to decide whether the order could be vacated under such circumstances.

3. *Rand v. Walker*, 117 U. S. 343; *Jackson, etc., Co. v. Pearson*, 60 Fed. Rep. 123; *Hamblin v. Chicago, etc.*, R. Co., 43 Fed. Rep. 401, where *Gresham, J.*, said: "After such a motion has been overruled the party who made it may plead to the jurisdiction of the court; and if, on issue joined, the plea is sustained, either on the ground that both plaintiff and defendant are citizens of the same state (the jurisdiction depending upon citizenship) or upon the ground that the right asserted under the Constitution or laws of the United States is without foundation, the case will be remanded." See also *Fisk v. Henarie*, 35 Fed. Rep. 230; *Deford v. Mehaffy*, 14 Fed. Rep. 181; *Birdseye v. Shaeffer*, 37 Fed. Rep. 821; *Burke v. Flood*, 1 Fed. Rep. 541; *Missouri Pac. R. Co. v. Fitzgerald*, 160 U. S. 580.

4. *Wolcott v. Sprague*, 55 Fed. Rep.

546; *Turner v. Indianapolis, etc.*, R. Co., 8 Biss. (U. S.) 380.

Leave to Renew the Motion is sometimes inserted in the order of denial. *Elliott v. Shuler*, 50 Fed. Rep. 454; *Donahue v. Calumet Fire-Clay Co.*, 94 Fed. Rep. 23.

5. It was considered that the court, having no jurisdiction of the case, could not even render a judgment for costs. *Josslyn v. Phillips*, 27 Fed. Rep. 481; *Mayor v. Cooper*, 6 Wall. (U. S.) 247; *Hornthall v. Collector*, 9 Wall. (U. S.) 560. See also *Burnham v. Rangeley*, 2 Woodb. & M. (U. S.) 417; *Mansfield, etc.*, R. Co. v. *Swan*, 111 U. S. 387.

6. Act of 1875, 18 U. S. Stat. at L. 472, § 5.

7. Act of 1887-1888, 24 U. S. Stat. at L. 555, c. 373; 25 U. S. Stat. at L. 436, c. 866. Furthermore, the Act of 1887-1888, as well as the Act of 1875, requires a bond to be given upon removal, for filing a transcript in the Circuit Court and "for paying all costs that may be awarded by the said Circuit Court if said court shall hold that such suit was wrongfully or improperly removed thereto."

"These provisions were manifestly designed to avoid the application of the general rule, which, in cases where the suit failed for want of jurisdiction, denied the authority of the court to award judgment against the losing party, even for costs. *M'Iver v. Wattles*, 9 Wheat. (U. S.) 650; *Mayor v. Cooper*, 6 Wall. (U. S.) 247." *Mansfield, etc.*, R. Co. v. *Swan*, 111 U. S. 387.

or decree on the merits by the federal Circuit Court is reversed on error or appeal, for want of jurisdiction in the Circuit Court, the cause having been improperly removed from the state court, the question of costs in the appellate court is not covered by any statutory provision¹ or formal rule of court, but rests in discretion,² and the power to award costs arises out of the fact that a judgment of reversal is an exercise of jurisdiction.³

(2) *Exercise of Discretion — In General.* — It is the general practice of the federal Circuit Court in remanding or dismissing a cause improperly removed to award the costs against the petitioner for removal.⁴ It is also the general practice of the

Allowance of Attorney's Fee. — Upon remanding the case the Circuit Court may allow a reasonable attorney's fee as a part of the costs. *Josslyn v. Phillips*, 27 Fed. Rep. 481, where Brown, J., said: "As the clerk's fee for filing the transcript is the only other item of cost likely to arise in a removed case before the motion to remand is made, and as this is always paid by the party procuring the removal from the state court, it seems to us that the statute must have intended to permit the court to impose a reasonable attorney's fee as a compensation to the party for his services in procuring the remand. In ordinary cases these would be the only costs to which the language of the act would attach, as the motion to remand is usually made before any further proceedings are taken in the Circuit Court." Accordingly the court allowed a fee of twenty dollars.

Contra. — In the seventh circuit the practice has been uniformly to allow no attorney's docket fee where a motion to remand has been sustained. *Smith v. Western Union Tel. Co.*, 81 Fed. Rep. 242.

1. *Mansfield, etc., R. Co. v. Swan*, 111 U. S. 387.

2. "No formal rule of the court covers the case of a reversal on that ground, although paragraph 3 of rule 24, 'which provides that in cases of reversal of any judgment or decree in this court, costs shall be allowed to the plaintiff in error or appellant, unless otherwise ordered by the court,' leaves room for the exercise of discretion in its application to such cases. The whole subject was very much discussed by Mr. Justice Woodbury in the case of *Burnham v. Rangeley*, 2 Woodb. & M. (U. S.) 417-424, where he collects a large number of authorities on the subject." *Mansfield, etc., R. Co. v. Swan*, 111 U. S. 388.

3. *Mansfield, etc., R. Co. v. Swan*, 111 U. S. 387.

The Jurisdiction of the Circuit Court of Appeals to award costs of that court upon reversal and remand for want of jurisdiction in the Circuit Court was expressly affirmed in *Grand Trunk R. Co. v. Twitchell*, 59 Fed. Rep. 727.

4. *Indiana v. Lake Erie, etc., R. Co.*, 85 Fed. Rep. 3; *Stadleman v. White Line Towing Co.*, 92 Fed. Rep. 209; *Hatcher v. Wadley*, 84 Fed. Rep. 913; *Hecht v. Metzler*, 82 Fed. Rep. 343; *Kane v. Indianapolis*, 82 Fed. Rep. 773; *Hoyt v. Bates*, 81 Fed. Rep. 641; *Ray v. Peirce*, 81 Fed. Rep. 886; *Fox v. Southern R. Co.*, 80 Fed. Rep. 948; *Gombert v. Lyon*, 80 Fed. Rep. 306; *Smith v. Western Union Tel. Co.*, 79 Fed. Rep. 133; *Bradley v. Ohio River, etc., R. Co.*, 78 Fed. Rep. 394; *Golden v. Bruning*, 72 Fed. Rep. 5; *First Littleton Bridge Corp. v. Connecticut River Lumber Co.*, 71 Fed. Rep. 226; *In re Jarnecke Ditch*, 69 Fed. Rep. 172; *Caples v. Texas, etc., R. Co.*, 67 Fed. Rep. 12; *Prescott v. Haughey*, 65 Fed. Rep. 660; *Daugherty v. Western Union Tel. Co.*, 61 Fed. Rep. 140; *De Loy v. Travelers' Ins. Co.*, 59 Fed. Rep. 320; *Indiana v. Tolleston Club*, 53 Fed. Rep. 19; *Washington v. Columbus, etc., R. Co.*, 53 Fed. Rep. 675; *Independent Dist. v. Rock Rapids Bank*, 48 Fed. Rep. 3; *Los Angeles Farming, etc., Co. v. Hoff*, 48 Fed. Rep. 344; *Davis v. Tillotson*, 48 Fed. Rep. 607; *State v. Columbus, etc., R. Co.*, 48 Fed. Rep. 629; *Adelbert College v. Toledo, etc., R. Co.*, 47 Fed. Rep. 848; *McNulty v. Connecticut Mut. L. Ins. Co.*, 46 Fed. Rep. 307; *Davis v. Chicago, etc., R. Co.*, 46 Fed. Rep. 309; *Bennett v. Devine*, 45 Fed. Rep. 705; *Fitzgerald v. Missouri Pac. R. Co.*, 45 Fed. Rep. 821; *Austin v. Gagan*, 39 Fed. Rep. 629; *Keeney v. Roberts*, 39 Fed. Rep. 630; *Dennison v.*

Supreme Court, when it reverses a judgment or decree in a case improperly removed, and directs the case to be remanded to the state court for want of jurisdiction, to order the costs both in the court below and in the Supreme Court to be borne by the party upon whose application the case was wrongfully removed;¹ and it makes no difference in this behalf that the party who procured the removal is the plaintiff in error or appellant who succeeded in obtaining the reversal of the judgment or decree.²

Brown, 38 Fed. Rep. 536; Thouron v. East Tennessee, etc., R. Co., 38 Fed. Rep. 680; Miller v. Sharp, 37 Fed. Rep. 163; Wedekind v. Southern Pac. Co., 36 Fed. Rep. 281; Yuba County v. Pioneer Gold Min. Co., 32 Fed. Rep. 185; Duff v. Duff, 31 Fed. Rep. 776; Rumsey v. Call, 28 Fed. Rep. 772; Winnemans v. Edgington, 27 Fed. Rep. 326; Winchell v. Coney, 27 Fed. Rep. 484; Goodnow v. Dolliver, 26 Fed. Rep. 471; Endy v. Commercial F. Ins. Co., 24 Fed. Rep. 657; Kelly v. Houghton, 23 Fed. Rep. 418; Rothschild v. Matthews, 22 Fed. Rep. 10; Badger v. Mulville, 22 Fed. Rep. 257; Hambleton v. Duham, 22 Fed. Rep. 465; Gudger v. Western North Carolina R. Co., 21 Fed. Rep. 84; MacNaughton v. South. Pac. Coast R. Co., 19 Fed. Rep. 885; Gribble v. Pioneer Press Co., 15 Fed. Rep. 691; Tuedt v. Carson, 13 Fed. Rep. 357, 4 McCrary (U. S.) 432; Teas v. Albright, 13 Fed. Rep. 414; Connell v. Utica, etc., R. Co., 13 Fed. Rep. 241; Berrian v. Chetwood, 9 Fed. Rep. 678; Bruce v. Gibson, 9 Fed. Rep. 542; Hanover F. Ins. Co. v. Keogh, 7 Fed. Rep. 766; Smith v. Horton, 7 Fed. Rep. 271; Pond v. Sibley, 7 Fed. Rep. 139; Hendecker v. Rosenbaum, 6 Fed. Rep. 99; Bailey v. New York Sav. Bank, 2 Fed. Rep. 18; Ruckman v. Palisade Land Co., 1 Fed. Rep. 371; Ryan v. Young, 9 Biss. (U. S.) 68; McLean v. St. Paul, etc., R. Co., 17 Blatchf. (U. S.) 368, 16 Blatchf. (U. S.) 319; Cissel v. McDonald, 16 Blatchf. (U. S.) 154; Bright v. Milwaukee, etc., R. Co., 14 Blatchf. (U. S.) 214; Donohoe v. Mariposa Land, etc., Co., 5 Sawy. (U. S.) 163; Keeney v. Roberts, 12 Sawy. (U. S.) 40, 39 Fed. Rep. 629; Trafton v. Nougues, 4 Sawy. (U. S.) 185.

1. Mattingly v. Northwestern Virginia R. Co., 158 U. S. 53; Neel v. Pennsylvania Co., 157 U. S. 153; Chapell v. Waterworth, 155 U. S. 102; Postal Tel. Cable Co. v. Alabama, 155 U. S. 488; East Lake Land Co. v. Brown,

155 U. S. 488; Tennessee v. Union, etc., Bank, 152 U. S. 454; Torrence v. Shedd, 144 U. S. 527; Martin v. Snyder, 148 U. S. 663; Hanrick v. Hanrick, 153 U. S. 192, where the costs were charged against one of several defendants, he having removed the cause on the ground of alleged separable controversy, and the Circuit Court was directed to render judgment against him for the costs in that court; Wilson v. Oswego Tp., 151 U. S. 57; Cates v. Allen, 149 U. S. 451; Martin v. Snyder, 148 U. S. 663; Bellaire v. Baltimore, etc., R. Co., 146 U. S. 119; Kellam v. Keith, 144 U. S. 568; La Confrance Compagnie, etc., v. Hall, 137 U. S. 62; Jackson v. Allen, 132 U. S. 27; Graves v. Corbin, 132 U. S. 571; Stevens v. Nichols, 130 U. S. 230; Crump v. Thurber, 115 U. S. 56; Mansfield, etc., R. Co. v. Swan, 111 U. S. 379, the leading case as to the authority of the Supreme Court to award costs where the judgment of the Circuit Court is reversed for want of jurisdiction.

Reversal with Direction to Dismiss.—In *Peninsular Iron Co. v. Stone*, 121 U. S. 631, costs were awarded against the petitioner for removal where the decree was reversed with a direction to dismiss the bill.

2. Removal Cases, 100 U. S. 457; Stevens v. Nichols, 130 U. S. 230; Walker v. Collins, 167 U. S. 57, where the judgment of the Circuit Court of Appeals affirming the judgment of the Circuit Court was reversed because the case was not removable, and it was ordered that all the costs from the time of removal be borne by the plaintiff in error who had removed the case; Mansfield, etc., R. Co. v. Swan, 111 U. S. 388, where the court said: "Although in a formal and nominal sense the plaintiffs in error prevail in obtaining a reversal of a judgment against them, the cause of that reversal is their own fault in invoking a jurisdiction to which they had no right to resort, and its effect is to defeat the entire pro-

The same practice in every particular obtains in the Circuit Court of Appeals.¹

Rule Relaxed under Equitable Circumstances. — Costs will be apportioned, or not awarded to either party, where both parties were equally responsible for the improper removal,² or in other cases

ceeding which they originated and have prosecuted. In a true and proper sense the plaintiffs in error are the losing and not the prevailing party, and this court, having jurisdiction upon their writ of error so to determine, and in that determination being compelled to reverse the judgment, of which on other grounds they complain, although denying their right to be heard for that purpose, has jurisdiction also, in order to give effect to its judgment upon the whole case against them, to do what justice and right seem to require, by awarding judgment against them for the costs that have accrued in this court."

1. *Mutual Reserve Fund L. Assoc. v. Farmer*, 77 Fed. Rep. 932; *Wabash R. Co. v. Barbour*, 73 Fed. Rep. 516, where the costs in the Circuit Court of Appeals and the costs of the Circuit Court and of the trial had therein were taxed against the plaintiff in error who had removed the case; *Wichita Nat. Bank v. Smith*, 72 Fed. Rep. 570; *Robbins v. Ellenbogen*, 71 Fed. Rep. 6; *Olds Wagon Works v. Benedict*, 67 Fed. Rep. 6; *Tod v. Cleveland, etc., R. Co.*, 65 Fed. Rep. 149; *Barth v. Coler*, 60 Fed. Rep. 469; *Grand Trunk R. Co. v. Twitchell*, 59 Fed. Rep. 730; *Craswell v. Belanger*, 56 Fed. Rep. 531; *Burnham v. Leoti First Nat. Bank*, 53 Fed. Rep. 167; *Southwestern Tel., etc., Co. v. Robinson*, 48 Fed. Rep. 770.

2. In *Peper v. Fordyce*, 119 U. S. 472, after removal by the defendant on a petition which showed that the cause was not removable, he filed an answer and cross-bill in the federal court. The plaintiff did not attempt to have the suit remanded, nor did he even call the attention of the court to the question of jurisdiction, but on the contrary he obtained an order for the consolidation of the removed cause with one originally brought by him in the Circuit Court, and the cases then proceeded to a final decree without objection. On reversal for want of jurisdiction, with a direction to remand, the costs of the Supreme Court were divided equally between the parties, and

each was ordered to pay his own costs in the Circuit Court.

In *Hancock v. Holbrook*, 112 U. S. 229, where a judgment of the Circuit Court was reversed on the merits and the cause ordered to be remanded to the state court, the appellee had procured the removal. The cause was not, however, docketed in the Circuit Court until a year after the petition for removal had been filed in the state court, and it nowhere appeared that any action was taken in the latter court in reference to its own jurisdiction, nor did it appear by which party the cause was docketed. The Supreme Court, being "strongly inclined to the opinion that the removal was effected with the consent of both parties, and without the attention of either of the courts having been called to the jurisdictional facts," ordered that each party pay one-half the costs in the Supreme Court, with liberty to the Circuit Court to make such order as to costs accruing in that court after the removal as equity and justice might require. The court distinguished *Removal Cases*, 100 U. S. 457, on the ground that in the latter it appeared that the appellee, after the case got to the Circuit Court, moved that it be remanded to the state court, and only remained in the Circuit Court because his motion was overruled.

In *Egerton v. Starin*, 91 Fed. Rep. 932, where the cause was remanded on motion of the plaintiff upon proof that he was a citizen of the same state as the defendant, no costs were taxed in favor of the plaintiff, he having described himself in his original complaint as "of" a different state.

Where a Cause Was Removed by Stipulation of the parties, without filing a petition or bond, and proceeded to judgment in the federal Circuit Court, which judgment was reversed and the cause remanded by the Circuit Court of Appeals, because the federal court had no jurisdiction thereof, no costs were allowed to either party. *Parkersburg First Nat. Bank v. Prager*, 91 Fed. Rep. 689.

where in furtherance of justice the general rule should not be applied.¹

Several Causes Heard Together. — Where two causes between the same parties, removed on the same grounds, were heard together, and remanded by one order for a defect common to both, costs were awarded in only one of the causes.²

41. Second Application for Removal After Remand. — Where a cause is removed and remanded because of the failure to file a copy of the record in due time, the removing party is not entitled to a second removal upon the same ground.³ The same rule was applied where the cause was first remanded for want of a sufficient averment of diverse citizenship in the petition for removal.⁴

42. Resumption of Jurisdiction by State Court — a. RESTORATION OF JURISDICTION — HOW EFFECTED. — The jurisdiction of the state court, having ceased by the filing of a sufficient petition and bond for removal, is not restored by the failure of the petitioner to file a transcript in the federal Circuit Court within the time prescribed by the statute.⁵ The jurisdiction remains in the federal Circuit Court until an order is made remanding the cause to the state court.⁶ When the cause has been duly

1. Remand for Cause Accruing After Removal. — Where a cause removed by one of several defendants on the ground of prejudice or local influence, the other defendants being citizens of the same state as the plaintiff, was remanded on the plaintiff's motion after he had entered a discontinuance as to the removing defendant, the costs were taxed against the plaintiff, inasmuch as the cause was rightfully removed. *Bane v. Keefer*, 66 Fed. Rep. 613.

2. Sheldrick v. Cockcroft, 27 Fed. Rep. 579.

3. St. Paul, etc., R. Co. v. McLean, 108 U. S. 212.

4. Smith v. Travelers' Ins. Co., 73 Fed. Rep. 513; *Nichols v. Stevens*, 123 Mo. 120. See also *Johnston v. Donovan*, 30 Fed. Rep. 395; *Frisbie v. Chesapeake, etc., R. Co.*, 59 Fed. Rep. 369; *McLean v. St. Paul, etc., R. Co.*, 17 Blatchf. (U. S.) 363; *Brigham v. Thompson Lumber Co.*, 55 Fed. Rep. 881; *Carson, etc., Lumber Co. v. Holtzclaw*, 44 Fed. Rep. 785. *Contra*, *Freeman v. Butler*, 39 Fed. Rep. 1. And compare *Lacroix v. Lyons*, 27 Fed. Rep. 404. But see *supra*, p. 323.

In *Hyde v. Ruble*, 104 U. S. 408, the case was first removed by all of the defendants on the ground of diverse citizenship and was remanded. Then the nonresident defendants removed it for

a separable controversy, and although it was again remanded it was not objected that a second removal could not be had if the case were removable at all.

Where a Suit Was Removed under the Act of 1789 and remanded by the Circuit Court because the citizenship of the parties did not sufficiently appear of record, it was held that a second removal could not be had on an amended petition, as the time for removal had passed. *Eastin v. Rucker*, 1 J. J. Marsh. (Ky.) 232, where the court said: "If more than one application is to be tolerated, we see no principle by which to limit the number."

5. National Steamship Co. v. Tugman, 106 U. S. 122, where the court said: "Whether the Circuit Court of the United States should retain jurisdiction, or dismiss or remand the action because of the failure to file the necessary transcript, was for it, not the state court, to determine."

Certificate of Clerk of Federal Court. — Failure to file a transcript of the record in the federal court does not reinvest the state court with jurisdiction though such failure be certified by the clerk of the federal court. *Kramer v. Ferry*, 27 Ill. App. 479, reversing a judgment thereupon rendered in the state court.

6. Kramer v. Ferry, 27 Ill. App. 481; *Lawton v. Blitch*, 30 Fed. Rep. 641.

remanded the jurisdiction of the state court is restored.¹

b. DUTY OF STATE COURT TO PROCEED. — Upon renunciation of jurisdiction by the federal court, the state court not only may rightfully proceed as though no removal had been attempted,² but its duty to do so is imperative.³

c. ORDER OF REMAND NOT REVIEWABLE. — The order of the federal court dismissing or remanding the cause to the state court must be accepted by the latter as conclusively adjudicating the absence of jurisdiction in the federal court.⁴ Though made by a federal Circuit Court, the order has precisely the

1. See the cases cited in the next note.

No Formal Order Relinquishing Jurisdiction Is Necessary to enable the state court to resume proceedings after a dismissal of the case by the federal Circuit Court. *Seeligson v. Texas Transp. Co.*, 70 Tex. 198.

A Duly Certified Copy of the Order of Remand made in the federal court is competent and sufficient evidence of the refusal of that court to assume control of the case. *Seeligson v. Texas Transp. Co.*, 70 Tex. 198.

2. *Baltimore, etc., R. Co. v. Koontz*, 104 U. S. 16; *St. Paul, etc., R. Co. v. M'Lean*, 108 U. S. 217; *Jansen v. Grimshaw*, 125 Ill. 476.

Jurisdiction of State Court Merely Suspended. — An order of removal does not abate the suit. *Winchell v. Coney*, 54 Conn. 32. And the failure of the state court to proceed with the cause while it was awaiting disposition in the federal court and until that court made the order of remand does not work a discontinuance. *Ex p. State*, 71 Ala. 363.

"An order for removal in a case not embraced by Act of Congress is void, and has no effect in legal contemplation, and although its practical effect may be an interruption, improperly, of the prosecution of the cause in the state court, the cause is to be considered as having been all the time pending in the state court, which delayed to see if the United States court would take jurisdiction, and, finding it would not, proceeds to try the case thus remitted to it as though no interruption had occurred." *Germania F. Ins. Co. v. Francis*, 52 Miss. 457, *quoted with approval in Ex p. State*, 71 Ala. 368. See also *Southern Pac. R. Co. v. Superior Ct.*, 63 Cal. 607.

No Order of Reinstatement Necessary. — Upon being duly notified that the cause has been remanded by the federal

court, the clerk of the state court may reinstate it upon the docket without any direction of the court or order revoking the order of removal. *Winchell v. Coney*, 54 Conn. 24.

Vacating Order of Removal. — If an order of removal was made it is proper to enter an order vacating it, or directing that the cause proceed. *Johnson v. Gelston*, 3 N. J. L. 245.

3. *Ex p. State*, 71 Ala. 368, holding that mandamus will lie to compel the restoration of the case if it has been struck from the docket; *Winchell v. Coney*, 54 Conn. 32; *Thacher v. McWilliams*, 47 Ga. 306; *Jackson v. Alabama G. S. R. Co.*, 58 Miss. 651; *Germania F. Ins. Co. v. Francis*, 52 Miss. 457; *Knahtla v. Oregon Short Line, etc., R. Co.*, 21 Oregon 136; *Talbott v. Planters' Oil Co.*, 12 Tex. Civ. App. 49; *Kleiber v. McManus*, 66 Tex. 48; *Seeligson v. Texas Transp. Co.*, 70 Tex. 198; *Birdseye v. Shaeffer*, 37 Fed. Rep. 829. See also *Bird v. Cockrem*, 28 La. Ann. 71.

4. The validity of the removal proceedings cannot be re-examined in the state court and its own jurisdiction questioned. *Ex p. State*, 71 Ala. 363; *May v. State Nat. Bank*, 59 Ark. 614, holding that it cannot be contended that a petition for removal was sufficient after the federal Circuit Court has pronounced it insufficient; *Coeur D'Alene R., etc., Co. v. Spalding*, (Idaho 1898) 53 Pac. Rep. 107; *Smithson v. Chicago Great Western R. Co.*, 71 Minn. 216; *Tilley v. Cobb*, 56 Minn. 295; *Bodley v. Emporia Nat. Bank*, 38 Kan. 59; *Gerner v. Mosher*, (Neb. 1899) 78 N. W. Rep. 384; *Western Union Tel. Co. v. Luck*, (Tex. Civ. App. 1897) 40 S. W. Rep. 753; *Talbott v. Planters Oil Co.*, 12 Tex. Civ. App. 49; *Pioneer Sav., etc., Co. v. Peck*, (Tex. Civ. App. 1898) 49 S. W. Rep. 160; *Kleiber v. McManus*, 66 Tex. 48. See also *Patten v. Cilley*, (N. H. 1894) 42 Atl. Rep.

same finality as if it were made by the United States Supreme Court, except so far as the order may have involved a finding on the existence of a federal question in the cause.¹

d. EFFECT OF PROCEEDINGS HAD IN FEDERAL COURT. — The case returns to the state court in the same condition as when the order of removal was made, or when, without an order of removal, the federal court first took cognizance of the case,² and the proceedings of the federal court in the erroneous exercise of jurisdiction by removal will be treated as null and void by the state court after resumption of its jurisdiction except in so far as parties have bound themselves by consenting to such proceedings in the federal court.³

43. Auxiliary Remedies in Removal Proceedings — *a. MANDAMUS AND PROHIBITION* — From Superior to Inferior State Court. — In some of the earlier cases mandamus was issued from the proper state

47; *Campbell v. Campbell*, 53 N. Y. Super. Ct. 310; *Henderson v. Cabell*, 83 Tex. 545.

1. *Missouri Pac. R. Co. v. Fitzgerald*, 160 U. S. 556.

2. *Levinski v. Middlesex Banking Co.*, 92 Fed. Rep. 462.

3. *Levinski v. Middlesex Banking Co.*, 92 Fed. Rep. 462. Thus, in *Doane v. Corbin*, 44 Ill. App. 463, the federal Circuit Court, in a removed cause, having control of a fund in the hands of a receiver, made an allowance for counsel fees rendered in the course of the litigation in the federal court to be paid out of the fund. On appeal to the United States Supreme Court the decree on the merits was reversed and the cause was ordered to be remanded to the state court (see *Graves v. Corbin*, 132 U. S. 571). Application was made in the state court for an order directing the receiver to pay the amount awarded by the federal Circuit Court. It was held that the order should not be made against the objection of the parties entitled to the fund, unless the latter had estopped themselves by consenting to the allowance in the federal court, which was a question to be determined only after a regular hearing upon issues joined. See also *Tucker v. Inter-States L. Assoc.*, 112 N. Car. 797.

Where a suit in equity removed to a federal court was eventually remanded to the state court for want of jurisdiction, it was held that the appointment of a receiver by the federal court while the cause was therein pending was void, and that no decree could be rendered by the state court against the

sureties on his bond given in the federal court. *Early v. Beecher*, 7 Lea (Tenn.) 256, where the court said: "What may be their liabilities in a suit on the bond as a common-law obligation we do not determine, but leave the parties to take such action in that reference as they may be advised."

In *Cates v. Allen*, 149 U. S. 461, a case in equity had proceeded to a decree on the merits in the federal Circuit Court, which was reversed with directions to remand to the state court. The Supreme Court said: "It will be for the state court to determine what orders should be made, if any, in regard to the amounts complainants have received under the decrees of the Circuit Court." In *Ayres v. Wiswall*, 112 U. S. 190, where the cause was remanded after a final hearing and decree on the pleadings and evidence, the court said: "It will be for the state court, when the case gets back there, to determine what shall be done with pleadings filed and testimony taken during the pendency of the suit in the other [the federal] jurisdiction."

Evidence Taken in Federal Court. — In *Birdseye v. Shaeffer*, 37 Fed. Rep. 829, in reply to the suggestion that the testimony taken in the cause while the suit was pending in the federal court would be unavailing and inadmissible in the state court after a remand, the court said: "If the laws of the state are inadequate to afford the necessary relief in such cases, the legislature will doubtless cure the defect by appropriate legislation when the omission is called to their attention."

court to compel the granting of an order of removal where it was erroneously denied,¹ but other and better-considered cases hold that the writ will not lie in such a case.² Nor will it be issued to compel the court to vacate an order of removal and proceed with the cause.³ But mandamus will lie to compel the inferior state court to proceed in a cause after it has been removed to and remanded by the federal court.⁴ The Supreme Court of a state will not grant a writ of prohibition to restrain an inferior court from further proceeding in a cause after the filing of a petition and bond for removal.⁵

From Federal to State or Federal Court. — Mandamus will not be issued by a federal court to compel the removal of a cause from a state court.⁶ The United States Supreme Court will not grant a mandamus to a federal Circuit Court to compel it to proceed with a cause improperly remanded to the state court,⁷ nor to compel it to remand a civil cause.⁸ But it will issue the writ at the instance of a state to compel a judge of the United States Circuit Court to relinquish jurisdiction unlawfully assumed by him of a criminal prosecution irregularly removed from a state court.⁹ The writ of prohibition will not be issued by the United States Supreme Court to restrain further action in a cause by a state court after the filing of a sufficient petition for removal therein.¹⁰

b. CERTIORARI. — An Act of Congress authorizes the federal court to issue and enforce a writ of certiorari to obtain a copy of the record from the state court in a cause removed.¹¹ As a general rule, the writ will not be issued where the clerk of the state

1. *Brown v. Crippin*, 4 Hen. & M. (Va.) 173; *Kennedy v. Woolfolk*, 1 Overt. (Tenn.) 453. See also *Hopper v. Kalkman*, 17 Cal. 517.

2. *State v. Curler*, 4 Nev. 445; *Glens Falls Ins. Co. v. Judge*, 21 Mich. 577; *Hill v. Henderson*, 6 Smed. & M. (Miss.) 351; *People v. Judges*, 2 Den. (N. Y.) 197. See also *Mabley v. Judge*, 41 Mich. 371; *Baron v. Kingsland*, 5 La. 378.

A Fortiori mandamus will not lie where it appears that the application for removal was insufficient. *Ex p. Andrews*, 40 Ala. 639; *Ex p. Groom*, 40 Ala. 731; *Orosco v. Gagliardo*, 22 Cal. 83; *State v. Hamilton County*, 3 Ohio 49. See also *People v. Superior Ct.*, 34 Ill. 356.

3. *Le Roux v. Bay Circuit Judge*, 46 Mich. 189, on the ground that the remedy is by motion to remand in the federal court; *Francisco v. Manhattan Ins. Co.*, 36 Cal. 283; *Ex p. State Ins. Co.*, 50 Ala. 464; *Ex p. Jones*, 66 Ala. 202. See also *State v. Circuit Judge*, 33 Wis. 127.

4. *Kleiber v. McManus*, 66 Tex. 48; *Ex p. State*, 71 Ala. 363.

5. *Southern Pac. R. Co. v. Superior Ct.*, 63 Cal. 607; *Ex p. Mobile, etc., R. Co.*, 63 Ala. 349; *Ex p. Grimbail*, 61 Ala. 598; *Central Pac. R. Co. v. Superior Ct.*, 62 Cal. 618, *overruling* *Sheehy v. Holmes*, 55 Cal. 485.

6. *In re Cromie*, 2 Biss. (U. S.) 160; *Ladd v. Tudor*, 3 Woodb. & M. (U. S.) 325.

7. *In re Pennsylvania Co.*, 137 U. S. 451; *Missouri Pac. R. Co. v. Fitzgerald*, 160 U. S. 556.

Contra, Prior to the Act of 1875, *Knickerbocker Ins. Co. v. Comstock*, 16 Wall. (U. S.) 258; *Chicago, etc., R. Co. v. Wiswall*, 23 Wall. (U. S.) 507.

8. *Ex p. Hoard*, 105 U. S. 578.

9. *Virginia v. Paul*, 148 U. S. 107, a case of an attempted removal under Rev. Stat. U. S., § 643, *following* *Virginia v. Rives*, 100 U. S. 313.

10. *Chesapeake, etc., R. Co. v. White*, 111 U. S. 134.

11. Act of 1875, 18 U. S. Stat. at L. 472, § 7, which provides that "the

court has not been derelict in duty,¹ nor to compel the addition to the record of papers which do not constitute a part of the record.² The writ will be denied if it appears that the cause was not removable.³

c. INJUNCTION TO RESTRAIN FURTHER PROCEEDINGS AFTER REMOVAL — **Power of Federal Court.** — Although the provisions of the United States Revised Statutes prohibiting federal courts from issuing the writ of injunction to stay proceedings in any court of a state⁴ apply to injunctions directed to parties engaged in proceedings in the state court,⁵ if a case has been duly and regularly removed from the state to the federal court it is competent for the latter to enjoin the parties from further proceedings in the state court,⁶ especially where the injunction is necessary to preserve the prior jurisdiction of the federal court.⁷

Exercise of Discretion. — The federal Circuit Court will not grant a

Circuit Court to which any cause shall be removable under this act shall have power to issue a writ of certiorari to said state court commanding said state court to make return of the record in any such cause removed as aforesaid, or in which any one or more of the plaintiffs or defendants have complied with the provisions of this act for the removal of the same, and enforce said writ according to law." The same section also makes it a misdemeanor for the clerk of the state court to refuse a copy of the record after tender of his legal fees. *Certiorari* was issued in *Baird v. Richmond, etc., R. Co.*, 113 N. Car. 603, and *Feibelman v. Packard*, 109 U. S. 422.

1. *Osgood v. Chicago, etc., R. Co.*, 6 Biss. (U. S.) 330; *Wilkinson v. Delaware, etc., R. Co.*, 23 Fed. Rep. 562; *Broadnax v. Eisner*, 13 Blatchf. (U. S.) 366; *Scott v. Clinton, etc., R. Co.*, 6 Biss. (U. S.) 537. See, however, *Anderson v. Gerding*, 3 Woods (U. S.) 487; *Hunter v. Royal Canadian Ins. Co.*, 3 Hughes (U. S.) 234; *Meissner v. Buck*, 28 Fed. Rep. 161, and *Northern Pac. Terminal Co. v. Lowenberg*, 18 Fed. Rep. 339, 9 Sawy. (U. S.) 348, where the writ was issued.

2. *Wilkinson v. Delaware, etc., R. Co.*, 23 Fed. Rep. 562.

3. *In re Helena, etc., Smelting, etc., Co.*, 48 Fed. Rep. 609. See also *Stone v. Sargent*, 129 Mass. 503.

4. Rev. Stat. U. S., § 720, provides that "the writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any

law relating to proceedings in bankruptcy."

5. *Diggs v. Wolcott*, 4 Cranch (U. S.) 179; *Peck v. Jenness*, 7 How. (U. S.) 612; *Haines v. Carpenter*, 91 U. S. 254; *Dial v. Reynolds*, 96 U. S. 340; *In re Chetwood*, 165 U. S. 443; *Wagner v. Drake*, 31 Fed. Rep. 851.

6. *Sharon v. Terry*, 36 Fed. Rep. 365, *per* Justice Field. See also the cases cited in the following notes.

7. *French v. Hay*, 22 Wall. (U. S.) 250, where an injunction was granted against a party seeking to execute in a state court of Pennsylvania a decree obtained in a state court of Virginia, notwithstanding the fact that the case upon which the decree was founded had been removed to the United States Circuit Court. The injunction was granted upon a bill filed, but the court said that it might upon a cross-bill — the removed case being in equity — and perhaps upon motion, have given the same relief.

In *Dietzsch v. Huidekoper*, 103 U. S. 494, the plaintiff in a replevin suit had effectually removed it into the federal court. But the state court proceeded to try the case, rendered judgment, and issued a writ of *retorno habendo*, which the plaintiff refused to obey, whereupon an action on the replevin bond was brought in the state court against him and his sureties. In the meanwhile the plaintiff had recovered judgment in his favor in the federal court. It was held that on a bill filed in the federal Circuit Court an injunction was properly granted to restrain further proceedings in the action on the bond.

preliminary injunction where the jurisdiction of the federal court by the removal is doubtful, or the threatened injury is not irreparable,¹ nor where the record has not been filed in the federal court;² and moreover the court will either interfere or decline to exercise the power, as a matter of discretion.³

In *Ward v. San Diego Land, etc., Co.*, 79 Fed. Rep. 665, after removal an injunction was granted against further proceedings in order to protect a federal receivership.

Power Limited to Preservation of Jurisdiction.—According to high authority, the power to enjoin proceedings in the state court is limited to the staying of suits commenced after the jurisdiction of the federal court has attached. *Stone v. Sargent*, 129 Mass. 503, where Gray, C. J., made the following statement, which was not necessary, however, to the decision of the case: "In *Dillon on Removal of Causes* (2d ed.) 77-79, it is said that the Circuit Court of the United States has the power to protect its suitors by injunction against a judgment rendered in the state court after a proper application to remove the cause. But the only authority there cited is *French v. Hay*, 22 Wall. (U. S.) 250, in which the circumstances were very peculiar, and the judgment in no way supports the position of the learned author. In that case the principal cause had been removed without objection from a state court of Virginia into the Circuit Court of the United States, and the state court of Virginia had not undertaken to retain jurisdiction thereof. The injunction issued by the federal court was not against proceeding with the original suit in the state court of Virginia, but against prosecuting a new suit, commenced in the courts of another state after the right of removal had been perfected, upon a decree rendered in the state court of Virginia before the application for removal. The judgment is limited by its language, as well as by the facts before the court, to injunctions to stay suits commenced after the jurisdiction of the federal court has attached; and in any other view would be inconsistent, not only with the clear terms of the Acts of Congress, but with earlier and later decisions of the Supreme Court of the United States." *Citing* Act March 2, 1793, § 5; Rev. Stat. U. S., § 720; *Diggs v. Wolcott*, 4 Cranch (U. S.) 179; *Watson v. Jones*, 13 Wall. (U. S.) 719; *Haines v. Carpenter*, 91 U.

S. 254; *Dial v. Reynolds*, 96 U. S. 340. See also opinion of Bradley, J., in *Live Stock Dealers', etc., Assoc. v. Crescent City Live Stock Landing, etc., Co.*, 1 Abb. (U. S.) 407, 1 Woods (U. S.) 34, and *White v. Holt*, 20 W. Va. 792.

1. *Wagner v. Drake*, 31 Fed. Rep. 849; *Frishman v. Insurance Cos.*, 41 Fed. Rep. 449; *Sinclair v. Pierce*, 50 Fed. Rep. 851, where the injunction was denied by Putnam, J., without prejudice to a renewal of the application under a new state of facts.

2. *Coeur D'Alene R., etc., Co. v. Spalding*, 93 Fed. Rep. 280.

3. See cases cited in the preceding notes, and generally article INJUNCTIONS, vol. 10, p. 869.

In *Missouri, etc., R. Co. v. Scott*, 4 Woods (U. S.) 386, 13 Fed. Rep. 793, the injunction was denied by Pardee, J., because the question whether the state court had been deprived of jurisdiction by the removal was in dispute between the parties.

In *Penrose v. Penrose*, 17 Blatchf. (U. S.) 332, the jurisdiction acquired by the removal was clear, but Benedict, J., denied an injunction, on the ground that there were no special circumstances requiring it, following the ruling of Blatchford, J., in *Fisk v. Union Pac. R. Co.*, 6 Blatchf. (U. S.) 362, which was deemed to settle the practice in that circuit. See also *Foster v. Chesapeake, etc., R. Co.*, 47 Fed. Rep. 379. But compare *Fisk v. Union Pac. R. Co.*, 10 Blatchf. (U. S.) 518, where Blatchford, J., granted an injunction.

In *Abeel v. Culberson*, 56 Fed. Rep. 329, where, under the circumstances stated in the opinion, it would have very materially embarrassed the Circuit Court in the exercise of its jurisdiction to have the removed case proceeded with in the state court, McCormick, J., granted an injunction.

In *Baltimore, etc., R. Co. v. Ford*, 35 Fed. Rep. 170, Jackson, J., made an injunction permanent where a cause had been properly removed, and the case dismissed on demurrer to the declaration, and the plaintiff was threatening to press the trial of the cause in the state court.

Injunction Improvidently Granted Dissolved. — Of course if it appears that the cause was not removable an injunction will not be granted, or if improvidently granted will be dissolved.¹

44. Appeal or Error in State Courts — *a.* JURISDICTION TO REVIEW ORDERS IN REMOVAL PROCEEDINGS. — There is nothing in the Act of Congress authorizing removals nor in the nature of the federal jurisdiction acquired by removal proceedings which precludes the proper appellate tribunal of the state from reviewing on appeal or error an order granting a petition for removal² or refusing to grant it, or other orders made in or concerning removal proceedings,³ provided only that upon appeal or error before final judgment the order is of such a character as to be the subject of error or appeal within the language of the state statutes,⁴ and with the qualification that the decision of the

In *Postal Tel. Cable Co. v. Southern R. Co.*, 88 Fed. Rep. 803, the case having been properly removed, *Simonton, J.*, without discussing the point, granted an injunction against further proceedings on a bill filed for that purpose.

1. *Bertha Zinc, etc., Co. v. Carico*, 61 Fed. Rep. 132.

2. The power to hear and determine an appeal from such an order is entirely independent of the question of jurisdiction to proceed upon the merits of the action. *Akerly v. Vilas*, 24 Wis. 165, 1 Am. Rep. 166; *Henen v. Baltimore, etc., R. Co.*, 17 W. Va. 884.

"If not removable, the allowance of the application is without force." *Winchell v. Coney*, 54 Conn. 32.

In *Carswell v. Schley*, 59 Ga. 19, a motion was made to dismiss a writ of error to an order of removal "upon the ground that whether removal was effected or not was a question for decision by the Circuit Court of the United States upon a motion to remand, and that this court could not entertain it." The court discussed the question and held that it clearly had jurisdiction to review the order. See also *Stafford v. Hightower*, 68 Ga. 394.

In *Crane v. Reeder*, 28 Mich. 531, in denying a motion to dismiss a writ of error to an order of removal the court said: "We were not at liberty to refuse to entertain the jurisdiction."

"We deem it our duty to assert and maintain what we believe to be the rights of our own courts until it is decided that we are in error by the only tribunal whose authority on the question we are bound to recognize."

Dunn v. Burlington, etc., R. Co., 35 Minn. 79.

The appellate jurisdiction of judgments in removal proceedings was vindicated in a strong opinion by Chief Justice Gray in *Stone v. Sargent*, 129 Mass. 503, *citing*, to the point that the appellate jurisdiction has been recognized as appropriate by the United States Supreme Court, *Sewing Mach. Co.'s Case*, 18 Wall. (U. S.) 553; *Vannevar v. Bryant*, 21 Wall. (U. S.) 41; *Chicago, etc., R. Co. v. McKinley*, 99 U. S. 147; *Fashnacht v. Frank*, 23 Wall. (U. S.) 416; *Phoenix Ins. Co. v. Pechner*, 95 U. S. 183; *Amory v. Amory*, 95 U. S. 186; *Removal Cases*, 100 U. S. 457.

"According to the rule of practice stated in *Stone v. Sargent*, 129 Mass. 507, which is believed to accord with what has been the practice in this state, the exceptions allowed by the presiding justice to his orders refusing the petitions for removal * * * are rightly before us, and the questions of law thereby raised are properly to be determined in the first instance by this court, although any judgment rendered here will be subject to be reversed on writ of error by the Supreme Court of the United States." *Edwards Mfg. Co. v. Sprague*, 76 Me. 63. See also *Craven v. Turner*, 82 Me. 385.

3. See *infra*, p. 391 *et seq.*

4. We have seen that the state court has a right, with certain qualifications, to determine whether upon the face of the record the petitioner for removal has brought himself within the Act of Congress. See *supra*, p. 338. It is the application of that principle which sustains the appellate jurisdiction.

appellate tribunal is reviewable in a proper case on error by the United States Supreme Court.¹

b. APPEALABILITY OF ORDERS IN REMOVAL PROCEEDINGS — (1) *Of Order of Removal* — *In General.* — In some of the states orders of removal are the subject of direct appeal or error;² in a

1. See *infra*, I. 45. *Review by United States Supreme Court on Error to State Court.*

2. *California.* — See *Welch v. Tennent*, 4 Cal. 203, where the court entertained an appeal from an order of removal.

Connecticut. — See *Winchell v. Coney*, 54 Conn. 32.

Georgia. — *Peters v. Peters*, 41 Ga. 242; *Burts v. Loyd*, 45 Ga. 105; *Carswell v. Schley*, 59 Ga. 17, holding that a writ of error would lie under a section of the code providing that "either party, in any civil cause * * * in the Superior Courts of this state, may except to any * * * judgment or decision or decree of such court, or of the judge thereof, in any matter heard at chambers;" *Jones v. Foreman*, 66 Ga. 371; *Angier v. East Tennessee, etc.*, R. Co., 74 Ga. 634, holding that it is "a final order, disposing of the case forever in the Superior Court, and therefore reviewable here;" *Stafford v. Hightower*, 68 Ga. 394; *Western Union Tel. Co. v. Griffith*, 104 Ga. 56; *Withers v. Hopkins Place Sav. Bank*, 104 Ga. 89; *Cléws v. Mumford*, 78 Ga. 476; *Jackson v. Mutual L. Ins. Co.*, 60 Ga. 423; *Stewart v. Mordecai*, 40 Ga. 1.

Indiana. — *Baltimore, etc.*, R. Co. v. *New Albany, etc.*, R. Co., 53 Ind. 597; *Burson v. National Park Bank*, 40 Ind. 173, holding that such order is a final judgment. *Overruling Aurora v. West*, 25 Ind. 148.

Iowa. — *Shear v. Bolinger*, 74 Iowa 757; *Dickinson v. Heeb Brewing Co.*, 73 Iowa 705; *Judge v. Arlen*, 71 Iowa 186; *Lemen v. Wagner*, 68 Iowa 660; *Ryan v. Mathews*, 64 Iowa 250; *Vimont v. Chicago, etc.*, R. Co., 64 Iowa 515; *Brayley v. Hedges*, 53 Iowa 582; *Chicago, etc.*, R. Co. v. *Welch*, 44 Iowa 665.

Kentucky. — *Hall v. Ricketts*, 9 Bush (Ky.) 370; *Short v. Wilson*, 1 Bush (Ky.) 350.

Louisiana. — *Guinault v. Louisville, etc.*, R. Co., 42 La. Ann. 52, 41 La. Ann. 571; *Townsend v. Sykes*, 38 La. Ann. 410; *Sachse v. Citizens' Bank*, 37 La. Ann. 364; *Ralston v. British, etc.*, *Mortg. Co.*, 37 La. Ann. 193; *Boden-*

heimer's Succession, 35 La. Ann. 1033; *Johnson v. New Orleans Nat. Banking Assoc.*, 33 La. Ann. 479; *New Orleans City R. Co. v. Crescent City R. Co.*, 33 La. Ann. 1273; *Meaux v. Pittman*, 32 La. Ann. 405; *Tunstall v. Madison*, 30 La. Ann. 471; *Goodrich v. Hunton*, 29 La. Ann. 372; *Martin v. Coons*, 24 La. Ann. 170; *State v. Judge*, 23 La. Ann. 29, granting a mandamus to compel the allowance of an appeal; *Rosenfield v. Adams Express Co.*, 21 La. Ann. 233; *Davis v. Montgomery*, 36 La. Ann. 874; *New Orleans v. Seixas*, 35 La. Ann. 37, holding that the appeal need not be taken by petition and citation, and that an appeal was well taken in open court on the same day that the order of removal was made, and formal notice thereof given to the appellee two days thereafter through the sheriff; *Hebert v. Lefevre*, 31 La. Ann. 363; *Stoker v. Leavenworth*, 7 La. 390; *Higgins v. M'Micken*, 6 Mart. (N. S.) (La.) 712; *State Bank v. Morgan*, 4 Mart. N. S. (La.) 344; *Fitz v. Hayden*, 4 Mart. N. S. (La.) 653; *Fisk v. Fisk*, 4 Mart. N. S. (La.) 676; *Duncan v. Hampton*, 12 Mart. (La.) 92; *Beebe v. Armstrong*, 11 Mart. (La.) 440; *Franciscus v. Surget*, 6 Rob. (La.) 33.

Massachusetts. — *Ellis v. Atlantic, etc.*, R. Co., 134 Mass. 340, quoting the statute providing for appeals and holding that such an order is a final judgment disposing of the whole case. In *Amy v. Manning*, 144 Mass. 156, the court said that if in the determination of questions arising on a petition for removal "a party is aggrieved in matter of law, the question of law can be brought to this court by exceptions, report, or sometimes by appeal." But review is usually based on exceptions or a report. See *Ellis v. Atlantic, etc.*, R. Co., 134 Mass. 340; *Bryan v. Richardson*, 153 Mass. 157; *Bryant v. Rich*, 106 Mass. 191; *Com. v. Casey*, 12 Allen (Mass.) 214; *Morton v. Mutual L. Ins. Co.*, 105 Mass. 141; *Du Vivier v. Hopkins*, 116 Mass. 125; *Tapley v. Martin*, 116 Mass. 275; *Florence Sewing Mach. Co. v. Grover, etc.*, *Sewing Mach. Co.*, 110 Mass. 70; *Mahone v. Manchester, etc.*, R. Corp., 111 Mass. 72; *Stone v.*

few of the states by construction of the statutory provisions regulating appeals, an order of removal is not appealable,¹ and in such cases an appeal will be dismissed without considering the merits of the application for removal, even with the stipulation of the parties.² Where an order of removal is deemed to be a final appealable judgment, an order allowing the petition to be filed, and accepting, but without granting, the petition,³ or an order accepting the bond,⁴ is a sufficient order of removal for the

Sargent, 129 Mass. 503; *Broadway Nat. Bank v. Adams*, 130 Mass. 431; *Danvers Sav. Bank v. Thompson*, 130 Mass. 490, 133 Mass. 182; *Clark v. Child*, 136 Mass. 344; *American Finance Co. v. Bostwick*, 151 Mass. 19; *Mason v. Interstate Consol. St. R. Co.*, 170 Mass. 382.

Michigan. — *Crane v. Reeder*, 35 Mich. 147, 28 Mich. 527; *Fornbrook Mfg. Co. v. E. T. Barnum Wire, etc.*, Works, 54 Mich. 556.

Nebraska. — *Rich v. Gross*, 29 Neb. 339. See also *Trester v. Missouri Pac. R. Co.*, 23 Neb. 246.

New York. — An order of removal made at special term was appealable to the general term (now appellate division). *Nye v. Northern Cent. R. Co.*, 24 Hun (N. Y.) 556; *Bell v. Lycoming Ins. Co.*, 3 Hun (N. Y.) 409, 6 Thomp. & C. (N. Y.) 54. See also *Vandevoort v. Palmer*, 4 Duer (N. Y.) 677; *Lalor v. Dunning*, (C. Pl. Spec. T.) 56 How. Pr. (N. Y.) 211; *Dart v. Walker*, (C. Pl. Gen. T.) 43 How. Pr. (N. Y.) 29; *Anderson v. Manufacturers' Bank*, (Supm. Ct. Gen. T.) 14 Abb. Pr. (N. Y.) 436; *Field v. Blair*, (Supm. Ct. Gen. T.) 1 Code Rep. N. S. (N. Y.) 361. In the earlier case of *Fargo v. McVicker*, (Supm. Ct. Gen. T.) 38 How. Pr. (N. Y.) 1, such order was affirmed, but the court expressed a doubt as to whether the appeal would lie.

North Carolina. — *Setzer v. Douglass*, 91 N. Car. 427; *Fitzgerald v. Allman*, 82 N. Car. 493, on the ground that it "affects a substantial right;" *Calloway v. Ore Knob Copper Co.*, 74 N. Car. 200; *Mecke v. Valletown Mineral Co.*, 122 N. Car. 790; *Gudger v. Western North Carolina R. Co.*, 87 N. Car. 325.

Ohio. — *Home L. Ins. Co. v. Dunn*, 20 Ohio St. 180, holding that an order of removal was a final order which determined the action and prevented a judgment and affected the substantial rights of the adverse party.

South Carolina. — *Robb v. Parker*, 3 S. Car. 63.

West Virginia. — *Henen v. Baltimore, etc.*, R. Co., 17 W. Va. 884.

Wisconsin. — *Goodman v. Oshkosh*, 45 Wis. 355; *Whiton v. Chicago, etc.*, R. Co., 25 Wis. 424; *Akerly v. Vilas*, 24 Wis. 165.

1. *Mississippi*. — *Jackson v. Alabama G. S. R. Co.*, 58 Miss. 648, the court holding that such an order is not a final judgment; that "it is a mere pause, * * * a suspension of the proceeding, which may be final or only temporary, as the federal question involved may be disposed of by the federal judiciary."

Oregon. — *Fields v. Lamb*, 2 Oregon 340, on the ground that the order did not affect a substantial right and determine the action so as to prevent a judgment or decree therein.

Tennessee. — *Jones v. Davenport*, 7 Coldw. (Tenn.) 145, holding that the order is not a final judgment disposing of the case, but "is a proceeding analogous to the change of venue provided for by the statutes of this state, and which does not involve any final judgment in the case." See also *Williams v. Adkins*, 6 Coldw. (Tenn.) 618.

Texas. — *Durham v. Southern L. Ins. Co.*, 46 Tex. 188, "because there is no final judgment; * * * not any more than an order changing the venue from one District Court of the state to another." See also *Kleiber v. McManus*, 66 Tex. 48.

2. *Brooks v. Calderwood*, 19 Cal. 125.

3. *Jackson v. Mutual L. Ins. Co.*, 60 Ga. 423.

4. *Angier v. East Tennessee, etc.*, R. Co., 74 Ga. 634. See also *Jackson v. Mutual L. Ins. Co.*, 60 Ga. 423.

But if the petition for removal is denied, the approval of the bond alone does not constitute an order of removal. See *Bryan v. Richardson*, 153 Mass. 157, where it appeared that the bond was duly approved when filed; but later on a hearing of the applica-

purpose of appeal. An order of removal is sufficiently entered for the purpose of appeal though the minutes are not signed by the judge ordering the removal.¹

Motion to Remand Pending or Denied. — An appeal will not be dismissed merely because a motion to remand is pending and undecided in the federal court.² But an appeal from an order of removal will be dismissed where it is made to appear that the federal Circuit Court has denied a motion to remand the cause and retained jurisdiction thereof.³ And it is recommended as the better practice in all cases to move to remand in the federal court before taking an appeal.⁴

After Remand of Cause. — No appeal from an order of removal can be taken after the cause has been remanded by the federal court and reinstated upon the docket of the state court.⁵

Acquiescence in Order of Removal. — An appeal from an order of removal will be dismissed where it is made to appear that the appellant has acquiesced in the order by voluntarily appearing in the federal court and invoking the exercise of jurisdiction in the cause.⁶

(2) *Of Order Denying Application.* — In some of the states an order denying an application for removal is the subject of direct

tion the petition for removal was dismissed. See also for a similar case, *Clark v. Opdyke*, 10 Hun (N. Y.) 384.

1. *Sachse v. Citizens' Bank*, 37 La. Ann. 364.

2. *Stone v. Sargent*, 129 Mass. 503.

3. *Ryan v. Mathews*, 64 Iowa 250.

4. *Judge v. Arlen*, 71 Iowa 188.

5. *Bird v. Cockrem*, 28 La. Ann. 71. See also *Fargo v. McVicker*, (Supm. Ct. Gen. T.) 38 How. Pr. (N. Y.) 22, suggesting that the remedy is by application to vacate the order. *Winchell v. Coney*, 54 Conn. 32. But compare *Home L. Ins. Co. v. Dunn*, 20 Ohio St. 180, which was a writ of error to an order of removal, wherein the court said: "Nor was the right of the plaintiff to have the order reviewed on petition in error impaired by the action of the defendant below in filing the transcript of the proceedings in the [federal] Circuit Court, nor by the fact that the motion of the plaintiff to dismiss the cause for want of jurisdiction in that court had been overruled." See also *Clippinger v. Missouri Valley L. Ins. Co.*, 26 Ohio St. 404.

6. *New Orleans City R. Co. v. Crescent City R. Co.*, 33 La. Ann. 1273, where the plaintiff, who had obtained a preliminary injunction, removed the suit under the Act of 1875, and the de-

fendant, who appealed from the order of removal, appeared in the federal court and moved to dissolve the injunction. The case also lays down the practice of the Supreme Court of Louisiana in cases where an issue of fact arises on a motion to dismiss an appeal, on which point see also *New Orleans v. Seixas*, 35 La. Ann. 37. The latter case does not expressly overrule the former, for the court held that the proceedings which had taken place in the federal court in the particular case did not constitute an acquiescence in the order, but the court said: "It is settled that if a party failed in his efforts to obtain a removal and was forced to trial in the state court, his appearing there and contesting the case is not a waiver of his right [see *supra*, p. 353]. * * * It would seem it ought to be equally clear that if a party failed in his efforts to prevent a removal and was forced to trial in the United States court, his appearing there and contesting the case should not be a waiver of his right to a trial in the state court, nor be considered an acquiescence in the order of removal, if he has continued to maintain that right by appealing from that order and by prosecuting such appeal with diligence."

appeal or error;¹ in others the appellate court has no jurisdiction to review the order on direct appeal or error,² and the order is reviewable only on error or appeal after final judgment or decree.

1. *Georgia*. — *Cumberland Gap Bldg., etc., Assoc. v. Wells*, 99 Ga. 228; *Young v. Oakes*, 104 Ga. 62; *Western Union Tel. Co. v. Griffith*, 104 Ga. 56, holding that such order is the subject of a writ of error under Civ. Code Ga. (1895), § 5526, which provides that a writ of error will lie whenever "the decision or judgment complained of, if it had been rendered as claimed by the plaintiff in error, would have been a final disposition of the cause;" *Ficklin v. Tarver*, 59 Ga. 263.

Iowa. — *Richards v. Rock Rapids*, 72 Iowa 77; *Byson v. McPherson*, 71 Iowa 437; *McLane v. Leicht*, 27 Fed. Rep. 887; *Ohle v. Chicago, etc., R. Co.*, 64 Iowa 599; *Bpsler v. Booge*, 54 Iowa 251; *Barber v. St. Louis, etc., R. Co.*, 43 Iowa 223; *Treadway v. Chicago, etc., R. Co.*, 21 Iowa 354.

Mississippi. — See *Denniston v. Potts*, 11 Smed. & M. (Miss.) 36.

New York. — An order of the special term denying a removal is appealable to the general term (appellate division). *Warner v. Pennsylvania R. Co.*, 6 Hun (N. Y.) 197; *Clark v. Opdyke*, 10 Hun (N. Y.) 383; *Chatham Nat. Bank v. Merchants' Nat. Bank*, 1 Hun (N. Y.) 702, 4 Thomp. & C. (N. Y.) 196; *Kerille v. Phoenix L. Ins. Co.*, 3 Thomp. & C. (N. Y.) 788. See also *De Camp v. New Jersey Mut. L. Ins. Co.*, 2 Sweeny (N. Y.) 481, holding that the order affects a substantial right; *Jones v. Seward*, 41 Barb. (N. Y.) 273; *Kranshaar v. New Haven Steamboat Co.*, 7 Robt. (N. Y.) 358; *Dennistoun v. New York, etc., R. Co.*, 1 Hilt. (N. Y.) 62; *Cooley v. Lawrence*, 5 Duer (N. Y.) 605.

In *Illius v. New York, etc., R. Co.*, 13 N. Y. 597, it was held that an order of the general term affirming an order denying a petition for removal was not appealable since it did not affect a substantial right and did not determine the action or prevent a judgment therein, and the appeal was dismissed. See also *Ulster County Sav. Inst. v. New York Fourth Nat. Bank*, (Supm. Ct. Gen. T.) 8 N. Y. Supp. 164; *Bell v. Dix*, 49 N. Y. 237. But compare *De Camp v. New Jersey Mut. L. Ins. Co.*, 2 Sweeny (N. Y.) 486.

In *Stevens v. Phoenix Ins. Co.*, 41 N. Y. 149, it was held that the defendant

could set up in an answer the facts showing that the cause ought to have been (or perhaps legally was) removed, and he could then prove these facts on the trial, and thus claim, before the Court of Appeals, on appeal from the judgment, a reversal for want of jurisdiction. To the same point see *Ayres v. Western R. Corp.*, 45 N. Y. 260; *Taylor v. Shew*, 54 N. Y. 75; *Shaft v. Phoenix Mut. L. Ins. Co.*, 67 N. Y. 544. However, if the privilege of setting up the facts by supplemental answer is denied by the special term, such order of denial is not reviewable by the general term (appellate division) on appeal from the final judgment, since it is not an order that necessarily affects the judgment. *Ulster County Sav. Inst. v. New York Fourth Nat. Bank*, (Supm. Ct. Gen. T.) 8 N. Y. Supp. 162.

North Carolina. — *Howard v. Southern R. Co.*, 122 N. Car. 953; *Winslow v. Collins*, 110 N. Car. 119; *Herndon v. Aetna Ins. Co.*, 108 N. Car. 650; *Herndon v. Aetna Ins. Co.*, 107 N. Car. 194; *Herndon v. Lancashire Ins. Co.*, 107 N. Car. 191; *Bowley v. Richmond, etc., R. Co.*, 110 N. Car. 315; *Springer v. Sheets*, 115 N. Car. 377; *Tate v. Douglas*, 113 N. Car. 190; *Douglas v. Richmond, etc., R. Co.*, 106 N. Car. 65; *McNeal Pipe, etc., Co. v. Howland*, 99 N. Car. 202, holding that an appeal from a refusal to order a removal may be regarded as an appeal from an order to proceed in the cause; *O'Kelly v. Richmond, etc., R. Co.*, 89 N. Car. 58; *Simmons v. Taylor*, 83 N. Car. 148; *Swann v. Myers*, 79 N. Car. 101. See also *Lawson v. Richmond, etc., R. Co.*, 112 N. Car. 390.

South Carolina. — *State v. Port Royal, etc., R. Co.*, 45 S. Car. 470.

South Dakota. — *Wing v. Chicago, etc., R. Co.*, 1 S. Dak. 455.

Wisconsin. — See *Mead v. Walker*, 15 Wis. 499; *Eldred v. Becker*, 60 Wis. 43, and *Knorr v. Home Ins. Co.*, 25 Wis. 143, where appeals were entertained from orders denying applications for removal.

2. *California*. — *Tripp v. Santa Rosa St. R. Co.*, 69 Cal. 631; *Brooks v. Calderwood*, 19 Cal. 125; *Hopper v. Kalkman*, 17 Cal. 517.

Illinois. — *Burson v. National Park*

(3) *Of Miscellaneous Orders.* — Under various statutes it has been held that an order refusing to vacate an order denying a petition for removal,¹ or an order denying a motion to stay further proceedings after the filing of a petition and bond for removal,² is not appealable; and on the other hand that an appeal lies from an order refusing to vacate an order of removal,³ from an order vacating an order of removal,⁴ or from an order denying leave to withdraw a petition for removal.⁵

c. *SUPERSEDEAS OR STAY OF PROCEEDINGS.* — If the petition and bond for removal were sufficient to accomplish the purpose, no appeal from an order of removal can operate to prevent the jurisdiction of the federal court from attaching to the cause.⁶

Bank, 40 Ind. 173, on the ground that "such refusal is in no sense a final order or judgment."

Louisiana. — *Bodenheimer's Succession*, 35 La. Ann. 1033, on the ground that the order "is an interlocutory decree which cannot work irreparable injury" and "its effect is merely to retain the case in the court in which it was presented;" *State v. Judge*, 23 La. Ann. 29; *Rosenfield v. Adams Express Co.*, 21 La. Ann. 233; *State v. Judge*, 15 La. Ann. 336; *New Orleans v. Shepherd*, 9 La. Ann. 241; *Baron v. Kingsland*, 5 La. 378; *Higgins v. M'Micken*, 6 Mart. N. S. (La.) 712; *Ralph v. Claiborne*, 2 Mart. (La.) 176.

Massachusetts. — *Ellis v. Atlantic*, etc., R. Co., 134 Mass. 340.

Minnesota. — *St. Anthony Falls Water-power Co. v. King Wrought-iron Bridge Co.*, 23 Minn. 186, where the court said: "The order of the court below refusing to transfer the cause to the United States Circuit Court does not come within any of the subdivisions of Gen. Stat., c. 86, § 8 [now Gen. Stat. 1894, § 6140], and is not appealable." One of the subdivisions above mentioned provides for an appeal "from an order which in effect determines the action and prevents a judgment from which an appeal might be taken." Compare *Stinson v. St. Paul*, etc., R. Co., 20 Minn. 446; *Butterfield v. Home Ins. Co.*, 14 Minn. 310.

Nevada. — *State v. Curler*, 4 Nev. 445, citing the Practice Act, § 285, and following California cases above cited in this note.

New Jersey. — See *National Union Bank v. Dodge*, 42 N. J. L. 319, where the court said: "It is doubtful whether an appeal will lie from an order staying the proceedings in the suit, until

the question of its removal is decided in the federal court, for the technical reason that such order does not determine the action nor affect the substantial rights of the parties."

New York. — As to review by the Court of Appeals, see the preceding note.

1. *Tripp v. Santa Rosa St. R. Co.*, 69 Cal. 631.

2. *Bell v. Dix*, 49 N. Y. 232, on the ground that it does not affect a substantial right, and that an order granting the motion would be a mere expression of opinion. Compare *Jones v. Foster*, 61 Wis. 25.

3. *Trester v. Missouri Pac. R. Co.*, 23 Neb. 247, holding that it affected a substantial right and prevented a judgment, within the meaning of Civ. Code Neb., § 518; *Rosenfield v. Condict*, 44 Tex. 466, holding, however, that if the ruling of the court was correct, it will not be reversed because the court assigned a wrong reason therefor.

In *New York* a special term order denying a motion to vacate an order of removal is appealable to the general term (appellate division). *Bushnell v. Parker*, (Supm. Ct. Gen. T.) 37 N. Y. St. Rep. 298; *Chamberlain v. American Nat. L., etc., Co.*, 11 Hun (N. Y.) 370.

4. *Southern R. Co. v. Hudgins*, (Ga. 1899) 33 S. E. Rep. 442; *Wickham v. Wickham*, 20 Hun (N. Y.) 239; *Bristol v. Chapman*, (Supm. Ct. Gen. T.) 34 How. Pr. (N. Y.) 140.

5. *Wadleigh v. Standard L., etc., Ins. Co.*, 76 Wis. 439, holding that the order affected a substantial right.

6. *Ellerman v. New Orleans, etc., R. Co.*, 2 Woods (U. S.) 120, where the plaintiff, in a cause wherein an order of removal had been made by the state court of Louisiana, took a suspensive

But the state court should desist from further proceedings pending an appeal from an order denying a petition for removal.¹

d. REVIEW AFTER FINAL JUDGMENT.—In most cases an order denying a petition for removal is reviewed on error or appeal after final judgment or decree in the cause.² Error in denying a petition for removal cannot be assigned by a codefendant who did not join in the petition for removal.³ If the federal Circuit Court remands the cause and the state court thereupon proceeds to final judgment, the action of the federal court is not reviewable in a higher state court on appeal or error.⁴

e. EXCEPTIONS AND RECORD ON APPEAL—*Necessity of Excepting and Preserving Exception.*—In some of the states it is held that no exception need be taken or saved to a ruling denying a petition for removal in order to present the question for review on appeal from or error to the final judgment,⁵ and this appears to be the sounder doctrine.⁶ However, the contrary doctrine is upheld by other of the state courts,⁷ and it is certainly the general

appeal from the order, and then unsuccessfully contended in the federal court that the latter had no power to proceed until the appeal was determined. See also *Akerly v. Vilas*, 1 Abb. (U. S.) 284. The decision of the court is incontrovertibly sound, since no state statutes can prevent a removal (see *supra*, p. 162), and a removal does not depend upon an order of the court (see *supra*, p. 347).

1. *State v. Port Royal, etc.*, R. Co., 45 S. Car. 470, holding, however, in that case, which "must not be drawn into a precedent," that the case not being removable, it was not a fatal error to proceed to judgment on the merits notwithstanding the appeal.

2. *On Appeal from Refusal to Vacate.*—In *Tripp v. Santa Rosa St. R. Co.*, 69 Cal. 631, it was held that an order denying a petition for removal was not reviewable on appeal from an order refusing to set aside a judgment of dismissal on the merits, and that the appeal should have been taken from the judgment of dismissal, in order to render the order reviewable.

3. *Danville Banking, etc., Co. v. Parks*, 88 Ill. 170; *Washington, etc., R. Co. v. Alexandria, etc., R. Co.*, 19 Gratt. (Va.) 608.

4. *Lewis v. Weidenfeld*, 114 Mich. 581, following *Missouri Pac. R. Co. v. Fitzgerald*, 160 U. S. 556.

5. *Little Rock, etc., R. Co. v. Ireland*, 50 Ark. 388.

In *Schwab v. Coots*, 48 Mich. 116, which was a writ of error to a final judgment after denial of a petition for

removal, the court said: "Inasmuch as it has been ruled by the United States Supreme Court that in cases subject to removal the record stands practically entitled to be removed when a petition has been filed and a satisfactory bond given, we are disposed to consider that if all this appears in any responsible way on the record a writ of error might bring it up without a formal bill of exceptions."

In *Miller v. Sunde*, 1 N. Dak. 1, on appeal from a judgment rendered after denial of a petition for removal which the Supreme Court pronounced sufficient to divest the trial court of jurisdiction, *Corliss, C. J.*, said: "It is immaterial whether the appellant is in a position to raise this question of jurisdiction. This court will reverse a judgment shown by the record to be void although the point is not raised at all."

6. See *Kanouse v. Martin*, 15 How. (U. S.) 198, explained in *Pennsylvania Co. v. Bender*, 148 U. S. 261.

7. *Peirce v. Walters*, 164 Ill. 562; *Singleton v. Boyle*, 4 Neb. 415, where the court said: "On suggestion of diminution of record several matters are brought before us which can have no bearing whatever upon the case. Several certificates from the clerk of the Circuit Court of the United States for the District of Nebraska are produced to show that before the judgment was rendered the case had been removed to that court and that the District Court was thereby ousted of

practice to take and preserve an exception to the order of the court.¹ No exception is necessary where the appeal is taken directly from the order granting or refusing to grant the petition for removal,² except perhaps where the appellant seeks to review the ruling of the court on the sufficiency of the bond.³

Record on Appeal. — At any rate, error should in some way be made to appear in the record.⁴ If the record on appeal or error after final judgment on the merits does not show that the petition and bond for removal filed in the court were called to its

its jurisdiction over it. But these certificates form no part of the record, and we cannot consider them. If it were desired to bring the question of removal before this court, the steps taken to obtain it and the action of the District Court thereon should have been preserved by a proper bill of exceptions. The court below having had jurisdiction both of the subject-matter and of the parties, and there being nothing in the record to overcome the presumption of its entire validity, it must be affirmed." In *Peirce v. Walters*, 164 Ill. 562, the court said: "It is first insisted the court below erred in refusing to transfer the cause to the federal court. That question is not presented by this record for our decision, the bill of exceptions containing no motion for such removal, affidavit, or bond; neither does it appear that any exception was taken to the denial of the motion." See further, to the point that the question should be presented by a bill of exceptions or otherwise in the record, *Wabash, etc., R. Co. v. People*, 106 Ill. 652; *Merchants' Despatch Transp. Co. v. Joesting*, 89 Ill. 152; *Hartford F. Ins. Co. v. Vanduzor*, 49 Ill. 489; *Empire Transp. Co. v. Richards*, 88 Ill. 405; *People v. Superior Ct.*, 34 Ill. 357; *Coeur D'Alene R., etc., Co. v. Spalding*, (Idaho 1898) 53 Pac. Rep. 107; *Stone v. Sargent*, 129 Mass. 512; *Trester v. Missouri Pac. R. Co.*, 23 Neb. 246; *State v. Curler*, 4 Nev. 447; *Shelby v. Hoffman*, 7 Ohio St. 455.

In *Connecticut*, where after the report of a committee the case was reserved by the Superior Court for the advice of the Supreme Court upon "the questions arising upon said report, and also [on] the question what order or decree should, upon the facts contained in said report, be made in said cause," the Supreme Court refused to consider an alleged error in a ruling of the Superior Court at an earlier stage of the case

denying a petition for removal to the federal court. *Occum Co. v. A. & W. Sprague Mfg. Co.*, 35 Conn. 496.

1. See *Young v. Oakes*, 104 Ga. 62; *Atlas Mut. Ins. Co. v. Byrus*, 45 Ind. 134; *Combs v. Nelson*, 91 Ind. 125; *Goodnow v. Litchfield*, 67 Iowa 694; *Bixby v. Blair*, 56 Iowa 418; *Treadway v. Chicago, etc., R. Co.*, 21 Iowa 354; *Echols v. Smith*, (Ky. 1897) 42 S. W. Rep. 538; *Howland Coal, etc., Works v. Brown*, 13 Bush (Ky.) 684; *Craven v. Turner*, 82 Me. 385; *Schwab v. Coots*, 48 Mich. 116; *Herryford v. Aetna Ins. Co.*, 42 Mo. 153; *Meadow Valley Min. Co. v. Dodds*, 7 Nev. 145; *Wheeler v. Liverpool, etc., Ins. Co.*, 60 N. H. 456; *Stebbins v. Lancashire Ins. Co.*, 59 N. H. 414; *Preston v. Travellers' Ins. Co.*, 58 N. H. 76; *Herndon v. Lancashire Ins. Co.*, 107 N. Car. 192; *Railway Pass. Assur. Co. v. Pierce*, 27 Ohio St. 156; *Baltimore, etc., R. Co. v. Cary*, 28 Ohio St. 211; *Erie R. Co. v. Stringer*, 32 Ohio St. 468; *Phoenix L. Ins. Co. v. Saettel*, 33 Ohio St. 279; *Bates v. Baltimore, etc., R. Co.*, 39 Ohio St. 159; *Baltimore, etc., R. Co. v. Noell*, 32 Gratt. (Va.) 397.

2. *Trester v. Missouri Pac. R. Co.*, 23 Neb. 246. See also *Ellis v. Atlantic, etc., R. Co.*, 134 Mass. 339.

3. See *Ellis v. Atlantic, etc., R. Co.*, 134 Mass. 341; *Stone v. Sargent*, 129 Mass. 512; *Schwab v. Coots*, 48 Mich. 116.

4. Thus, in *Schwab v. Coots*, 48 Mich. 116, a writ of error to an order denying a petition for removal, there was no objection or exception to the negative action of the court, and the record did not show on what ground the denial was based. The Supreme Court therefore assumed in favor of the ruling of the trial court that the bond for removal was regarded as insufficient. Compare as to the record on appeal, *Kanouse v. Martin*, 15 How. (U. S.) 198, explained in *Pennsylvania Co. v. Bender*, 148 U. S. 261.

attention and its action thereon invoked, there is no assignable error connected with the removal proceedings.¹

f. PRESUMPTIONS ON APPEAL. — On appeal, the ruling of the court is presumed to have been correct where error is not affirmatively shown by the record.² Thus, if the bond for removal is sufficient upon its face, the appellate court cannot assume that the denial of a petition for removal was based on the insufficiency of the sureties.³

g. JUDGMENT AND ORDER OF REMAND — *Affirmance.* — If the order granting or denying a petition for removal is pronounced correct and no other error is assigned, there is ordinarily a judgment simply of affirmance,⁴ but sometimes the appeal or writ of error is dismissed for want of jurisdiction thereof.⁵

Reversal and Order of Remand. — If an order of removal is reversed the court below is directed to proceed as if no order had been made.⁶ The reversal of the order of removal will not affect the jurisdiction of the federal court if the latter court decides that it acquired jurisdiction by the removal.⁷ If an order denying a petition for removal is declared erroneous the reversal is accompanied with a direction in substance to enter an order of removal and proceed no further in the cause unless jurisdiction thereof shall be lawfully restored.⁸ On appeal from a judgment on the

1. *Home Ins. Co. v. Curtis*, 32 Mich. 402.

2. *Singleton v. Boyle*, 4 Neb. 415. See generally article APPEALS, vol. 2, p. 420 *et seq.*

3. *Taylor v. Shew*, 54 N. Y. 75; *Mix v. Andes Ins. Co.*, 74 N. Y. 57; *Winslow v. Collins*, 110 N. Car. 121. Compare *Schwab v. Coots*, 48 Mich. 116.

4. See for instance *New York L. Ins. Co. v. Best*, 23 Ohio St. 114; *State v. Southern Pac. Co.*, 23 Oregon 434.

5. See *Crane v. Reeder*, 35 Mich. 147; *Forncrook Mfg. Co. v. E. T. Barnum Wire, etc., Works*, 54 Mich. 556.

It was remarked in *Ulster County Sav. Inst. v. New York Fourth Nat. Bank*, (Supm. Ct. Gen. T.) 8 N. Y. Supp. 164, that if an order of removal was correct and regular there would be no jurisdiction of an appeal.

In *Richardson v. Jenks*, 56 Ohio St. 422, a defendant in attachment, having filed a sufficient petition for removal, moved to discharge the attachment, which was denied by the Court of Common Pleas, and the order of that court was affirmed by the Circuit Court on a petition in error. A petition in error to reverse the judgment of the Circuit Court was dismissed on overruling a demurrer to an answer setting up the removal proceedings.

6. *Hall v. Ricketts*, 9 Bush (Ky.) 372; *Duncan v. Hampton*, 12 Mart. (La.) 97; *Beebe v. Armstrong*, 11 Mart. (La.) 442; *Townsend v. Sykes*, 38 La. Ann. 411; *Setzer v. Douglass*, 91 N. Car. 430; *Mecke v. Valleytown Mineral Co.*, 122 N. Car. 798.

In *Friese v. Homeopathic Mut. L. Ins. Co.*, 107 Pa. St. 134, an order of removal was granted on a petition filed after judgment and a provisional order opening it upon conditions. The plaintiff filed a *præcipe* for a *fi. fa.*, which the court declined to issue, and a rule to show cause against the clerk was discharged. On error the order discharging the rule was reversed and the rule made absolute, it appearing that the cause was not removable.

7. *Chicago, etc., R. Co. v. Whitton*, 13 Wall. (U. S.) 275.

8. *Atlas Mut. Ins. Co. v. Byrus*, 45 Ind. 133; *Western Union Tel. Co. v. Dickinson*, 40 Ind. 446; *McCormick v. Humphrey*, 27 Ind. 144; *Sharp v. Gutscher*, 74 Ind. 364; *Van Horn v. Litchfield*, 70 Iowa 13; *Treadway v. Chicago, etc., R. Co.*, 21 Iowa 362; *Garrett v. Bonner*, 30 La. Ann. 1306; *Rosenfield v. Adams Express Co.*, 21 La. Ann. 234; *Hill v. Henderson*, 6 Smed. & M. (Miss.) 357, where the court was ordered to transfer the cause

merits after erroneously refusing to grant a petition for removal the appellate court will reverse the judgment without examining into the merits of the case.¹

h. PROCEEDING ON MANDATE IN COURT BELOW.—After reversal of judgment and remand with instructions to order a removal, if the successful appellant does not file a sufficient bond as directed in the order of remand, the court below may proceed as if there had been no application for removal.²

45. Review by United States Supreme Court on Error to State Court — Jurisdiction to Review.—If the state court proceeds to judgment notwithstanding a removal or attempted removal, its ruling in retaining the case is reviewable by the United States Supreme Court on error to the final judgment or decree³ of the highest state court in which a decision could be had.⁴ If the state court and the federal Circuit Court go to judgment respectively, each judgment is open to revision by the federal Supreme Court in the

on the petitioner's entering into the required bond with sufficient surety; *Stanley v. Chicago, etc., R. Co.*, 62 Mo. 511, where the judgment was reversed "and the cause remanded with instructions to enter an allowance of the petition of the defendant for the removal of the cause to the Circuit Court of the United States for the Western District of Missouri, *nunc pro tunc*;" *Merriam v. Dunbar*, 11 Neb. 208; *Winslow v. Collins*, 110 N. Car. 122; *Erie R. Co. v. Stringer*, 32 Ohio St. 476; *Phoenix L. Ins. Co. v. Saettel*, 33 Ohio St. 283; *Koshland v. National F. Ins. Co.*, 31 Oregon 205; *Building, etc., Assoc. v. Cunningham*, 92 Tex. 155; *McKee v. Brooks*, 64 Tex. 258; *Feibleman v. Edmonds*, 69 Tex. 340; *Rathbone Oil Tract Co. v. Rauch*, 5 W. Va. 84, where the judgment was reversed "and the cause remanded with instructions to the court below to send it to the Circuit Court of the United States for trial, if the defendant shall desire it, and the facts shall again appear in the court below as they appear in the record here;" *Rece v. Newport News, etc., Co.*, 32 W. Va. 173.

In *Holden v. Putnam F. Ins. Co.*, 46 N. Y. 5, the court said that if on appeal from the final judgment it appeared that a petition for removal was erroneously denied, the judgment could not be affirmed, and it was intimated that the appeal would be suspended or dismissed, leaving the party to pursue his remedy in the federal court, on the theory that the mandate of the Act of Congress to "proceed no further in the cause" is obligatory as

well upon a court of appellate as of original jurisdiction.

Order of Removal by Appellate Court.—In *New York*, where an order of the special term denying an application for removal is reversed on appeal by the general term (now appellate division), the order of removal may be made in the appellate tribunal. See *Jones v. Seward*, 41 Barb. (N. Y.) 273.

1. *Stanley v. Chicago, etc., R. Co.*, 62 Mo. 511.

2. *Hill v. Henderson*, 13 Smed. & M. (Miss.) 688.

3. **Only After Final Judgment.**—Where the state court, before proceeding further in the cause, reserved the question arising on a petition for removal for the decision of the Supreme Court of the State, and the latter dismissed the petition and remanded the case with directions to proceed therein, it was held that there was not yet a final judgment reviewable on error by the United States Supreme Court. *Kimball v. Evans*, 93 U. S. 320. See also *Tripp v. Santa Rosa St. R. Co.*, 144 U. S. 126.

4. Rev. Stat. U. S., § 709; *Missouri Pac. R. Co. v. Fitzgerald*, 160 U. S. 556; *Galveston, etc., R. Co. v. Texas*, 170 U. S. 226; *Murray v. Louisiana*, 163 U. S. 101; *Smith v. Mississippi*, 162 U. S. 592; *Gibson v. Mississippi*, 162 U. S. 565; *Oregon Short Line, etc., R. Co. v. Skottowe*, 162 U. S. 490; *Stone v. South Carolina*, 117 U. S. 430; *Baltimore, etc., R. Co. v. Koontze*, 104 U. S. 5; *Kanouse v. Martin*, 15 How. (U. S.) 198.

appropriate mode.¹ But if after removal the state court awaits the action of the federal Circuit Court, and the latter remands the cause, which thereupon proceeds to final judgment in the state court, the action of the Circuit Court in remanding the cause is not reviewable by the United States Supreme Court on error to the judgment of the state court.²

Assignment of Error. — Though the case was removable there is no assignable error if no application for removal was made,³ and a defendant who did not join in the application for removal cannot assign as error the action of the state court in denying an application for removal by other defendants.⁴

The Transcript of the Record must show the facts necessary to support the assignment of error, and if omissions in that behalf are not supplied by certiorari, the writ of error will be dismissed.⁵

Judgment and Mandate. — If the action of the court in refusing to remove the cause is pronounced correct, the judgment is affirmed without examining the merits where no other federal question is involved.⁶ If it is pronounced erroneous, the judgment will be reversed and the cause remanded with directions to reverse the original judgment and transmit the case to the court where it originated with instructions to vacate all orders and judgments made subsequently to the filing of the petition for removal and to proceed no further until its jurisdiction is restored.⁷

46. Appeal or Error in Federal Courts—*a.* **APPEALABILITY OF ORDERS AND REVIEW OF FINAL JUDGMENT.** — Prior to the passage of the Act of Congress of March 3, 1875, an appeal or writ of error would not lie to review an order of the Circuit Court remanding a suit which had been removed, since such an

1. Removal Cases, 100 U. S. 457; Missouri Pac. R. Co. v. Fitzgerald, 160 U. S. 556.

2. Missouri Pac. R. Co. v. Fitzgerald, 160 U. S. 556, the effect of which decision is that an order of the Circuit Court remanding a cause is final and conclusive so that it cannot be reviewed either directly or indirectly by the United States Supreme Court. But in the same case it was remarked that if the application for removal was on the ground of a federal question involved, and the state court, after remand from the federal court, should decide such question against the claimant, the judgment would be open to revision "irrespective of the ruling of the Circuit Court in that regard in the matter of removal."

"If a motion to remand is heard in a United States Circuit Court, and there allowed, the result is conclusive in all courts, and terminates the controversy as to the right or regularity of re-

moval." Sinclair v. Pierce, 50 Fed. Rep. 852.

3. Northern Pac. R. Co. v. Austin, 135 U. S. 315.

4. Merchants' Cotton Press, etc., Co. v. Insurance Co. of North America, 151 U. S. 387.

5. Goodenough Horseshoe Mfg. Co. v. Rhode Island Horseshoe Co., 24 U. S. (L. ed.) 368.

6. Manning v. Amy, 140 U. S. 137; Kansas City, etc., R. Co. v. Daughtry, 138 U. S. 298; Gregory v. Hartley, 113 U. S. 742; Phoenix Ins. Co. v. Pechner, 95 U. S. 183.

7. Baltimore, etc., R. Co. v. Koontz, 104 U. S. 5; New Orleans, etc., R. Co. v. Mississippi, 102 U. S. 135; Southern Pac. R. Co. v. California, 118 U. S. 113; Carson v. Hyatt, 118 U. S. 279; National Steamship Co. v. Tugman, 106 U. S. 118; Removal Cases, 100 U. S. 457; Gordon v. Longest, 16 Pet. (U. S.) 97.

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order was not a final order or decree.¹ By the act last mentioned it was provided that the order of the Circuit Court remanding the cause should be "reviewable by the Supreme Court on writ of error or appeal, as the case may be," without regard to the amount involved.² But this provision was expressly repealed by the Act of 1887-1888, which also provides that "no appeal or writ of error from the decision of the Circuit Court so remanding such cause shall be allowed;"³ nor can the order

See *National S. S. Co. v. Tugman*, 82 Fed. Rep. 246.

1. *Chicago, etc., R. Co. v. Wiswall*, 23 Wall. (U. S.) 507, holding that the remedy was by mandamus to compel the Circuit Court to hear and decide; *Babbitt v. Clark*, 103 U. S. 609; *Turner v. Farmers' L. & T. Co.*, 106 U. S. 555; *Ex p. Hoard*, 105 U. S. 579.

2. There were sixty cases carried to the Supreme Court under this provision, beginning with *Hoadley v. San Francisco*, 94 U. S. 4, and ending with *Rosenbaum v. Bauer*, 120 U. S. 450.

By the Act of Feb. 25, 1889 (25 U. S. Stat. at L. 693, c. 236), since repealed, it was provided that in all cases where a final judgment or decree should be rendered in a Circuit Court of the United States in which there was a question involving the jurisdiction of the court, the party against whom the judgment or decree was rendered should be entitled to an appeal or writ of error without reference to the amount of such judgment or decree, but where it did not exceed the sum of five thousand dollars the question of jurisdiction should alone be reviewable. In order to give jurisdiction to the Supreme Court it was not essential that a question of jurisdiction should have been raised in the Circuit Court if it was apparent of record. *Mattingly v. Northwestern Virginia R. Co.*, 158 U. S. 53. But in *Richmond, etc., R. Co. v. Thouron*, 134 U. S. 45, it was held that a remanding order was not a final judgment or decree within the terms of the act, and that the Supreme Court had no jurisdiction to review it.

3. Act of 1887-1888, 24 U. S. Stat. at L. 553, c. 373; 25 U. S. Stat. at L. 435, c. 866. For cases enforcing this provision, see *Missouri Pac. R. Co. v. Fitzgerald*, 160 U. S. 556; *Morey v. Lockhart*, 123 U. S. 57; *Wilkinson v. Nebraska*, 123 U. S. 286; *In re Pennsylvania Co.*, 137 U. S. 451; *Powers v. Chesapeake, etc., R. Co.*, 169 U. S. 98;

Gurnee v. Patrick County, 137 U. S. 141; *Sherman v. Grinnell*, 123 U. S. 679; *Birdseye v. Schaeffer*, 140 U. S. 117; *Joy v. Adelbert College*, 146 U. S. 355; *Richmond, etc., R. Co. v. Thouron*, 134 U. S. 45; *McLish v. Roff*, 141 U. S. 661; *Chicago, etc., R. Co. v. Roberts*, 141 U. S. 690; *McCormick Harvesting Mach. Co. v. Walthers*, 134 U. S. 44; *Graves v. Corbin*, 132 U. S. 571; *Chicago, etc., R. Co. v. Gray*, 131 U. S. 396.

Certificate of Division.—Nor is the order of remand reviewable on direct appeal or error under Rev. Stat. U. S., § 693, on account of a certificate in the record of the judges holding the court, that their opinions were opposed upon the question of remanding, for the order is still not a final judgment. *Morey v. Lockhart*, 123 U. S. 56.

Effect on Pending Cases.—Section 6 of the Act of 1887-1888 was accompanied by the proviso that "this act shall not affect the jurisdiction over or disposition of any suit removed from the court of any state, or suit commenced in any court of the United States, before the passage hereof except as otherwise expressly provided in this act." This proviso was construed to relate only to the jurisdiction of the United States Circuit Courts, and applying the general rule that if a law conferring jurisdiction is repealed without any reservation as to pending cases, all such cases fall with the law, the effect of the repeal of the provisions of the Act of 1875 allowing a writ of error to the Supreme Court was held to be that the Supreme Court had no power to review on appeal or writ of error an order of the Circuit Court remanding a cause to a state court, where it was commenced, removed, and remanded after the Act of 1887-1888 went into effect. *Morey v. Lockhart*, 123 U. S. 56. Nor where the cause was begun and removed before the act took effect, but not remanded until afterwards. *Birdseye v. Schaeffer*, 140 U. S. 117; *Wil-*

of remand be reviewed on appeal or error after final judgment in the cause upon its second and successful removal to the federal court.¹ If the Circuit Court denies a motion to remand, then after final judgment² its refusal to remand may be reviewed on appeal or error by the Supreme Court³ or by the Circuit Court of Appeals;⁴ and finally the question of jurisdiction may be reviewed in certain cases by the Supreme Court on appeal or error after the final decision of the Circuit Court of Appeals,⁵ or upon questions certified to the Supreme Court by the Circuit Court of Appeals.⁶

b. OBJECTION, EXCEPTION, ASSIGNMENT OF ERROR, AND RECORD. — The Supreme Court or the Circuit Court of Appeals will take notice of the want of jurisdiction of the Circuit Court, although the point be not formally raised in either court or assigned for error,⁷ and although the objection be made by the party who procured the removal.⁸ If the determination of the question of

inson v. Nebraska, 123 U. S. 286; *Gurnee v. Patrick County*, 137 U. S. 141. Nor where the cause was remanded while the Act of 1875 was in force, but the writ of error was not brought until the passage of the Act of 1887-1888. *Sherman v. Grinnell*, 123 U. S. 679; *Chicago, etc., R. Co. v. Gray*, 131 U. S. 396.

By Circuit Court of Appeals. — An order of remand is not reviewable on direct appeal or error by the Circuit Court of Appeals. *Levinski v. Middlesex Banking Co.*, 92 Fed. Rep. 462.

Dismissal of a Petition for Removal on the ground of local prejudice is equivalent to a remanding order, and the order of dismissal is not the subject of appeal or error. *Patten v. Cilley*, 62 Fed. Rep. 497.

1. *Powers v. Chesapeake, etc., R. Co.*, 169 U. S. 92.

2. **Only After Final Judgment.** — An order overruling a motion to remand is not a final judgment on the merits and is not the subject of direct appeal or error. *Bender v. Pennsylvania Co.*, 148 U. S. 502, dismissing a writ of error, and *citing McLish v. Roff*, 141 U. S. 661; *Chicago, etc., R. Co. v. Roberts*, 141 U. S. 690; *Joy v. Adelbert College*, 146 U. S. 355. See also *Graves v. Corbin*, 132 U. S. 591.

A judgment of the Circuit Court sustaining a general demurrer to a declaration in an action removed into that court from a state court, and remanding the cause for want of jurisdiction, is not final, and therefore is not reviewable by the Supreme Court

on a writ of error. *Gurnee v. Patrick County*, 137 U. S. 141.

3. *Powers v. Chesapeake, etc., R. Co.*, 169 U. S. 92; *Missouri Pac. R. Co. v. Fitzgerald*, 160 U. S. 556; *Torrence v. Shedd*, 144 U. S. 527.

Such review is had by virtue of the *Evarts Act*, 26 U. S. Stat. at L. 827, c. 517, § 5, which provides that "appeals or writs of error may be taken from the District Courts or from the existing Circuit Courts direct to the Supreme Court * * * in any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision."

4. 26 U. S. Stat. at L. 827, c. 517, § 5.
5. 26 U. S. Stat. at L. 828, c. 517, § 6.

For such cases, see *Walker v. Collins*, 167 U. S. 57; *Spokane Falls, etc., R. Co. v. Ziegler*, 167 U. S. 65; *Texas, etc., R. Co. v. Barrett*, 166 U. S. 617; *Texas, etc., R. Co. v. Cody*, 166 U. S. 606; *U. S. v. American Bell Telephone Co.*, 159 U. S. 548.

6. *Mexican Nat. R. Co. v. Davidson*, 157 U. S. 201. See also article CERTIFIED CASES, vol. 3, p. 918.

7. See *supra*, p. 375.

8. *Mansfield, etc., R. Co. v. Swan*, 11 U. S. 382; *Wabash R. Co. v. Barbour*, 73 Fed. Rep. 513.

In *Graves v. Corbin*, 132 U. S. 571, where the cause had been removed on the ground of a separable controversy and proceeded to a decree on the merits in favor of the plaintiff, the decree was reversed on appeal to the Supreme

jurisdiction depended upon issues of fact, the record on appeal should contain the affidavits or other evidence adduced.¹ The transcript from the state court forms part of the record of the Circuit Court and must necessarily appear in the record on a writ of error.²

c. JUDGMENT AND MANDATE. — Where the record does not affirmatively show that the Circuit Court had jurisdiction, the judgment will be reversed without any inquiry into the merits,³ and the Circuit Court will be directed to remand the cause to the state court whence it was removed;⁴ and usually the petitioner for removal will be ordered to pay all the costs.⁵

II. FROM ONE FEDERAL COURT TO ANOTHER — Certification from District to Circuit Court. — An Act of Congress provides for the certification into the Circuit Court of suits and processes pending in a District Court the judge whereof is unable to hold court and perform his duties.⁶

Transfer from One Circuit Court to Another. — An Act of Congress provides for the transfer of a civil case in a Circuit Court to another Circuit Court when all the judges of the court wherein the suit was instituted are disqualified by interest or relationship, or it is otherwise improper for them to sit upon the trial.⁷ Cases trans-

Court and the case ordered to be remanded to the state court, on the ground that no separable controversy existed, although there was nothing in the record which showed that the question of the removability of the case was raised in the Circuit Court.

1. See *Carson v. Hyatt*, 118 U. S. 287, as to evidence on the issue of diverse citizenship.

Elimination of Separable Controversy. — If a cause is removed on a petition showing *prima facie* a separable controversy and is heard on the merits in the federal Circuit Court, the record on appeal must contain the evidence in order to support a contention in the appellate court that the alleged separable controversy disappeared in the progress of the case. *Connell v. Smiley*, 156 U. S. 335.

2. *Clinton v. Missouri Pac. R. Co.*, 122 U. S. 469.

3. *Walker v. Collins*, 167 U. S. 57; *Martin v. Baltimore, etc., R. Co.*, 151 U. S. 676; *Laidly v. Huntington*, 121 U. S. 179; *Hancock v. Holbrook*, 112 U. S. 229; *Craswell v. Belanger*, 56 Fed. Rep. 529.

4. *Mattingly v. Northwestern Virginia R. Co.*, 158 U. S. 57; *Martin v. Baltimore, etc., R. Co.*, 151 U. S. 676; *Mansfield, etc., R. Co. v. Swan*, 111 U. S. 389; *Baltimore, etc., R. Co. v. Koontz*, 104 U. S. 15; *Walker v. Col-*

lins, 167 U. S. 57, where on a writ of error a judgment of the Circuit Court of Appeals was reversed and the cause remanded "to the Circuit Court," with directions to remand to the state court; *Waco Hardware Co. v. Michigan Stove Co.*, 91 Fed. Rep. 292; *Parkersburg First Nat. Bank v. Prager*, 91 Fed. Rep. 693; *Farmers', etc., Nat. Bank v. Schuster*, 86 Fed. Rep. 161; *Barth v. Coler*, 60 Fed. Rep. 466.

5. See *supra*, p. 381.

6. Rev. Stat. U. S., § 587. See *Ex p. U. S.*, 1 Gall. (U. S.) 338, holding that where the disability of the district judge terminates in his death the Circuit Court must remand the certified causes to the District Court.

7. Rev. Stat. U. S., § 615, provides as follows: "When it appears in any civil suit in any Circuit Court that all of the judges thereof who are competent by law to try said case are in any way interested therein, or have been of counsel for either party, or are so related or connected with either party as to render it, in the opinion of the court, improper for them to sit in such trial, it shall be the duty of the court, on the application of either party, to cause the fact to be entered on the records, and to make an order that an authenticated copy thereof, with all

ferred under the statute, where the parties do not agree, should be sent, as a matter of course, to the nearest Circuit Court, unless that court is not competent in point of law to try them.¹ The court to which the cause is transferred has all the powers necessary in order to carry the litigation of the parties into judgment or decree.² If the cause transferred is an action at law, the court to which it is transferred may follow the practice pre-

the proceedings in the case, shall be forthwith certified to the most convenient Circuit Court in the next adjoining state or in the next adjoining circuit; and said court shall, upon the filing of such record and order with its clerk, take cognizance of and proceed to hear and determine the case, in the same manner as if it had been rightfully and originally commenced therein; and the proper process for the due execution of the judgment or decree rendered in the cause shall run into and may be executed in the district where such judgment or decree was rendered, and also into the district from which the cause was removed."

Rev. Stat. U. S., § 616, provides as follows: "The circuit justice, or the circuit judge of any circuit, may order any civil cause which is certified into any court of the circuit under the provisions of the preceding section to be certified back to the court whence it came; and then the latter shall proceed therein as if the cause had not been certified from it: Provided, that if, for any reason, it shall be improper for the judges of such court to try the cause so certified back, it shall be tried by some other judge holding such court, pursuant to the provisions of the next section."

1. *Richardson v. Boston*, 1 Curt. (U. S.) 250, where the court, construing the Act of February 28, 1839, § 8, 5 U. S. Stat. at L. 322, said: "There are two governing elements contained in the statute. The first is 'the most convenient Circuit Court,' the second 'in the next adjacent state or circuit.' It is not difficult to perceive why the alternative was given, allowing a removal to a Circuit Court in the next adjacent circuit, instead of confining it to the next adjacent state. In admiralty appeals, or writs of error from the District Court, if the judge of the Supreme Court be interested, it would not be in accordance with our system, and scarcely decorous in itself, to remove the cause to another district

in the same circuit, to be heard by another district judge. * * * The leading idea of the law is, I think, proximity of place; and that Circuit Court which is competent to act and nearest to the subject of the controversy, the witnesses, the parties, and the court whence the removal is to take place, is the most convenient Circuit Court within the meaning of this act."

2. *May v. Le Claire*, 18 Fed. Rep. 49, holding that where an executor who was defendant in a bill in equity answered the bill prior to a transfer and resigned after the transfer, the court to which the transfer was made had authority to issue a subpoena directed to the marshal of the district whence the cause was removed, for service upon the administrator with the will annexed, who was the successor of the original defendant. The court said: "I agree that the Circuit Court had no right to issue any process to be executed outside of the district, and particularly in the district of another state, unless authorized by law; but it is not necessary that the authority should be expressly given by the Act of Congress. It is sufficient if it can be clearly deduced from the legislation of Congress that it is indispensably necessary in order to carry into effect the action of the court which the law of Congress has authorized. * * * Notwithstanding the statute merely refers to and authorizes 'the proper process for the due execution of the judgment or the decree rendered in the cause' to run into the district from which the cause was removed, it is apparent that unless the court has the power necessary, and which often must be exercised by courts in order to reach the judgment or decree, that there never could be any process issued to execute the decree or judgment. It is therefore one of those cases where the power is necessarily implied from the express declaration of powers given, and without which the latter powers might never be called into exercise."

scribed for the courts of the state from which the cause was transferred, although the Circuit Court where the action was originally brought has not adopted the state practice.¹

Removal of Criminal Proceeding from One District to Another. — An Act of Congress provides for the removal of criminals and criminal prosecutions to the district where the trial is to be had, when the offender has been committed in a district other than that wherein he is to be tried.² The act, being in restraint of liberty, is to be strictly construed, and the government asking a removal is required to comply strictly with the law.³ The act applies to a

1. *Lee County v. Rogers*, 7 Wall. (U. S.) 175.

2. Rev. Stat. U. S., § 1014, which provides as follows: "For any crime or offense against the United States, the offender may, by any justice or judge of the United States, or by any commissioner of a Circuit Court to take bail, or by any chancellor, judge of a Supreme or Superior Court, chief or first judge of Common Pleas, mayor of a city, justice of the peace, or other magistrate, of any state where he may be found, and agreeably to the usual mode of process against offenders in such state, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense. Copies of the process shall be returned as speedily as may be into the clerk's office of such court, together with the recognizances of the witnesses for their appearance to testify in the case. And where any offender or witness is committed in any district other than that where the offense is to be tried, it shall be the duty of the judge of the district where such offender or witness is imprisoned seasonably to issue, and of the marshal to execute, a warrant for his removal to the district where the trial is to be had."

A Wilful Contempt of a Court of the United States is a "crime or offense against the United States" within the meaning of the Act of Congress. *U. S. v. Jacobi*, 1 Flipp. (U. S.) 108.

Discretion to Grant or Refuse Order of Removal. — In *In re Wolf*, 27 Fed. Rep. 608, the court said: "This court held in the case of *U. S. v. Rogers*, 23 Fed. Rep. 658, that the judge, in acting on an application for the removal of a party charged with crime, was performing a judicial function; and in the performance of such function he may look into the proceedings of the

commissioner or the court in which the indictment was found, for the purpose of enabling him to properly determine questions pertaining to the removal, and grant or refuse the order accordingly. Under the section of the statute above referred to [Rev. Stat. U. S., § 1014], the judge is invested with plenary power to grant or refuse the warrant of removal, and he is but exercising sound judicial discretion when he looks into the question of jurisdiction, or into the whole case, so far as to enable him to determine where the trial is to be had."

Sufficiency of Proof of Guilt. — Where a defendant has been arrested and held for trial by a Circuit Court commissioner, and an application for removal is resisted on the ground of the insufficiency of the evidence, the rule is that the commissioner's conclusions upon the proofs before him cannot be reviewed or set aside if there was competent evidence of the crime alleged, and also evidence tending to prove the probable guilt of the defendant. *U. S. v. Lantry*, 30 Fed. Rep. 233, where the court said: "In this respect there is no difference between extradition proceedings and a removal under section 1014" of the United States Revised Statutes.

In *U. S. v. Brawner*, 7 Fed. Rep. 88, the court said: "Doubtless the action of the committing magistrate is *prima facie* sufficient as a basis for the warrant, but it is not conclusive; and while the judge should not unnecessarily require another or further preliminary examination, if it appear to him necessary that the bail should be reduced, or that for any reason the prisoner should again be heard in defense, I have no doubt that it is his duty to pass fully upon the case and determine for himself whether he should be further held or removed."

3. *In re Wolf*, 27 Fed. Rep. 609.

case where it is sought to remove an offender from a district within a state to one within a territory.¹ It seems that the warrant of removal can be issued only by a judge of the District Court, and not by a judge of the Circuit Court.² No warrant for the removal of the defendant can be issued until he has been arrested and committed for want of bail.³ If the defendant offers bail it is his right to be discharged on bail.⁴ The application to the District Court for a warrant of removal should be based upon a valid indictment against the defendant.⁵ Upon application for

1. *U. S. v. Haskins*, 3 Sawy. (U. S.) 262.

2. See letters of Judge Love and Mr. Justice Miller published in 1 Woolw. (U. S.) 422 *et seq.*

3. *U. S. v. Shepard*, 1 Abb. (U. S.) 431; *U. S. v. Haskins*, 3 Sawy. (U. S.) 262; *U. S. v. Jacobi*, 4 Am. L. T. Rep. 148, 14 Int. Rev. Rec. 45.

4. *U. S. v. Jacobi*, 4 Am. L. T. Rep. 148, 14 Int. Rev. Rec. 45.

In *U. S. v. Volz*, 14 Blatchf. (U. S.) 18, the court said: "Until the removal warrant is issued, the prisoner is held in arrest under the commitment of the commissioner, and to that officer application may be made to be released from arrest, on giving bail for trial before such court of the United States as the commissioner shall determine to have cognizance of the offense as proved before him. What power the commissioner may have after the district judge shall have issued his warrant directing the prisoner to be removed to another district for trial, it is unnecessary now to consider. But it seems plain that up to the time of the issuing of a removal warrant the commissioner under whose commitment the prisoner is held has jurisdiction to entertain an application for his release on bail."

Reducing Excessive Bail.—On an application for an order of removal the district judge has ample power, if he thinks the bail excessive, to "reduce the bail and to review the action of the commissioner or other committing magistrate." *U. S. v. Brawner*, 7 Fed. Rep. 892, where the court said: "The discretion of the magistrate in taking bail is to be guided by the compound consideration of the ability of the prisoner to give bail and the atrocity of the offense."

5. **No Removal until Valid Indictment Found.**—In *U. S. v. White*, 25 Fed. Rep. 716, McCormick, J., presiding in the District Court for the Northern

District of Texas, said that it was his practice not to entertain applications for removal until after indictment found, and to require a copy of the indictment to accompany such application. In the course of his opinion it also appears that the writ of removal will not be issued where the indictment charges no offense against the defendant. *Commenting upon In re Buell*, 3 Dill. (U. S.) 116, the court said: "I am aware that in *Re Buell*, the district judge of the Eastern District of Missouri refused to issue the writ of removal, and ordered the discharge of the prisoner, because in that case it appeared on the face of the indictment that the publication of the libel was made in Detroit, Michigan, while the indictment was found in the District of Columbia, and that on appeal to the Circuit Court Judge Dillon affirmed Judge Treat's ruling in the case."

* * * And there is a note to the report of the case in 3 Dill. (U. S.) 120, to the effect that another indictment having been found in one of the courts for the District of Columbia against Mr. Buell, he was again arrested, and was discharged on habeas corpus by Judge Treat, on the ground that the indictment was found by a grand jury of a court having no jurisdiction of the offense. How this fact was made to appear the note does not show. It is well understood that want of jurisdiction deprives the record of a court of its force, and that, in the interest of liberty, this can be inquired into anywhere and at all times where a proper case is presented; but there is certain order and comity to be observed in all court proceedings and the authorized action of judge, and the case should present peculiar features of urgency to warrant the judge of one court in interrupting the progress of a case pending in another court by hearing and sustaining a plea which ordinarily should be heard by the judge of the

a warrant of removal the federal court will relinquish jurisdiction where it is made to appear that, prior to his arrest for the alleged offense against the United States, the defendant had been arrested, indicted, and held to bail in the state court for an offense against the state.¹ The application is usually made by the United States district attorney for the district in which the defendant was arrested.² The practice of hearing an application for removal without invoking the writ of habeas corpus is admissible and proper.³

Transfer of Indictments.— Provision is made by statute for the remission of indictments in certain cases from a District to a Circuit Court, and *vice versa*.⁴

court where the cause was proceeding." It was held, however, that the indictment in the case before the court was sufficient, and a writ of removal was issued.

In *U. S. v. Rogers*, 23 Fed. Rep. 662, the court said: "Jurisdiction can be raised at any stage of a criminal proceeding. It is never presumed, but must always be proved; and it is never waived by a defendant. If this principle be correct, it follows that the party who is charged with a crime and arrested in one district to be removed for trial to another can raise the question, as an objection to his removal, that he cannot be tried in that other, or that the trial cannot be had there for want of jurisdiction in the court, either over the person, the subject-matter, or the place where the crime was committed. There is no question in my mind of the right of a person accused to raise the question of jurisdiction on the hearing of an application for removal, without invoking the aid of the writ of habeas corpus." Citing *In re James*, 18 Fed. Rep. 853; *U. S. v. Brawner*, 7 Fed. Rep. 86.

An order of removal will not be granted where the indictment shows on its face that the offense was not committed within the jurisdiction of the court in which the indictment was found. *In re Doig*, 4 Fed. Rep. 197; *In re Buell*, 3 Dill. (U. S.) 116.

An indictment charging the defendant with the crime of conspiring in June to procure a false judgment to be entered in the preceding May, and to have done acts in October to aid a conspiracy which was formed in the following June, was held to be worthless as evidence upon which to base a warrant of removal, unless, possibly, the inconsistencies were proved to be

clerical errors. *U. S. v. Pope*, 24 Int. Rev. Rec. 29, 3 Cinc. L. Bul. 30, 27 Fed. Cas. No. 16,069.

1. *In re James*, 18 Fed. Rep. 853, where the defendant was released and turned over to his bondsmen, who had him in their custody when he was arrested at the instance of the United States.

2. See *In re Buell*, 3 Dill. (U. S.) 116; *U. S. v. Rogers*, 23 Fed. Rep. 658; *Re Alexander*, 1 Lowell (U. S.) 530. In *U. S. v. White*, 25 Fed. Rep. 716, the application appears to have been made jointly by the district attorneys for the district where the defendant was arrested and the district whither he was to be removed, respectively. In *In re James*, 18 Fed. Rep. 853, the application was made by the United States marshal who arrested the defendant.

3. *In re James*, 18 Fed. Rep. 854; *U. S. v. Brawner*, 7 Fed. Rep. 86, where the court said: "Technically it may be that the judge could not discharge the prisoner without a habeas corpus, while he might refuse his warrant of removal, leaving him where the commitment had placed him, until application for habeas corpus should be made. But my judgment is that, having the prisoner before him, with the plenary power conferred by the statute to grant or refuse the warrant of removal, and the only object and purpose of the commitment being to take his judgment whether there shall be removal, the power to discharge exists without any habeas corpus and is necessarily implied from the statute."

4. Rev. Stat. U. S. § 1037, provides as follows: "Whenever the district attorney deems it necessary, any Circuit Court may, by order entered on its minutes, remit any indictment pending

III. FROM TERRITORIAL TO FEDERAL COURTS — 1. Authority and Grounds for Removal. — When a territory is admitted into the Union as a state the enabling act establishes a federal Circuit Court for the district comprising the new state and provides for removal to that court of causes pending in the territorial courts which would have been within the jurisdiction of the federal

therein to the next session of the District Court of the same district, where the offense charged in the indictment is cognizable by the said District Court. And in like manner any District Court may remit to the next session of the Circuit Court of the same district any indictment pending in the said District Court. And such remission shall carry with it all recognizances, processes, and proceedings pending in the case in the court from which the remission is made; and the court to which such remission is made shall, after the order of remission is filed therein, act in the case as if the indictment and all other proceedings in the same had been originated in said court."

Rev. Stat. U. S., § 1038, provides as follows: "Any District Court may, by order entered on its minutes, remit any indictment pending therein to the next session of the Circuit Court for the same district, when, in the opinion of such District Court, difficult and important questions of law are involved in the case; and thereupon the proceedings in such case shall be the same in the Circuit Court as if such indictment had been originally found and presented therein."

Rev. Stat. U. S., § 1039, provides as follows: "Every indictment of a capital offense presented to a District Court, together with the recognizances taken therein, shall, by order entered on its minutes, be remitted to the next session of the Circuit Court for the same district; and, on the filing of such order and indictment with the clerk of such Circuit Court, that court shall proceed thereon in the same manner as if said indictment had been originally found and presented therein."

Transmission of Copy of Indictment. — Rev. Stat. U. S., § 1037, quoted at the head of this note, does not require the original indictment to be transmitted to the court to which the case is sent; the trial may be had upon an exemplified copy or record of the indictment. *U. S. v. McKee*, 4 Dill. (U. S.) 1.

Amendment of Record After Remission of Indictment. — In *Kelly v. U. S.*, 27 Fed. Rep. 616, the plaintiff in error was first tried in the Circuit Court on an indictment for manslaughter. The jury failed to agree, and therefore the case was certified to the District Court, under Rev. Stat. U. S., § 1037, quoted at the head of this note. The order of remission set out that the jurors were unable to agree, but did not state that they were thereupon discharged by the court. After the case had been remitted to the District Court, the district judge, while sitting in the Circuit Court, ordered the clerk of the Circuit Court to correct the record so as to conform to the fact, by inserting after the words "unable to agree," "and were, by order of court, discharged from further consideration of this case." The plaintiff in error contended that his plea of former jeopardy should have been sustained, on the ground that the court had no right to correct the record in the manner stated; and that without such correction the plea of former jeopardy would be good, because, as the record then stood, it did not appear that the jury had been discharged. But the court said: "The district judge sat at the trial of the case in the Circuit Court. The fact was one within his knowledge and the knowledge of all present. The omission was a mere clerical one. Under the circumstances, we can discover no error in the order to correct the record in accordance with the fact. The power of a court to amend its own record *nunc pro tunc* has long been recognized, and is well established."

Scope of the Statutory Provisions. — In *Campbell v. Kirkpatrick*, 5 McLean (U. S.) 175, it was held that the statutory provisions above quoted have no application to civil cases and furthermore that they apply only to cases of which the Circuit and District Courts have concurrent jurisdiction; so that an indictment for an offense of which the Circuit Court has no jurisdiction cannot be tried by it upon a transfer from the District Court.

court had the latter court existed at the time of the commencement of such cases.¹ In one instance the enabling act authorized

1. See Act of July 3, 1890, 26 U. S. Stat. at L. 217, c. 356, admitting Idaho; Act of Feb. 22, 1889, 25 U. S. Stat. at L. 682, c. 180, admitting North Dakota, South Dakota, Montana, and Washington.

"Prior to 1847 there seems to have been great uncertainty in the matter of the transfer of cases pending in the territorial courts on the admission of the territories as states; but on the admission of the territory of Florida as a state, without any special provisions for the transfer of causes to the federal courts, giving rise to protracted litigation, Congress proceeded to legislate upon the subject; and in reference to this legislation Mr. Justice Davis, in *U. S. Express Co. v. Kountze*, 8 Wall. (U. S.) 342, says: 'On the admission of a new state into the Union, it becomes necessary to provide, not only for the judgments and decrees of the territorial courts, but also for their unfinished business. In recognition of this necessity, Congress, after Florida became a state, passed an act providing among other things that all cases of federal character and jurisdiction pending in the courts of the territory be transferred to the District Court of the United States for the District of Florida. The provisions of this act were made applicable, at the time of its passage, to cases pending in the courts of the late territory of Michigan, and were afterward extended to the courts of the late territory of Iowa. Congress, in making this provision for the changed condition of Iowa, thought proper in the same act to adopt a permanent system on this subject, and extend the provisions of the original and supplementary acts to cases from all territories which should afterwards be formed into states.' The provisions of the acts above referred to have been substantially incorporated into the Revised Statutes of the United States and constitute sections 567, 568, and 704 of the same." *Per* Corson, P. J., in *Dorne v. Richmond Silver Min. Co.*, 1 S. Dak. 22. But most of the territories admitted as states since the enactment of the sections of the United States Revised Statutes above cited were admitted under enabling acts which contained provisions superseding those sections.

Necessity of Congressional Authority. — "Unless Congress, by some legislation, either in the act of admission or elsewhere, provided for the survival of causes pending at the time of admission, then all such cases abate." *Dorne v. Richmond Silver Min. Co.*, 43 Fed. Rep. 692.

"The courts of the United States inferior to this court having no jurisdiction except as conferred by Congress, congressional legislation is necessary to enable those courts, after the admission of the state into the Union, to take jurisdiction of cases previously commenced in the courts of the territory, and not yet finally adjudged." *Koenigsberger v. Richmond Silver Min. Co.*, 158 U. S. 48.

Such Acts are Constitutional. — *Strasburger v. Beecher*, 44 Fed. Rep. 211; *Dorne v. Richmond Silver Min. Co.*, 43 Fed. Rep. 694.

A Case Pending in the Territorial Supreme Court on appeal may be removed. *U. S. v. Lynde*, 44 Fed. Rep. 215.

Construction of Enabling Acts. — "Such legislation has been so construed and expounded by this court as to give effect as far as possible, consistently with its terms and with the Constitution of the United States, to the apparent intention of Congress to vest in the courts of the United States the jurisdiction of such cases so far as they are of a federal character, either because of their arising under the Constitution and laws of the United States, or because of their being between citizens of different states." *Koenigsberger v. Richmond Silver Min. Co.*, 158 U. S. 48, *citing* *Freeborn v. Smith*, 2 Wall. (U. S.) 160; *U. S. Express Co. v. Kountze*, 8 Wall. (U. S.) 342; *Baker v. Morton*, 12 Wall. (U. S.) 150.

In *U. S. v. Taylor*, 44 Fed. Rep. 2, decided under an enabling act which provided for the removal of cases "pending" in the territorial courts, it was held that a case wherein a final decree granting a perpetual injunction had been granted was removable to the federal court and that proceedings to punish the defendant for contempt by violating the injunction might be taken in the federal court.

Diverse Citizenship as Ground of Removal. — In *Washington, etc., R. Co. v. Coeur D'Alene R., etc., Co.*, 160 U.

the constitutional convention therein provided for to make an ordinance regulating the transfer to the proper federal court of cases of federal cognizance pending in the territorial courts.¹

The Amount in Dispute Necessary to the Jurisdiction of the Federal Court is the same as in cases which it is sought to remove from a state to a federal court, viz., two thousand dollars.²

2. Waiver of Right of Removal. — A party may waive his right of removal by some unequivocal act showing his acquiescence in the jurisdiction of the state court.³ But silence or passive

S. 77, an action brought in the District Court of the territory of Idaho by a resident and citizen of the territory of Washington against a resident and citizen of the territory of Montana was held removable to the federal Circuit Court on the ground of diverse citizenship after the admission of Idaho as a state, the territories of Washington and Montana having also been admitted as states before the filing of the petition for removal.

In *Koenigsberger v. Richmond Silver Min. Co.*, 158 U. S. 41, a citizen of the territory of Dakota brought an action in the District Court of that territory against a citizen of New York, and it was held that after Dakota became a state the cause was removable to the federal court on the ground of diverse citizenship within the intent of the enabling act. See also *Blackburn v. Wooding*, 56 Fed. Rep. 545; *Dorne v. Richmond Silver Min. Co.*, 43 Fed. Rep. 690; *Herman v. McKinney*, 43 Fed. Rep. 680, in which cases the federal jurisdiction was sustained; *U. S. Express Co. v. Kountze*, 8 Wall. (U. S.) 342; *Baker v. Morton*, 12 Wall. (U. S.) 151. The federal jurisdiction was denied in the following cases, which were decided prior to the ruling of the Supreme Court in the two cases first above cited: *Strasburger v. Beecher*, 44 Fed. Rep. 209; *Johnson v. Bunker Hill, etc., Co.*, 46 Fed. Rep. 417; *Nickerson v. Crook*, 45 Fed. Rep. 658; and *Dunton v. Muth*, 45 Fed. Rep. 390.

1. Act of July 16, 1894, 28 U. S. Stat. at L. 111, c. 138, § 17, admitting Utah, referred to in *Hecht v. Metzler*, 82 Fed. Rep. 340, holding that such delegation of authority by Congress to the convention was valid; on which point see also *McCormick v. Western Union Tel. Co.*, 79 Fed. Rep. 449, 49 U. S. App. 116.

2. See *Lee v. Continental Ins. Co.*, 74 Fed. Rep. 424, and *supra*, p. 267 *et seq.*

3. Various Acts Constituting Waiver. — In *Gaffney v. Gillette*, 4 Dill. (U. S.) 264, note, a cause was pending in the Supreme Court of Colorado territory at the time of its admission as a state. The parties, at the suggestion of the state Supreme Court, filed therein a written stipulation invoking its action and submitting the cause to its judgment, and accordingly the decree was reversed and the cause remanded. It was held that the parties had waived their right of removal.

In *Gull River Lumber Co. v. School Dist. No. 39*, 1 N. Dak. 408, it was held that a defendant who answered in the state court, was successful on the trial, argued the plaintiff's appeal in the Supreme Court, and, having been defeated, applied for and obtained a rehearing and moved for and secured a continuance to a later day in the term, had conclusively waived his right of removal.

By obtaining from the state court an order appointing a receiver and an order for a writ of assistance the plaintiff waived his right of removal. *Ames v. Colorado Cent. R. Co.*, 4 Dill. (U. S.) 251.

In *Wing v. Chicago, etc., R. Co.*, 1 S. Dak. 455, previous to the convening of the first term of the state court as the successor of the territorial court, both plaintiff and defendant gave notice of trial, and the cause was put on the calendar. When it was reached for trial, the defendant moved for a continuance, upon the ground of absent witnesses. The court passed judgment on the motion, against the application. Thereupon the defendant filed a petition for removal of the cause to the federal court. In affirming a denial of the application the court said: "These unquestioned substantive acts on the part of defendant, actively submitting to the jurisdiction of the state court, are strong and positive evidence of its decision to try the case

inaction in the state court is not conclusive against a party as an election to remain in that court.¹

3. On Whose Application Removal May Be Made.—It is not necessary, as in removals under the Act of 1887-1888,² that the party applying for removal shall be a nonresident of the state in which the cause is pending, or of the territory in which it originated,³ and the enabling acts uniformly provide for removal by either the plaintiff or the defendant.⁴

4. Time for Application.—The enabling acts do not prescribe any time within which the right of transfer shall be exercised. It is said to be "perhaps true that the request should be made in a reasonable time,"⁵ and it is no objection to an application by a defendant that the time within which he is required to answer or plead in the state court has expired,⁶ or that he has

in the state court. They are inconsistent with a desire to substitute the United States courts for the state tribunal, and amount to an election on the part of defendant; and having once made it for any purpose, the right of transfer has been forfeited, and the application came too late."

In *Hecht v. Metzler*, 82 Fed. Rep. 340, there were trial and judgment in the territorial court, and a motion for a new trial was pending therein when the territory became a state. The state court to which the cause was transferred by force of the law heard and denied the motion for a new trial, and from the order denying the motion the plaintiff appealed to the Supreme Court of the state, where the defendant appeared without objection and united with the plaintiff in asking a decision of the cause. The Supreme Court reversed the judgment and remanded the cause to the court below for a new trial. On the coming down of the remittitur the defendant filed in the trial court his petition for removal. It was held that he had waived his right to have the cause removed.

See further, *supra*, p. 163.

1. *Ames v. Colorado Cent. R. Co.*, 4 Dill. (U. S.) 260.

Acts Not Constituting Waiver.—In *Carr v. Fife*, 44 Fed. Rep. 713, after the admission of the state, a stipulation was signed whereby the parties submitted the case for decision to the Superior Court of the state which was the successor of the territorial court in which the cause originated, but the state court never acted upon the stipulation, and after it had been filed granted a motion made by the defendants to re-

move the case to the federal court. It was held that the defendant was not precluded from thus removing the cause.

In *Strasburger v. Beecher*, 44 Fed. Rep. 209, it was held that the signing of a stipulation for a continuance in the state court did not debar the party from subsequently removing the cause.

2. See *supra*, p. 274.

3. *Herman v. McKinney*, 43 Fed. Rep. 689.

4. *Blackburn v. Wooding*, 56 Fed. Rep. 545, was a case removed on the application of the plaintiff.

5. *Strasburger v. Beecher*, 44 Fed. Rep. 211, where, however, Knowles, J., said that "if the application was made at any time before trial in the state court, there could be no objection but that it had been made in season," unless by some unequivocal act the party had waived his right.

In *Wing v. Chicago, etc., R. Co.*, 1 S. Dak. 459, the court said: "The provisions of the enabling act do not state when this written request shall be filed. the time must be left to the construction of the court to which the application is directed. * * * By this construction it is clear that a party has no right of transfer unless he files his written request asking the removal before he has taken any active steps in the case in the state court."

6. *Fraser v. Trent*, 74 Fed. Rep. 423; *Crown Point Min. Co. v. Ontario Silver Min. Co.*, 74 Fed. Rep. 419, holding that a provision that a removal could be had only "upon motion or petition * * * made under and in accordance with the Act or Acts of the Congress of the United States" referred to

already answered or pleaded in that court.¹

5. To What Court Application Is Made. — In most of the reported cases, if not in all, the application for removal was made to, and removal was made from, the state court which succeeded to the business pending in the territorial court.² But it has been held that under some circumstances an application to the state court would be wholly improper.³

6. Form and Contents of Application. — The enabling acts usually provide that cases shall remain in the state courts in the absence of a request for removal.⁴ A "written request" for removal is

the method of procedure adopted by Congress in the kindred subject of removal of cases originating in state courts, and did not require the application to be made within the time specified in respect of the latter class of cases.

1. *McCornick v. Western Union Tel. Co.*, 79 Fed. Rep. 449, a case arising subsequent to the enactment of the Act of Congress of 1887-1888 now in force, providing for the removal of causes from state to federal courts, which requires the application to be made before the defendant is required to answer or plead, etc., see *supra*, pp. 284-288.

In *Dunton v. Muth*, 45 Fed. Rep. 390, however, it seems to have been assumed by the court that it was necessary to make the application within the time specified by the Act of 1875, then in force, which regulated removals from state to federal courts.

2. See generally the cases cited in the several sections of this division.

The enabling acts usually designate the court simply as the "proper court."

The cause is removed from the state court in which, as the successor of the territorial court, it is pending, and the fact that a cause is pending in the Supreme Court of the state at the time when the right to a transfer is asserted is no objection to the exercise of the right. *Hecht v. Metzler*, 82 Fed. Rep. 343; *Bates v. Payson*, 4 Dill. (U. S.) 265; *Koenigsberger v. Richmond Silver Min. Co.*, 158 U. S. 41.

3. In *Bluebird Min. Co. v. Murray*, 45 Fed. Rep. 388, it was held that the application for removal might be properly filed in the territorial court during its existence, and that where a transfer of the case from the territorial court to the state court as its successor had been actually effected the cause could not be removed from the state court.

Hanford, J., said: "On the other hand, I have heretofore decided in a case entitled *Carr v. Fife*, 44 Fed. Rep. 713, that the request was properly filed in a state court which had never assumed or exercised jurisdiction of the cause, but whose clerk had, before the organization of the national courts for the district, received actual possession of the record and papers of the cause. I still hold to that opinion, and it is in harmony with the decision made by Judge Knowles in the case of *Strasburger v. Beecher*, 44 Fed. Rep. 209. But obviously, in whatever court the request may be properly filed, to be effective it must be filed in time to guide the officers of the respective courts in the actual transfer of the case, and it is too late after the fact of succession by a state court shall have actually occurred, by reason of such court having, with the knowledge and acquiescence of all the parties, by a positive act assumed jurisdiction."

It was also held by *Hanford, J.*, in *Murray v. Bluebird Min. Co.*, 45 Fed. Rep. 387, that where the plaintiff voluntarily appeared in the state court and resisted a motion to require him to give additional security against damages by reason of an injunction granted by the territorial court, and, in obedience to the order of the state court, afterwards filed therein an additional bond, full and perfect jurisdiction in the state court had attached, and he could not thereafter procure a removal of the cause to the federal court.

4. Exception to Rule. — By the enabling act admitting Colorado, cases pending in the territorial courts at the time of its admission were transferred to the proper federal court by virtue of the act itself; it absolutely transferred those cases, without any act of the parties. *Ames v. Colorado Cent. R. Co.*, 4 Dill. (U. S.) 251, *quoted in*

the form of application usually prescribed, though in one instance more specific provision was made;¹ but in any case it is customary and appears to be necessary to allege in the written application for removal all the facts essential to federal jurisdiction which do not affirmatively appear in other parts of the record.²

Allegation of Amount in Dispute. — If the record in a cause removed to the federal court is defective in not containing a specific allegation that the matter in dispute exceeds the sum of two thousand dollars,³ the federal court may permit the record to be amended by affidavits supplying the formal averments of value.⁴

7. Notice of Application. — The enabling acts do not require notice of the application for removal, and no notice is necessary.⁵

8. Bond for Removal. — The provisions of the United States statutes which require a bond to be filed as one of the conditions of removal of a cause from a state to a federal court⁶ do not apply in proceedings to remove a cause originating in a territorial court.⁷

9. Hearing and Order of Removal — Hearing and Determination. — The court to which the application for removal is made has the power to determine whether the cause is removable and the request for removal sufficient, subject, however, to the power of the federal court to settle the question by assuming or refusing jurisdiction.⁸ But the state court has no authority to decide

Wing v. Chicago, etc., R. Co., 1 S. Dak. 460.

1. Most of the enabling acts provide for removal upon "written request" without otherwise prescribing the requisites of the application. But the provisions of the Constitution of Utah adopted pursuant to the authority delegated by the enabling act required civil actions to be removed only "upon motion or petition by one of the parties thereto, made under and in accordance with the Act or Acts of Congress of the United States." Commenting upon the provision in *McCornick v. Western Union Tel. Co.*, 79 Fed. Rep. 451, the court said: "This means that the application and proceedings should in form conform to similar proceedings under the Acts of Congress, and show the jurisdictional facts which would warrant the assumption of jurisdiction by the federal court."

2. See the preceding note, and *Dunton v. Muth*, 45 Fed. Rep. 390, which was a case removed under an enabling act providing simply for a "written request;" *Crown Point Min. Co. v. Ontario Silver Min. Co.*, 74 Fed. Rep. 421; *Strasburger v. Beecher*, 44 Fed. Rep. 214.

3. As to the amount in dispute necessary to confer jurisdiction, see *supra*, p. 410. It must affirmatively appear in the petition for removal or elsewhere in the record that the requisite jurisdictional amount was in dispute at the commencement of the suit and not merely at the date of signing the petition. *Strasburger v. Beecher*, 44 Fed. Rep. 214.

4. *Carr v. Fife*, 156 U. S. 494 [*affirming* 45 Fed. Rep. 209], holding that it was proper to admit such affidavits though a decree had been rendered where the term at which the decree was entered had not ended; but the court said that the procedure would have been more formal if the decree had been set aside and renewed after the amendment of the record by the affidavits.

5. *Strasburger v. Beecher*, 44 Fed. Rep. 213. See also for the same doctrine in analogous cases, *supra*, p. 319.

6. See *supra*, p. 328 *et seq.*

7. *Strasburger v. Beecher*, 44 Fed. Rep. 209, holding that no bond is necessary in removals under the enabling acts. See also *Wing v. Chicago, etc.*, R. Co., 1 S. Dak. 459.

8. *Strasburger v. Beecher*, 44 Fed. Rep. 212. See also, for the same

any question of fact.¹

Order of Removal. — While it is customary to make an order of removal,² still, if the cause is removable and the proceedings for removal are regular, the jurisdiction of the court in which the cause is pending is *ipso facto* ousted by the filing of the "written request;"³ no order of removal is necessary to confer jurisdiction upon the federal court, and no refusal of an order can prevent that jurisdiction from attaching.⁴

10. Filing Papers in Federal Court — Removal Takes Original Papers. — The enabling acts do not require that any certified copy of the record shall be filed in the federal court; they contemplate that the original papers in the cause shall be transferred to that court.⁵

Certiorari from Federal Court. — If a cause has been properly removed the federal court will issue a writ of certiorari requiring the court whence the cause was removed to send up the papers on file therein, where such writ would be appropriate in a cause originating in a state court and removed to a federal court.⁶

11. Extent of Jurisdiction Acquired by Federal Court. — Upon removal of the cause to the federal court that court may proceed as the territorial court where the cause was pending would have proceeded if it had retained the cause.⁷

12. Remand and Costs on Remand — Grounds for Remand. — A cause removed to a federal court will be remanded upon the same grounds that would necessitate a remand had the cause originated in a state court and been removed to the federal court,⁸ and it

doctrine in analogous cases, *supra*, p. 338.

1. *Miller v. Sunde*, 1 N. Dak. 3. See also *supra*, p. 340.

2. See *McCornick v. Western Union Tel. Co.*, 79 Fed. Rep. 450; *Carr v. Fife*, 44 Fed. Rep. 714.

3. *Miller v. Sunde*, 1 N. Dak. 1; *Strasburger v. Beecher*, 44 Fed. Rep. 212, holding that in that respect the same rule applies as in the analogous cases of removals from state to federal courts, for which see *supra*, p. 347.

4. *Strasburger v. Beecher*, 44 Fed. Rep. 212, applying the rule laid down *supra*, p. 347, in analogous cases.

5. *Strasburger v. Beecher*, 44 Fed. Rep. 211, where the court quoted the enabling act for the admission of North Dakota, South Dakota, Montana, and Washington, 25 U. S. Stat. at L. 683, c. 180, § 23, which provided that "all the files, records, indictments, and proceedings relating to any such cases shall be transferred to such circuit, district, and state courts respectively."

6. See *Dunton v. Muth*, 45 Fed. Rep. 390, and *supra*, p. 387.

7. *Koenigsberger v. Richmond Silver Min. Co.*, 158 U. S. 51.

Thus where a case was tried in a territorial District Court and an appeal from the judgment therein was taken to the Supreme Court of the territory, of which court the state Supreme Court became the successor, whence the case was removed to the federal Circuit Court, it was held that whether the judgment should be affirmed or reversed, the federal court could enter the proper judgment and if necessary try the case again. *Bates v. Payson*, 4 Dill. (U. S.) 265. See also *Koenigsberger v. Richmond Silver Min. Co.*, 158 U. S. 41.

8. See *supra*, p. 366 *et seq.*; *Hecht v. Mezler*, 82 Fed. Rep. 340, where the cause was remanded on the ground that the removing party had waived his right of removal; *Carson v. Donaldson*, 45 Fed. Rep. 821, where the cause was remanded on the ground that there was no separable contro-

will be so remanded by the court of its own motion whenever the want of federal jurisdiction appears.¹

Costs on Remand. — Upon remanding the cause costs will be taxed against the party who procured the removal.²

13. Appeal and Error. — Orders granting or denying a petition for removal are probably appealable wherever a like order in a cause in the state court would be appealable.³

IV. FROM ONE STATE COURT TO ANOTHER — 1. Of Civil Causes — a. AUTHORITY AND GROUNDS FOR REMOVAL — Authority for Removal. — Every case must remain in the court where it originated until removed by lawful authority, and no court has inherent power to remove a cause pending therein to another court; that power is derived entirely from the statute.⁴ Jurisdiction by

versy, which was the only basis for removal.

Judge Ordering Removal Disqualified. — It is no ground for remand that the judge who made the order of removal was disqualified by reason of having been attorney for one of the parties. *Strasburger v. Beecher*, 44 Fed. Rep. 209.

1. *Nickerson v. Crook*, 45 Fed. Rep. 658; *Carson v. Donaldson*, 45 Fed. Rep. 821, where the cause was remanded though both parties sought to uphold the federal jurisdiction.

2. *Hecht v. Metzler*, 82 Fed. Rep. 343.

3. See *supra*, p. 391 *et seq.*

In *Wing v. Chicago*, etc., R. Co., 1 S. Dak. 455, an appeal from an order denying a removal was affirmed.

4. *Shannon v. Smith*, 31 Mich. 451. See also *Santa Cruz v. Santa Cruz R. Co.*, 56 Cal. 148.

In *Bliss v. Hurd*, 168 Mass. 464, the court said: "It often happens that two courts have concurrent jurisdiction over actions, and yet there is no right of removal of such actions from one to the other or from the inferior court to the superior court. The right to remove an action from one court to another does not depend upon the original jurisdiction of the court to which the action is removed, but upon the terms of the statute authorizing the removal."

Construction of Statutes Authorizing Removal. — In *Dion v. Fowers*, 128 Mass. 192, it was held that the title to real estate was not brought in question within the meaning of Gen. Stat. Mass., c. 120, § 13, then in force, in a petition to enforce a mechanic's lien, so as to authorize its removal from the District Court to the Superior Court on appli-

cation of a mortgagee of the premises who contended that his mortgage took precedence of the lien. The court construed the word "action" in the statute as not embracing proceedings to enforce statutory liens.

Pub. Stat. Mass., c. 152, § 7, provides for the removal from the Superior Court to the Supreme Judicial Court of certain "actions, except of tort." In *Carter v. Wabash*, etc., R. Co., 137 Mass. 187, it was held that where the plaintiff's declaration contained counts both in contract and in tort, all alleged to be for the same cause of action, the cause was not removable. The court said: "As the law now stands, it prohibits any action of tort from being brought in or removed to this court. * * * If the defendant could remove such a case, it would be in the power of the plaintiff to oust the jurisdiction of the court by discontinuing his counts in contract and leaving his case purely one of tort."

The statute last above cited was held not to embrace actions for flowing land, since it is expressly provided by section 3 of the same chapter that the Superior Court "shall have exclusive original jurisdiction of complaints for flowing lands." *Humphrey v. Berkshire Woollen Co.*, 10 Allen (Mass.) 420.

Where criminal jurisdiction is exclusively vested in one of several branches of a court and jurisdiction of civil cases is denied to that branch, it may nevertheless try a civil case transferred to it where another statute authorizes a judge of either branch to hear and determine a case pending in another branch, when from any cause the judge of the latter may be unable to dispose of all the cases before him without unreasonable and expensive

removal cannot be conferred by mere waiver or consent of parties where the statute does not authorize the removal under any circumstances.¹

Constitutionality of Statutes.—Statutes providing for the removal of causes are sometimes declared invalid on the ground that they invade the constitutional jurisdiction of the court in which the action was originally brought.² But the general right of the legislature to regulate the practice in the state courts is beyond dispute, and a provision for removal from one court to another does not impair the obligation of a contract nor take away any vested right.³

Grounds for Removal.—The statutes authorizing removal which are considered in this article⁴ do not usually mention grounds

delay. *Mengel Jr. Brothers Co. v. Jackson*, 94 Ky. 472.

1. *Kindel v. Le Bert*, 23 Colo. 385, where, however, the assumption of jurisdiction by a court to which the cause was transferred without authority was not assigned for error nor discussed by counsel, and the court proceeded to a consideration of the errors assigned.

An Exceptional Instance.—Where a cause is transferred by consent to a court which would have had original jurisdiction thereof it may be treated as an original action in the latter court, so that it will be immaterial whether the court whence the cause was transferred had or had not jurisdiction thereof. *Lundgren v. Crum*, 47 Neb. 242.

2. A constitutional provision that a certain court shall have "general jurisdiction in law and equity" will invalidate an act of the legislature authorizing the court of its own motion, and without the consent of the parties, to transfer cases pending therein to another court not of co-ordinate jurisdiction. *De Hart v. Hatch*, 3 Hun (N. Y.) 375. See also *Alexander v. Bennett*, 60 N. Y. 204.

But it is competent for a party to waive his constitutional right, and where he submits to the transfer without objection and the cause proceeds to trial and judgment, also without objection, he cannot for the first time urge the invalidity of the judgment on appeal. *Heath v. Hubbell*, 6 Daly (N. Y.) 183, followed in *Farrington v. O'Conner*, 6 Daly (N. Y.) 209.

3. *Johnson v. Ackerson*, 3 Daly (N. Y.) 432.

In *Michigan*, How. Annot. Stat. (1882), § 6584, now Comp. Laws Mich.

(1897), § 638, providing for removal of causes from the Circuit Court of Kent County to the Superior Court of Grand Rapids, was held constitutional in *Wood v. Kent Circuit Judge*, 105 Mich. 378, where the court said: "The section providing for the removal of causes from the Circuit Court to the Superior Court of Detroit is, so far as any constitutional question can be raised, identical with the section now before us, and the constitutionality of that act has been recognized by this court." Citing *Bigelow v. Booth*, 39 Mich. 622, *Rankin v. Wayne Circuit Judge*, 39 Mich. 115, *Butler v. Wayne Circuit Judge*, 41 Mich. 654.

Construction of Constitution.—A constitutional provision vesting in the courts the power to change the venue of cases does not render invalid an act of the legislature providing for the transfer of causes from one court to another, both in the same venue, and having concurrent jurisdiction of such causes. *Armstrong v. Emmet*, 16 Tex. Civ. App. 242.

Curative Acts.—Where a cause has been removed upon the application of the defendant a subsequent legislative act curing all defects of jurisdiction and procedure in the removal of such causes theretofore effected cannot be injurious to the rights of the defendant, and is not open to his objection that it was not within the scope of legislative authority. *Hyde v. Greenough*, 11 Cush. (Mass.) 87.

4. **Change of Venue.**—As to the grounds for change of venue and the practice in procuring a change, see article CHANGE OF VENUE, vol. 4, p. 373.

Disqualification or Incapacity of Judge.—In *New York*, Code Civ. Pro., § 342, provides for the removal to the

for removal, the legislature having determined that for the purpose of relieving the crowded docket of a court and facilitating the disposition of judicial business, or for the purpose of giving to a defendant the right of selecting a court of concurrent jurisdiction, or for other reasons, it is expedient that in all cases of a certain class one or both of the parties may have a removal upon complying with certain formalities.¹

b. WAIVER OF RIGHT OF REMOVAL. — By taking proceedings tantamount to a submission of the controversy to the court or to an expression of intention to try it there, a party may waive his right of removal.²

Supreme Court of an action or special proceeding pending in the County Court or before a county judge if the judge "is for any cause incapable to act." In *Matter of Munger*, 10 N. Y. App. Div. 347, it was held that "the section refers to an incapacity relating to a particular action or special proceeding, rather than to a general incapacity to act as a judge at all," and that the section "has no application whatever to a voluntary absence of the county judge from the state." As to disqualification of a judge as a ground for change of venue see article CHANGE OF VENUE, vol. 4, p. 405 *et seq.*

As to Title to Land in Issue as a ground for ousting the jurisdiction of a justice of the peace and transferring the cause to another court, see article JUSTICES OF THE PEACE, vol. 12, p. 675 *et seq.*

1. In California, Code Civ. Pro., § 838, provides for the compulsory transfer to the Superior Court of an action in a justice's court "if it appear from answer of the defendant, verified by the his oath, that the determination of the action will necessarily involve the question of * * * the legality of any tax, impost, assessment, toll, or municipal fine." It was held in *Santa Cruz v. Santa Cruz R. Co.*, 56 Cal. 150, that if a complaint in a justice's court to recover a license tax states no cause of action a transfer is not authorized and the Superior Court could acquire no jurisdiction thereby.

Code Civ. Pro. Cal., § 933, provides that "all proceedings in civil actions in police courts must, except as in this title otherwise provided, be conducted in the same manner as civil actions in justices' courts." This section, together with section 838 above quoted, authorizes the transfer of a cause from a police court to the Superior Court

where the legality of a municipal tax is in issue. *Santa Barbara v. Eldred*, 95 Cal. 378. See also *Santa Barbara v. Stearns*, 51 Cal. 499.

A license charge or fee for the transaction of business acquired by a municipal ordinance is a tax within the meaning of the term "tax" as employed in Code Civ. Pro. Cal., § 838, above quoted.

2. Where the defendant elects to proceed to trial and submits to the jurisdiction of the court, he waives the right of removal. *Halperin v. Schermerhorn*, (C. Pl. Gen. T.) 8 Misc. (N. Y.) 336, where an application made after reversal of a judgment on appeal and a remand of the cause for a new trial was held to have been properly denied.

In New York, Code Civ. Pro., § 3216, as amended by Laws 1895, c. 946, provides for the removal of certain causes from the District Court of New York city to the City Court of New York city by the defendant "after issue is joined and before an adjournment has been granted upon his application." Prior to the amendment above mentioned the section of the code above cited provided for the removal of such causes to the Court of Common Pleas. An adjournment caused by the defendant's demand for a bill of particulars was held to be the equivalent of an adjournment on his application, and the cause was not thereafter removable. *Ives v. Quinn*, (C. Pl. Gen. T.) 7 Misc. (N. Y.) 660.

For a case holding that various adjournments had under peculiar circumstances could not be attributed to the defendant so as to constitute a waiver of his application for removal, see *Schmitzpahn v. Davis Sewing Mach. Co.*, (Supm. Ct. App. T.) 19 Misc. (N. Y.) 621.

c. AMOUNT IN DISPUTE. — The right of removal is sometimes limited to cases in which a definite amount is in dispute.¹ Where the right is confined to cases in which "the damages claimed" exceed a certain sum, it has been held that a claim of interest on the principal sum demanded may be considered as a part of the damages claimed.²

d. TIME FOR APPLICATION. — There is no uniformity in the statutory provisions prescribing the time when the application for removal shall be made. Some of them require it to be made at the time of entering appearance.³ Most of them authorize a removal at a later period,⁴ but not after a trial of the cause upon the merits.⁵ A premature application will not affect the juris-

For a case holding that the application was too late because made after an adjournment, see *Dinkel v. Wehle*, (C. Pl. Gen. T.) 63 How. Pr. (N. Y.) 298.

In *Krahner v. Heilman*, 16 Daly (N. Y.) 132, an action in a District Court, the defendant, upon the return day of the summons, offered an undertaking, which was rejected; but leave to file another undertaking was granted, and an adjournment had for the production of sureties to justify. The undertaking was filed; but upon the adjourned day, the defendant did not appear with the sureties. His default was taken and judgment rendered in the plaintiff's favor. This judgment was subsequently vacated, and the default opened, and the defendant permitted to come in and defend upon the deposit by him of the amount of the plaintiff's demand, with costs and interest, with the clerk of the District Court. A stipulation to that effect was signed and an order entered thereon. The trial of the cause was adjourned thereafter from time to time. When it finally came on for trial the defendant produced the sureties upon his undertaking, and applied for an order removing the cause under Code Civ. Pro., § 3216. It was held that he had clearly waived his right of removal, and that the District Court had power to try the cause.

1. Construction of Statute. — In *Gray v. Thrasher*, 104 Mass. 373, it was held that a writ of scire facias returnable before the municipal court of Boston, to charge a trustee on a judgment rendered against the principal defendant, was not a civil action wherein the debt or damage exceeded a definite sum within the meaning of the statutes which authorized the removal of

certain cases of that description to the Superior Court. The court said: "A writ of scire facias * * * is a judicial writ, which can only issue from the court having possession of the record on which it is founded. * * * No debt or damage is therein demanded."

2. *Blumenthal v. Lloyd*, (Supm. Ct. App. T.) 18 Misc. (N. Y.) 195.

3. Under Comp. Laws Mich. (1897), § 638, the removal of a cause by the defendant from the Circuit Court of Kent county to the Superior Court of Grand Rapids is to be had "at the time of entering his appearance." The fact that a preliminary injunction has been issued upon an *ex parte* showing does not prevent a removal upon proper application. *Wood v. Kent Circuit Judge*, 105 Mich. 378.

4. In *Lyle v. Baker*, 4 Dall. (Pa.) 433, the statute provided for the removal of a cause from one court to another "on or before the first day of the next term after the said action shall have been commenced." It was held that the cause was removable on or before the first day of the term next after that to which the original writ was returnable.

In *New York* an application for removal of a cause from the New York city District Court under Code Civ. Pro., § 3216, after an adjournment at the defendant's request is too late. *Dinkle v. Wehle*, (C. Pl. Gen. T.) 63 How. Pr. (N. Y.) 298. See also *supra*, p. 417, note 2.

5. In *Smith v. Castles*, 1 Gray (Mass.) 108, it was held that after a trial and a new trial granted the case was not within the provision of Stat. Mass. 1844, c. 162, that any action entered in the Court of Common Pleas where the *ad damnum* in the writ ex-

diction of the court in which the cause is pending.¹

e. WHO MAY MAKE APPLICATION. — A removal can be had only at the instance of a party to the cause.² One of several defendants may, however, have a removal upon his sole application where the statute authorizes removal upon application of "the defendant."³ And one of several defendants who has not been served and has not appeared in the cause may be disregarded in proceedings for removal.⁴

f. REMOVAL BY CONSENT OR STIPULATION. — The statute

ceeded a certain sum "after the first term may be carried to the Supreme Judicial Court by the consent of both parties, provided it be done before the trial commences in the Court of Common Pleas."

Constitutionality of Statute. — Where two courts have concurrent jurisdiction, but neither has appellate jurisdiction over the other under the constitution, a statute authorizing a removal of a cause from one court to the other after the determination of the merits of the action is unconstitutional. *Heath v. Kent Circuit Judge*, 37 Mich. 372, *Distinguished in Wood v. Kent Circuit Judge*, 105 Mich. 378, where it was held that the issuance of a preliminary injunction upon an *ex parte* showing was not such a determination of the merits as to render a subsequent removal obnoxious to constitutional objections.

1. In *New York* a judgment of the District Court will not be reversed on appeal because of the denial of an application for removal under Code Civ. Pro., § 3216, unless the record shows that the application was made after issue joined. *Zeimer v. Stearns*, (C. Pl. Gen. T.) 14 Misc. (N. Y.) 7.

2. It was held in *Robbins v. Justices*, 12 Gray (Mass.) 225, that a stockholder summoned in under Stat. 1851, c. 315, for the purpose of giving him an opportunity to try the question whether any judgment obtained by the plaintiff should be enforced against his goods and estate, was in no sense a party to the action and could not remove it, upon his affidavit and request, from the Superior Court, where it was commenced, to the Supreme Judicial Court under the statutes now embodied in Pub. Stat. Mass., c. 152, § 8.

3. Under Stat. Mass. 1840, c. 87, § 3, which provided for removal of a cause from the Court of Common Pleas to the Supreme Judicial Court on affidavit of "the defendant," it was held that one of several defendants could have

the cause removed. *Whiton v. Brodhead*, 3 Cush. (Mass.) 356.

Pub. Stat. Mass., c. 152, § 7, provides that certain actions, if brought in the Superior Court, "may, before the trial is commenced, be carried by consent of parties to the Supreme Judicial Court." By section 8 of the same chapter the defendant, at the first term at which he is held by law to appear, may make oath or affirmation "that he verily believes he has a substantial defense, that the amount in controversy exceeds the amount or value mentioned, * * * that he intends to bring the cause to trial," and may request that "the same may be removed to the Supreme Judicial Court," whereupon "it shall be immediately transferred, with the papers therein, to the clerk of that court, * * * and the cause shall proceed as if originally brought in that court." In *American Finance Co. v. Bostwick*, 151 Mass. 26, it was said: "Any one of the defendants may remove such an action from the Superior Court to the Supreme Judicial Court, although the other defendants do not join in the request." *Citing Whiton v. Brodhead*, 3 Cush. (Mass.) 356. *Compare Jones v. Kent Circuit Judge*, 35 Mich. 494, a case arising under a Michigan act providing for the removal of causes from the Circuit Court of Kent County to the Superior Court of Grand Rapids on petition of "the defendant," where the court remarked that the apparent intent and policy of the law "would seem to require all the defendants to join in such petition or the cause could not be removed."

4. *Goebel v. Stevenson*, 35 Mich. 172.

Under Code Civ. Pro. N. Y., § 3216, authorizing the removal of certain actions from a District Court of New York city to the New York City Court on application of "the defendant," it was held that one of several defendants who alone was served with summons

sometimes provides for a transfer upon written agreement of the parties entered of record.¹ If such an agreement imposes conditions upon one of the parties, such as the payment of costs, he cannot insist upon a transfer until he has fulfilled the condition.² A case may be transferred by consent in open court where the parties affirm the existence of all the facts made essential to the transfer by statute, although a different method of effecting a transfer is provided by statute.³ A cause cannot be removed upon mere consent of the parties and without an order where the statute requires an order and where the court to which it is sought to remove the cause has no jurisdiction of the subject-matter except by removal under the statute.⁴

g. APPLICATION FOR REMOVAL.—The statutes usually authorize a removal only upon motion, petition, or request of the party entitled to the removal.⁵

h. BOND OR UNDERTAKING—(1) *Necessity and Sufficiency*—**Necessity of Bond.**—In some cases the statute requires the party applying for removal to give a bond or undertaking to enter the cause in the court to which it is removed, or to pay any judgment that may be rendered against him. In other cases no bond is required by the statute.

Amount of Bond.—In one state the statute provides that the court shall fix the amount of the bond within prescribed limits.⁶

and appeared in the action was entitled to a removal on his sole application. *Nicoll v. Palmer*, (C. Pl. Spec. T.) 24 Civ. Pro. (N. Y.) 409.

1. *Ex p. Burton*, 100 Ala. 391.

2. *Ex p. Burton*, 100 Ala. 391, an attempted transfer of a case by agreement under the Act of March 1, 1881 (Acts Ala. 1880-1881, p. 268), from the City Court of Montgomery to the Circuit Court.

3. *Ex p. Rice*, 102 Ala. 671. In *Goebel v. Stevenson*, 35 Mich. 172, it was held that the transfer of a cause by consent of all the parties entered of record, the court also consenting to another court which had jurisdiction of the subject-matter, was effective, though the statute provided for a transfer upon petition and bond and made no provision for a transfer by stipulation.

4. *Bray v. Marshall*, 66 Mo. 122, an action of ejectment transferred by mere consent of the parties from the Circuit Court of the county in which the land was situated to the Circuit Court of another county.

5. **Implied Request.**—In *Leary v. Reagan*, 115 Mass. 558, decided under a statute which provided for the re-

moval of a cause from a police court to the Superior Court upon request of the defendant when it appeared by the pleadings that the title to real estate was in question, it was held that where the judge of the police court ordered the defendant to remove such a cause and to recognize with a surety therefor, and the defendant, protesting against the order, recognized as ordered, and removed the cause, he thereby in substance and effect requested its removal and could not have it dismissed from the Superior Court. The court said: "If he did not wish to have the case removed, he had only to refuse so to recognize, and it would then have been the duty of the police court to hear and determine the case as if there had been no request to remove it."

6. In New York, Code Civ. Pro., § 3216, concerning removals from a District Court of New York city to the Court of Common Pleas (now to the New York City Court), provides for the filing of an undertaking "in a sum fixed by the justice, not exceeding twice the amount of the damages claimed," etc. It was held in *Mongan v. Lehigh Valley R. Co.*, (C. Pl. Gen. T.) 14 Misc. (N. Y.) 26, where the

Recital of Consideration. — Where the statute provides for an "undertaking," which is usually an unsealed instrument, no expressed consideration is necessary to its validity; the statute creates the liability.¹

Execution of Bond. — It is not required that the bond or undertaking shall be executed by the applicant for removal.²

Approval or Disapproval. — The court has power in the exercise of a sound discretion to disapprove the security,³ but cannot reject it arbitrarily⁴ nor lawfully refuse to approve or disapprove it.⁵ If the court erroneously refuses to pass upon the sufficiency of the bond offered with the petition for removal, and denies the application, mandamus will lie to compel consideration of the bond.⁶

Defect in Bond. — Where the statute requires a party seeking a removal to give a bond, mere defects in the bond which do not create any doubt as to the terms of the obligation will be regarded as immaterial after a removal is actually effected.⁷

plaintiff claimed two hundred and fifty dollars damages, to be no sufficient ground for refusing to grant an order of removal that an undertaking presented by the defendant in the sum of five hundred dollars was executed before the justice had fixed the amount, since the amount of the undertaking presented was the greatest which the justice had the power to exact. The court said: "In the case of *Scherer v. Hopkins*, (C. Pl. Gen. T.) 42 N. Y. St. Rep. 189, this court ruled that such a ground as that assigned by the justice in the case at bar presented no reason for the denial of the motion, the granting of which is made mandatory by the statute if its conditions are fulfilled."

The approval of the court indorsed upon the undertaking presented is a sufficient compliance with the code provision that he shall fix the amount of the undertaking. *Dunseith v. Linke*, 10 Daly (N. Y.) 363.

Execution Before Amount Fixed. — In *Scherer v. Hopkins*, (C. Pl. Gen. T.) 42 N. Y. St. Rep. 189, it was held that an undertaking may be executed before the amount is fixed by the court, and if the undertaking so executed is in the amount so fixed it will be binding upon the sureties although the fact of the fixing is not recited in it.

1. *Johnson v. Ackerson*, 3 Daly (N. Y.) 430.

2. *Mongan v. Lehigh Valley R. Co.*, (C. Pl. Gen. T.) 14 Misc. (N. Y.) 26, a removal under Code Civ. Pro. N. Y., § 3216.

3. *Hogan v. Devlin*, 2 Daly (N. Y.) 184.

4. In *O'Connor v. Moschowitz*, (C. Pl. Gen. T.) 48 How. Pr. (N. Y.) 451, the sureties on an undertaking justified on sworn examinations and the plaintiff made no objection to their sufficiency. The court approved the sufficiency of one of the sureties, but refused to approve the undertaking or to sign the order of removal, on the ground that he was personally acquainted with the other surety, whom he would not accept. It was held that the rejection of the undertaking was an abuse of discretion requiring a reversal of the judgment subsequently rendered. The court said: "A judge should have no private reason; it must be a judicial reason, and not an arbitrary, whimsical, capricious reason."

5. *Hogan v. Devlin*, 2 Daly (N. Y.) 184.

6. *Turner v. Wayne Circuit Judge*, 27 Mich. 5.

7. In *Muir v. Judge*, 28 Mich. 266, the plaintiffs in a cause pending in the Circuit Court of Wayne county filed a petition under the statute for the removal of the cause to the Superior Court of Detroit. With their petition they presented a bond signed by themselves as principals and by one surety, as required by the statute; and thereupon an order was entered in the cause in the Circuit Court accepting the security. The bond was in the usual form except in the condition, and contained the names of the plaintiffs as principals,

(2) *Action On.* — Upon breach of the obligation of the bond or undertaking no demand is necessary before bringing action against the obligors, and where the condition of the instrument is that the party shall pay any judgment that may be rendered against him, it is not necessary to exhaust the remedies on the judgment before bringing suit for breach of the obligation.¹

i. *ORDER OF REMOVAL.* — A statute which provides for removal upon the motion of a party contemplates an order of court to make the removal regular,² and it is the absolute duty

and that of the surety as surety, and recited the proceedings for a transfer of the cause, concluding as follows: "Now the condition of this obligation is such that if the said — shall cause to be filed and entered in the said Superior Court, on the first day of next term, copies of all papers filed and proceedings had in said cause in the said circuit, then this obligation to be void, otherwise to remain in full force and effect." In compliance with the condition of the bond copies of all the papers filed in the cause were filed in the Superior Court, and the cause was duly noticed for hearing in the latter court and placed upon the docket. Thereupon, on motion of the defendant, the court dismissed the cause for want of jurisdiction by reason of the incompleteness of the bond in not naming the obligors in the condition thereof. The plaintiffs then filed a certified copy of this order of dismissal in the Circuit Court and noticed the cause for trial in that court; but when the cause was reached on the docket the circuit judge declined to proceed with the trial, holding that by the law the cause was removed to the Superior Court. The plaintiffs then moved in the Circuit Court for an order vacating the former order accepting the security offered upon the petition for removal, and the circuit judge refused to hear the motion, holding that by the removal all proceedings in that court were stayed, and that he had no authority to proceed further therein. The plaintiffs then applied to the Supreme Court for a mandamus to compel the judge of the Superior Court to vacate and set aside the order dismissing the cause from that court, and a writ of mandamus was granted. The court said that "after the papers were filed and the conditions of the bond fully performed the bond became *functus officio*, and any such irregularities in it would not thereafter warrant

a dismissal of the cause." See also *supra*, p. 335.

Remand to Cure Defect. — In *Nicoll v. Palmer*, (C. Pl. Spec. T.) 24 Civ. Pro. (N. Y.) 409, a cause was removed from a District Court of New York city to the Court of Common Pleas, under Code Civ. Pro., § 3216 [amended by Laws 1895, c. 946, by substituting the New York City Court for the Court of Common Pleas]. The application for removal was made by one of several defendants, who alone was served with process and appeared in the action, but the undertaking incorrectly recited that the defendants appeared and joined issue and applied for the removal. The Court of Common Pleas, holding that the erroneous recital might affect the liability of the surety upon the undertaking, refused to remand the cause, but remanded the undertaking for the purpose of amendment in the District Court. *Citing Levy v. Scheringer*, (C. Pl. Spec. T.) 19 Civ. Pro. (N. Y.) 346, where an undertaking which was defective in not reciting the amount of any penalty was remanded for amendment, the court *citing* Code Civ. Pro., §§ 725, 729, 730.

1. *Johnson v. Ackerson*, 3 Daly (N. Y.) 430.

2. *Armstrong v. Emmet*, 16 Tex. Civ. App. 242. See also *Bray v. Marshall*, 66 Mo. 122.

In New York, Code Civ. Pro., § 3216, providing for the removal of certain causes from a New York city District Court to the City Court declares that "from the time of the granting of the order (of removal) the City Court of the city of New York has cognizance of the action." The jurisdiction of the District Court is not divested until an order of removal is granted. *Ives v. Quinn*, (C. Pl. Gen. T.) 7 Misc. (N. Y.) 660. See also *People v. District Ct.*, 13 Civ. Pro. (N. Y.) 137.

Removal Without Order. — The New York Constitution of 1894, art. 6, § 6,

of the court to make an order where the cause is removable and the proceedings for removal are regular.¹

j. CONSUMMATING REMOVAL BY ENTERING CAUSE. — The removal should be consummated by duly entering the cause in the court to which it is removed within the time prescribed by statute.²

k. VALIDITY OF PROCEEDINGS AFTER DIVESTITURE OF JURISDICTION BY REMOVAL. — Further proceedings in the court from which a cause has been legally removed are absolutely void,³ and

abolished Circuit Courts and Courts of Oyer and Terminer, and provided that the jurisdiction of those courts "shall thereupon be vested in the Supreme Court." It was held that the provision was self-executing, and that the Supreme Court had jurisdiction to try a criminal case pending in the Court of Oyer and Terminer without any statutory provision or any order of court authorizing the transfer. *People v. Hoch*, 150 N. Y. 291.

1. *Mongan v. Lehigh Valley R. Co.*, (C. Pl. Gen. T.) 14 Misc. (N. Y.) 26; *Scherer v. Hopkins*, (C. Pl. Gen. T.) 42 N. Y. St. Rep. 189.

Mandamus Will Lie to compel a court to allow the removal of a cause where a proper application therefor has been erroneously denied. *Whiton v. Brodhead*, 3 Cush. (Mass.) 356.

2. Pub. Stat. Mass., c. 152, § 8, provides that upon affidavit of the defendant in certain actions in the Superior Court the cause "shall be immediately transferred, with the papers therein, to the clerk" of the Supreme Judicial Court, "and by him forthwith entered at the charge of the party removing the same, upon the payment of the entry fee, and the cause shall proceed as if originally brought in that court." It is the special duty of the defendant to pay the fee of the clerk and to cause the action to be duly entered, and if he fails to do so the plaintiff may advance and pay the money himself and cause the action to be entered, and tax the money so advanced in his bill of costs, if he shall finally prevail. If neither of the parties causes the action to be entered at the term at which it might and ought to have been entered, it cannot afterwards, at a succeeding term, be entered there upon the petition of either the plaintiff or the defendant. *Knapp v. Lambert*, 3 Gray (Mass.) 377; *Rice v. Nickerson*, 4 Allen (Mass.) 66, holding that under such circumstances the cause remains on the docket and

within the jurisdiction of the Superior Court.

If the Supreme Judicial Court is in session when the affidavit and request for transfer are made the cause should be entered in the court at that term. *Rice v. Nickerson*, 4 Allen (Mass.) 66. If it is not in session the entry should be made at or before the next term. *Knapp v. Lambert*, 3 Gray (Mass.) 377.

In *Parker v. Jackson*, 5 Cush. (Mass.) 501, it was held that an action removed from the Court of Common Pleas to the Supreme Judicial Court on the affidavit of the defendant, but not entered in the latter court at the next term, could not be entered therein at a subsequent term.

Premature Entry. — Under a statute providing for the entry of a cause in the court to which it was removed at the term of the court holden next after such removal, it was held that a cause could not be entered at a term of court which commenced on the same day that the order of removal was made, and that the cause must stand for entry at the following term. *French v. Barnard*, 9 Cush. (Mass.) 403.

3. *Boynton v. Foster*, 7 Met. (Mass.) 415, in which case the defendant regularly removed the cause from the Court of Common Pleas to the Supreme Judicial Court under Stat. Mass. 1840, c. 87, § 3. Subsequently one who had been summoned as trustee of the defendant and was not cognizant of the removal filed an answer in the Court of Common Pleas, gave notice thereof to the plaintiff's attorney, and procured an order for his discharge. It was held that the order of discharge was void. See also *Santa Barbara v. Eldred*, 95 Cal. 378, holding, however, that where a police court rendered judgment in a cause after its jurisdiction was ousted by proper proceedings for the transfer of the cause to the Superior Court and an appeal was taken from the judgment to the Superior Court, the

no writ of error is necessary to reverse a judgment thus rendered.¹

l. EFFECT OF REMOVAL ON ATTACHMENT OR BAIL.—Whether the lien of an attachment of property or the obligation of bail will continue after the removal of a cause from one court to another depends upon the construction of the statute authorizing the removal.² It seems that if the statute makes no provision on the subject a removal will vacate attachments and discharge bail.³

m. EXTENT OF JURISDICTION ACQUIRED BY REMOVAL.—After a cause has been properly removed, the court to which it is removed acquires the same jurisdiction that the court in which the cause was originally pending possessed, but not as a general rule any greater jurisdiction than that court had.⁴

n. REMAND OF CAUSE—**Grounds for Remand.**—If the court to

judgment of the latter court was valid for the reason that the cause was one of the subject-matter of which the Superior Court had original jurisdiction, and the action might be considered as having been brought originally in that court.

Mandamus to Vacate Erroneous Order.—In *Wood v. Kent Circuit Judge*, 105 Mich. 378, a bill for divorce, mandamus was granted to compel the judge of the Circuit Court of Kent county to vacate an order granting temporary alimony made after the case had been regularly removed to the Superior Court of Grand Rapids.

Nunc Pro Tunc Entry After Removal.—In *State v. Reid*, 1 Dev. & B. L. (N. Car.) 379, Ruffin, C. J., said: "It is certainly true that after a cause has been removed from one court to another, and is well constituted in the latter, there can be no further proceedings in the former." It was held in that case, however, that the court may, after removal of the cause therefrom, supply an omission in its record by a *nunc pro tunc* entry of proceedings which occurred prior to the order of removal, and may then send a new transcript of the amended record to the court to which the cause was removed.

1. *Boynton v. Foster*, 7 Met. (Mass.) 415.

Reversed on Appeal.—In *Santa Barbara v. Stearns*, 51 Cal. 499, it was held that a judgment rendered by a court after it has been divested of jurisdiction by proper proceedings for transfer will be reversed on appeal, and the cause will be remanded with directions to take the necessary steps to consum-

mate the transfer. See also *Hogan v. Devlin*, 2 Daly (N. Y.) 184.

2. In *Campau v. Seeley*, 30 Mich. 57, decided under a statute providing for the removal of causes from the Circuit Court of Wayne County to the Superior Court of Detroit, on the application of either party, and that "any bail that shall originally have been taken shall be discharged," it was held that a removal upon petition of the plaintiff operated to discharge a recognizance of special bail given by the defendant.

3. *Campau v. Seeley*, 30 Mich. 62.

4. **Amendment of Pleadings.**—On the removal of a cause from a District Court of New York city to the City Court under Code Civ. Pro. N. Y., § 3216, it continues to be in effect an action in a District Court, subject to the incidents of such an action, including the right of amendment of the pleadings within the limits of the jurisdiction of the District Courts. *Walker v. Scott*, (C. Pl. Spec. T.) 3 Misc. (N. Y.) 330; *Latteman v. Fere*, (C. Pl. Spec. T.) 11 Civ. Pro. (N. Y.) 217; *Myers v. Rosenback*, (C. Pl. Spec. T.) 7 Misc. (N. Y.) 561. But supplemental pleadings cannot be filed after removal, since such pleadings are not authorized in the District Courts. *Myers v. Rosenback*, (C. Pl. Spec. T.) 7 Misc. (N. Y.) 561, holding, however, that the same result may be accomplished by amending the pleading, as, for instance, by setting up an additional defense in an amended answer. See *Salter v. Parkhurst*, 2 Daly (N. Y.) 240, holding therefore that the complaint could not be amended so as to charge

which a cause is removed determines that it was not removable or that the proceedings for removal were fatally defective in jurisdictional requisites the cause should be struck from the docket¹ or dismissed or remanded to the court whence it was removed.²

If the Cause Is Erroneously Dismissed or Remanded for want of jurisdiction by the court to which it is removed, mandamus will lie to compel the court to reinstate the cause.³

Waiver of Right to Remand. — Irregularities in the proceedings for removal may be waived by failure to take seasonable objection in the court to which the cause is removed⁴ or by invoking the action of the court in such a manner as to recognize its jurisdiction.⁵

The estate of the defendant, a married woman, with a debt contracted by her with reference to such estate.

Amount of Recovery — Counterclaim. — The action referred to in the preceding paragraph is in all respects the same after removal as before, and the plaintiff's recovery must be confined to an amount within the jurisdiction of the District Court. *Druckenmiller v. Shoninger*, 15 Daly (N. Y.) 477. The defendant cannot, after removal, set up a counterclaim exceeding the claim of the plaintiff in the District Court by an amount greater than the jurisdiction of the latter court. *Walker v. Scott*, (C. Pl. Spec. T.) 3 Misc. (N. Y.) 329.

Trustee Process Accompanies Removal. — In *Boynton v. Foster*, 7 Met. (Mass.) 415, an action in the Court of Common Pleas, accompanied by trustee process, it was held that a removal of the cause to the Supreme Judicial Court on affidavit of the defendant under Stat. Mass. 1840, c. 87, § 3, carried the trustee process and that the trustee must follow the cause into the court to which it was removed.

Defenses. — Under Stat. Mass. 1840, c. 87, § 3, which provided for removal of certain causes from the Court of Common Pleas to the Supreme Judicial Court upon affidavit of the defendant, it was held that after removal the cause stood in the latter court as if it had been an original action commenced there, that the defendant could rely upon any defense, and that he might properly file a plea in abatement in that court. *Colt v. Partridge*, 7 Met. (Mass.) 570.

"The defendant may, therefore, after the cause is removed, file a plea in abatement or make any defense

which he could have made in the Superior Court." *American Finance Co. v. Bostwick*, 151 Mass. 26.

1. *Ex p. Burton*, 100 Ala. 391; *Field v. Talcott*, 4 N. Y. L. Bul. 22, holding that the application to remand should be granted under the common-law power of the court so to dispose of cases as to prevent injustice. Compare *Ewing v. Brooks*, 69 Mo. 49, holding that where the transfer of a cause is unauthorized the court to which it is transferred cannot enter an order of dismissal, but should strike the cause from its docket and return the papers to the court whence the cause was transferred.

2. *Santa Cruz v. Santa Cruz R. Co.*, 56 Cal. 150; *Bray v. Marshall*, 66 Mo. 122. See also *Hyde v. Greenough*, 11 Cush. (Mass.) 87.

Remanded Not Dismissed. — In *Dion v. Powers*, 128 Mass. 192, it was held that if a nonremovable cause is removed it should be remanded, and not dismissed.

3. *Muir v. Judge*, 28 Mich. 266.

4. *Armstrong v. Emmet*, 16 Tex. Civ. App. 242, holding that although the cause was removed without an order of court, and the removal was for that reason irregular, the objection was waived by long acquiescence in the removal before making a motion to strike the cause from the docket.

5. *Armstrong v. Emmet*, 16 Tex. Civ. App. 242.

So far as the right of the plaintiff to remove a cause depends upon the residence of the defendant, the latter will be precluded from objecting when he appears in the court to which the cause is removed and by his proceedings therein submits himself to its jurisdiction. *Field v. Judge*, 30 Mich. 10.

o. **APPEAL AND ERROR.** — Where appeals lie from orders affecting a substantial right, it has been held that an order transferring a cause from one court to another is appealable.¹ Where the court to which a cause has been removed has no jurisdiction of the subject-matter, a judgment rendered therein will be reversed on appeal even though the plaintiff in error procured the removal² and the objection was raised for the first time on appeal.³

2. Of Criminal Causes — Power to Remove. — At common law it was competent for the counsel for the crown in England to remove criminal cases from the Oyer and Terminer to the Court of King's Bench by certiorari,⁴ and it was held in *New York*, there being no statutory provisions abrogating the common law in that particular, that a certiorari would issue at the instance of the state to remove a criminal case from the Court of Oyer and Terminer in that state to the Supreme Court.⁵

Notice of Removal. — Where by statute the district attorney has authority to transfer an indictment found in one court to another for trial, and no provision is made for notice of the transfer to the defendant, no notice is necessary.⁶

Transmitting Copy of Order. — Where a criminal case is removed from one court to another it is the more regular practice to send to the latter court a copy of the order of removal, but this appears not to be necessary unless the statute requires it.⁷

1. *De Hart v. Hatch*, 3 Hun (N. Y.) 375.

2. *Gray v. Thrasher*, 104 Mass. 373.

3. *Bray v. Marshall*, 66 Mo. 122.

4. See *People v. Baker*, (Supm. Ct. Spec. T.) 3 Park Crim. (N. Y.) 181; *Com. v. Simpson*, 2 Grant. Cas. (Pa.) 438, and the cases cited therein. "It was a very usual practice at common law to remove indictments before trial into the Queen's Bench from the Quarter Sessions and assizes, and from the Mayor's court of London, counties palatine, and special jurisdictions, and to transfer them from one commission to another." *People v. Hurst*, 41 Mich. 334.

In *Texas* a statute authorizing the judges of certain judicial districts to transfer criminal causes from one district to the other within the same county was pronounced constitutional in *Moore v. State*, 36 Tex. Crim. 88.

5. *People v. Baker*, (Supm. Ct. Spec. T.) 3 Park Crim. (N. Y.) 181.

6. *People v. Carolin*, 115 N. Y. 658, 24 N. Y. St. Rep. 595, where an indictment was removed from the Court of General Sessions in New York city to the Court of Oyer and Terminer.

7. *Cummings v. State*, 37 Tex. Crim. 436, where the court said: "Whether it be necessary or not that these orders accompany the transfer, when the jurisdiction of the court is attacked on the ground that the cause was improperly placed on the docket of the district to which it was transferred, we think it a sufficient answer that the proper orders were entered in the court making the transfer at the time of making same; and it would not be too late to file a copy of said orders in answer to the motion in arrest of judgment."

REMOVAL OF CLOUD.

See article *QUIETING TITLE AND REMOVAL OF CLOUD*,
vol. 17, p. 274.

RENDITION AND ENTRY OF JUDGMENTS.

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CROSS-REFERENCE.

As to *Rendition and Entry of Judgments in Criminal Cases*, see article *SENTENCE*.

I. RENDITION — 1. What Constitutes. — The act, after the trial and final submission of a case, of pronouncing judgment in language which finally determines the rights of the parties to the action and leaves nothing more to be done except the entry of the judgment by the clerk constitutes the rendition of a judgment.¹

1. *Matter of Cook*, 77 Cal. 220. See *Gray v. Palmer*, 28 Cal. 416; *Wells v. Casement v. Ringgold*, 28 Cal. 339; *Hogan*, 1 Ill. 337. In *Gray v. Palmer*,

No Particular Form Is Required in the proceedings of a court to render them an order or judgment. It is sufficient if they are final.¹

Distinguished from Entry. — The rendition and the entry of a judgment are entirely different things. The first is a purely judicial act of the court alone,² and must be first in the order of time,³ while the entry is merely evidence that a judgment has been rendered,⁴ and is purely a ministerial act.⁵

28 Cal. 416, it was held that when an order for judgment had been made and regularly entered by the clerk in the minutes of the court, and the judgment had been drawn up in form, signed by the judge, and filed by the clerk, final judgment had been rendered within the meaning of the term "rendition of the judgment," as used in section 336 of the Practice Act.

1. Wells v. Hogan, 1 Ill. 337; Johnson v. Gillett, 52 Ill. 360.

As to the Signature of Judgments, see article JUDGMENTS, vol. 11, p. 960. As to the time and place of signature of the judgment entry, see *infra*, II. 13. *Signature.*

2. Peck v. Courtis, 31 Cal. 209; Sieber v. Frink, 7 Colo. 148; Schuster v. Rader, 13 Colo. 329; Blatchford v. Newberry, 100 Ill. 489; Reily v. Burton, 71 Ind. 118; Callanan v. Votruba, 104 Iowa 672; Conwell v. Kuykendall, 29 Kan. 707; Truett v. Legg, 32 Md. 147; Mathews v. Moore, 2 Murph. (N. Car.) 181; Goddard v. Coffin, Davies (U. S.) 381, 2 Ware (U. S.) 382.

3. Peck v. Courtis, 31 Cal. 209.

In Gray v. Palmer, 28 Cal. 416, the question was whether an appeal from a judgment had been taken in time, under a statute requiring the appeal to be taken within one year after "the rendition of the judgment." In that case the judgment was rendered more than two months before it was entered by the clerk, and the appeal was taken within a year after the entry, but not within a year after the rendition, and the court held that the appeal was too late, Sawyer, J., saying: "After a careful review of these and other sections of the Practice Act, we cannot resist the conclusion that the terms 'rendition' and 'entry' are used in different senses, and to express the idea appropriate to those words respectively; and that there is a rendition of a judgment before it is actually entered in the judgment book. Different stages of the proceedings are recognized by the statute as initial points

from which other proceedings may be taken or other rights acquired. Thus the right of appeal attaches, and time for taking it commences to run, from the rendition of the judgment by the court; the right to issue execution, from the time of the entry of the judgment rendered; and the judgment lien upon real estate attaches from the docketing of the judgment rendered and entered. * * * Upon the construction given by us, there are not two final judgments, as is argued by appellant. The clerk enters the judgment rendered by the court. The court pronounces the judgment, and the clerk performs the ministerial duty of entering it. The judgment rendered is the judgment entered."

4. California State Tel. Co. v. Patterson, 1 Nev. 150.

5. Sieber v. Frink, 7 Colo. 148; California State Tel. Co. v. Patterson, 1 Nev. 150; Gray v. Palmer, 28 Cal. 416; McMillan v. Richards, 12 Cal. 467; Genella v. Relyea, 32 Cal. 159; Mathews v. Houghton, 11 Me. 377; Fish v. Emerson, 44 N. Y. 376.

"The pronouncing of judgment is a judicial act; the entry of record thereof is a ministerial duty. The judgment is complete when properly declared though the mechanical act of recording the same has not been performed." Sieber v. Frink, 7 Colo. 148. See also California State Tel. Co. v. Patterson, 1 Nev. 150; Fontaine v. Hudson, 93 Mo. 62.

Entry and Docketing — California Statute. — The enforcement of a judgment does not depend upon its entry or docketing. These are merely ministerial acts, the first of which is required to be done for putting in motion the right of appeal from the judgment itself, and of limiting the time within which the right may be exercised, or in which the judgment may be enforced, and the other for the purpose of creating a lien by the judgment upon the real property of the debtor. But neither is necessary for the issue

Duty of Court to Render. — As soon as the facts of the case are determined, if they are of such a nature that judgment can be given upon them, it is the duty of the court to give judgment.¹

Judgment on Verdict. — In practice it would seem that a judgment on verdict is rarely if ever announced by the court in legal actions, since it follows so naturally and necessarily that it is taken for granted.² In some of the states statutes prescribing the procedure upon the coming in of a verdict in a trial by jury

ance of an execution upon a judgment which has been duly rendered. *Per* McKee, J., in *Los Angeles County Bank v. Raynor*, 61 Cal. 145, citing Code Civ. Pro. Cal., §§ 671, 681, 685.

Use of Terms as to Judgment by Confession. — In *Schuster v. Rader*, 13 Colo. 320, the court said: "Discriminating law writers speak of judgments by confession as being 'entered,' while other judgments are spoken of as being 'given' or 'rendered.' Such is the language of the code. The distinction is significant. At common law the giving of judgment was a judicial act, to be performed only by the court sitting at stated times and places. The matter in controversy having been duly set forth in the pleadings, the evidence was taken, or the facts agreed upon, and the verdict found. The whole record was then duly submitted to the court, and upon due consideration judgment was returned or rendered thereon by the court, as the law of the case required. Hence Blackstone's concise definition, 'Judgments are the sentence of the law pronounced by the court upon the matter contained in the record.' The judgment having been so pronounced in open court, the act of entering the same in the record by the clerk was purely ministerial, and was not essential to the existence of the judgment so rendered, though the entry was necessary to preserve it, and, as a matter of proof, was the best evidence of its existence. The judgment derived its force and effect from the fact that it had been so considered, adjudged, and decreed by the court; and it became effective from the time of such adjudication and promulgation in open court, though the ministerial act of entering the same in the records of the court might be delayed. 3 Black. Com. 395; *Freem. Judgm.*, § 40; *Freem. Ex'ns*, § 18; *Filley v. Cody*, 4 Colo. 109; *Sieber v. Frink*, 7 Colo. 148;

Gray v. Palmer, 28 Cal. 416. Under statutes authorizing judgments by confession in vacation through the agency of the clerk, there being no judicial determination of the controversy, the act of giving judgment in such cases is called the 'entering,' rather than the 'rendering,' of judgment. Nevertheless, judgments by confession are the sentence of the law upon the matter contained in the record, the matter being supposed to be so plain, by the written admission of the defendant, as to require no judicial consideration."

1. *Foster v. Wulff*, 20 Mo. App. 85; *Burgess v. Kirby*, 94 N. Car. 575; *Isler v. Brown*, 67 N. Car. 177. In the last named case the court said: "As soon as the facts of a case are determined, whether by the pleadings, or a case agreed, or a special verdict, or a general verdict subject to a case agreed (as here), provided they be of such a nature that a court can give judgment upon them, it is the duty of the court having jurisdiction to give judgment upon them; and if the case be here upon an appeal, it is the duty of this court to give such judgment as the court below ought to have given. When the facts have been once determined, provided there has been no irregularity in the proceedings by which they are determined, no court has a right to deprive the parties of the standpoint they have gained, by setting aside the verdict or other form of finding, and reopen the issues thus regularly concluded." See also *Huntress v. Hurd*, 72 Me. 450; *Shurtleff v. Wiscasset*, 74 Me. 130; *Stahl v. Gotzenberger*, 45 Wis. 121; *Baxter v. State*, 17 Wis. 588.

2. *Lanier v. Richardson*, 72 Ala. 134. In this case Stone, J., said: "Its [the judgment's] first actual utterance is in the reading of the minutes, the work of the clerk. The judgment, no matter when written up, is considered and treated as given on the day when verdict is rendered."

expressly make it the duty of the clerk to enter a judgment in conformity with the verdict, unless a different direction be given by the court.¹

2. Time and Place of Rendition — *a.* BEFORE PROPER TERM. — It is erroneous to render a judgment at a term earlier than that provided by law.² According to some decisions, however, a

1. *Morrison v. New York, etc., R. Co.*, 32 Barb. (N. Y.) 568.

"By section 1189 of the code, when a jury renders a general verdict the clerk must, upon application of the party in whose favor it is, enter judgment in conformity with the verdict, unless a different direction is given by the court, or it is otherwise specially prescribed by law." *Overton v. National Bank*, (Supm. Ct. Spec. T.) 3 N. Y. St. Rep. 169. See also *Lynch v. Rome Gas Light Co.*, 42 Barb. (N. Y.) 591, in which case it is held that "in cases at law there is no judgment pronounced, except by the record. There may be a verdict or an order for judgment, but the judgment itself is made up in the clerk's office. The prevailing party recovers a certain sum as damages or costs, or both, and then the judgment is docketed and the amount becomes a lien upon the real estate of the defendant in the county where the judgment is docketed." Cited in *Butler v. Lee*, 3 Keyes (N. Y.) 76.

Applies Only to Legal Actions. — In *Stahl v. Gotzenberger*, 45 Wis. 121, it was held that judgment is to be entered by clerk only in legal actions. The court said: "It is true, section 16 of the same chapter [Rev. Stat. 1858, c. 132] provides that 'if a different direction be not given by the court, the clerk must enter judgment in conformity to the verdict.' It is very clear, however, that the verdict referred to in this section is a verdict in what was formerly called a legal action, as distinguished from an equitable action, in which the verdict disposes of the whole case and judgment follows as a matter of course. In such cases, unless a different order or direction be made by the court, it is implied that the court directs judgment in conformity with the verdict without any formal order appearing upon the record. But in equitable actions, where the issues must be determined by the court, the clerk has no authority to enter judgment until the court has in some way declared what the nature of the judgment shall be, and then the clerk, as

the mere hand of the court, enters upon the records the judgment so declared."

What Contrary Direction Contemplated by Code. — In *Morrison v. New York, etc., R. Co.*, 32 Barb. (N. Y.) 568, the court, after setting out the provision of the code to the effect stated in the text, said: "The only direction of the court at variance with the general directions of the statute contemplated by this section is an order reserving the cause for argument or fuller consideration."

2. *Teat v. Cocke*, 42 Ala. 336; *Dupree v. Smith*, 3 Ala. 736; *Walker v. Massey*, 10 Ala. 30; *Ex p. Northeast, etc., Alabama R. Co.*, 37 Ala. 679; *Passmore v. Moore*, 1 J. J. Marsh. (Ky.) 591; *Tobar v. Losano*, 6 Tex. Civ. App. 698.

At Appearance Term. — In *Alabama* and *Kentucky* it has been held that judgment cannot be rendered at an appearance term. *Dupree v. Smith*, 3 Ala. 736; *Walker v. Massey*, 10 Ala. 30; *Passmore v. Moore*, 1 J. J. Marsh. (Ky.) 591.

At Return Term. — In *Alabama* it has been held that judgment may not be rendered at the return term. *Ex p. Northeast, etc., Alabama R. Co.*, 37 Ala. 679; *Teat v. Cocke*, 42 Ala. 336.

Entry at Same Term with Default. — In *Nave v. Todd*, 83 Mo. 601, it was held that an entry of final judgment at the same term with the default, when the statute provides that the former shall be entered at the next term after default, is irregular and may be corrected on motion at a subsequent term, without notice to the defendant.

After Amendment of Declaration. — It has been held that it is not error to proceed to render judgment at the same term at which the declaration has been amended, if the defendant after the amendment defaults and does not ask a continuance. *Quartier v. St. Mary's University*, 18 Ill. 300.

In *Iowa* it has been held that it is not error to render judgment at the first term after commencement of an action, when no application for a con-

judgment thus prematurely rendered, while erroneous, is not void.¹

b. AT ADJOURNED TERM. — A valid judgment may be rendered at an adjourned term of court,² and, in the absence of statute to the contrary, though the judge has during the interval held court in another county of the same district.³

c. IN VACATION. — The question as to the validity of judgments rendered in vacation has been fully discussed in another article.⁴

d. ON SUNDAY OR HOLIDAY. — Sunday being *dies non juridicus*, it follows that no valid judgment can be pronounced upon that day, nor in fact can the court do any other purely judicial act on such day.⁵ This rule, however, does not apply in the

tinuance was made by the defendant. *Holt v. Smith*, 9 Iowa 373.

In *Texas* it is held that judgment may be rendered at the first term of court after service of notice on defendant. *Rowan v. Shapard*, 2 Tex. App. Civ. Cas., § 295.

In *Georgia*, except in cases expressly provided for, a judgment rendered at the first term after suit brought does not affect the rights of claimants and other third persons. *State v. Gaskill*, 68 Ga. 518.

Presumption that Judgment Was Rendered at Legal Term. — A judgment will not be reversed on the ground that it was not rendered at a legal term of the court below, where there is nothing in the record to show that it was not rendered at a legal term. *Nesqually Mill Co. v. Taylor*, 1 Wash. Ter. 3. See also *Baldrige v. Penland*, 68 Tex. 441.

Order of Court Prematurely Dated. — Although it is not material whether an order made by the court, at the close of a trial, is reduced to form, and receives the sanction of the judge at that time or at a subsequent period, if, however, the date of the written order is of a period which has not yet arrived, the order is not merely irregular, but is absolutely void upon its face; certainly so until the day on which it purports to be dated shall have arrived. *Smith v. Coe*, 7 Robt. (N. Y.) 477.

1. *Morey v. Hoyt*, 62 Conn. 543; *Tobar v. Losano*, 6 Tex. Civ. App. 698. See also article JUDGMENTS, vol. 11, pp. 812 *et seq.*

2. *Higley v. Gilmer*, 3 Mont. 90; *Mayne v. Creighton*, 3 Mont. 108; *Roudebush v. Ray*, 3 Mont. 188.

3. *Higley v. Gilmer*, 3 Mont. 90. In this case the court said: "The terms

of court held in one county are distinct from those held in another county, even in the same district. When a term of the district court is adjourned in one county it is not an adjournment of that court to another county. When the term is finished and adjourned *sine die*, that term is ended. When the court convenes in another county it does so for the purpose of holding a distinct term of court there. No argument has been presented by the learned counsel in this case, and none has occurred to this court, that will show any good and substantial reason for holding that under the laws of this territory, and the orders of this court, the power to adjourn from time to time a court in one county should be limited to the time of the meeting of another term of court in another county in the same district."

4. See article JUDGMENTS, vol. 11, p. 814.

5. *Alabama*. — *Nabors v. State*, 6 Ala. 200.

Illinois. — *Baxter v. People*, 8 Ill. 368.

Indiana. — *Chapman v. State*, 5 Blackf. (Ind.) 111.

Iowa. — *Davis v. Fish*, 1 Greene (Iowa) 406; *Bishop v. Carter*, 29 Iowa 165.

Kansas. — *Parsons v. Lindsay*, 41 Kan. 336.

Kentucky. — *Arthur v. Mosby*, 2 Bibb (Ky.) 589.

Massachusetts. — *Pearce v. Atwood*, 13 Mass. 347.

New York. — *Story v. Elliot*, 8 Cow. (N. Y.) 27; *Merritt v. Earle*, 31 Barb. (N. Y.) 38; *Rice v. Mead*, (Supm. Ct. Gen. T.) 22 How. Pr. (N. Y.) 445; *Allen v. Godfrey*, 44 N. Y. 433; *Hoghtaling v. Osborn*, 15 Johns. (N. Y.) 119.

case of other legal holidays, and judgments rendered on such holidays are valid¹ unless judicial acts are by statute expressly

Tennessee. — *Styles v. Harrison*, 99 Tenn. 128.

Vermont. — *Blood v. Bates*, 31 Vt. 147.

Washington. — *Fox v. Nachtsheim*, 3 Wash. 684.

England. — *Mackalley's Case*, 9 Coke 66; *Swann v. Broome*, 3 Burr. 1595.

See also generally article SUNDAYS AND HOLIDAYS.

Judgment Rendered After Midnight of Saturday. — A judgment which is rendered after midnight of Saturday is void as being rendered on Sunday. *Parsons v. Lindsay*, 41 Kan. 336.

In *Arthur v. Mosby*, 2 Bibb (Ky.) 589, in which case the judgment of the court was rendered after twelve o'clock on Saturday night, it was said: "The judicial power of the court was limited to the preceding day; after midnight another day had commenced — a day not judicial in our law, and on which our courts are not authorized to sit and adjudicate. It follows, therefore, that * * * the proceedings and judgment of the court after midnight and the beginning of another day (excluded in the computation of our juridical days) were not authorized by law."

Award of Arbitrators on Sunday. — In *Story v. Elliot*, 8 Cow. (N. Y.) 27, it was held that an award of arbitrators so far partakes of the nature of a judgment that such an award made and published on Sunday is void. See, however, on this point, *Blood v. Bates*, 31 Vt. 147; *Sargeant v. Butts*, 21 Vt. 99.

Contra — Justices' Judgments. — In *Nebraska*, by section 38 of an Act to amend chapter 13 of the Revised Statutes of 1866, entitled "Courts," it was provided that "no court can be opened, nor can any judicial business be transacted, on Sunday or on any legal holiday," except, (1) to give instructions to a jury then deliberating on their verdict; (2) to receive a verdict or discharge a jury; (3) to exercise the powers of a single magistrate in a criminal proceeding. By section 2002 of the *Nebraska Code* it is provided that "upon a verdict the justice must immediately render judgment accordingly." In accordance with these provisions it was held, in *Thompson v. Church*, 13 Neb. 287, that since whenever a verdict is received the justice is

required immediately to render judgment thereon, such judgment must be rendered on Sunday where the verdict has been received on that day. This would also seem to be the rule in *Wisconsin*. *Wearne v. Smith*, 32 Wis. 412. See also *Perkins v. Jones*, 28 Wis. 243.

In *Minnesota*, where a verdict was returned between noon and one o'clock P. M. on Saturday, while the justice was hearing another case, a rendition of judgment thereon on the Monday morning following was held to be in due time. *Sorenson v. Swenson*, 55 Minn. 58.

Fact Must Be Clearly Established. — The presumptions of law are all in support of a judgment, and when it is sought to avoid it because rendered on Sunday, the evidence must clearly establish the fact in order to overcome the presumption of regularity. *Bishop v. Carter*, 29 Iowa 165.

1. *Pfister v. State*, 84 Ala. 432; *Hamer v. Sears*, 81 Ga. 288; *Slater v. Schack*, 41 Minn. 269; *Glenn v. Eddy*, 51 N. J. L. 255; *State v. Ricketts*, 74 N. Car. 187; *Dunlap v. State*, 9 Tex. App. 179; *Spalding v. Bernhard*, 76 Wis. 368.

Sundays and Holidays Distinguished. — In *Glenn v. Eddy*, 51 N. J. L. 255, the court, in speaking of holidays, used the following language: "The statutory declaration that these days shall be legal holidays does not indicate an intent to assimilate their status to that of Sunday. 'Holiday,' in its present conventional meaning, is scarcely applicable to Sunday. * * *

It is applicable to all, and has long been applied to some, of the days named. When the statute declares them to be legal holidays it does not permit a reference to the legal status of Sunday to discover its meaning; for it proceeds to interpret the phrase, so far as it is prohibitory, by an express enactment declaring what shall not be done thereon. What it thus expresses is prohibited; what it fails to prohibit remains lawful to be done."

Thanksgiving Day. — A judgment of a justice of the peace rendered on Thanksgiving Day is not void. *Bear v. Youngman*, 19 Mo. App. 41.

Election Day. — In *New York* a justice of the peace is not prohibited by statute from rendering a judgment on the

prohibited on such days.¹

e. PRESUMPTION AS TO DATE OF JUDGMENT. — Under the common law it was presumed that all judgments were rendered on the first day of the term,² and the same rule seems to prevail in certain of the states of the Union.³ According to decisions in other states, however, a judgment is considered as rendered on the last day of the term, contrary to the presumption of the common law.⁴ In still other states neither of these rules has been

day on which a general election is held, in a cause that has been tried before and submitted to him on a previous day. *Rice v. Mead*, (Supm. Ct. Gen. T.) 22 How. Pr. (N. Y.) 445.

1. *Hamer v. Sears*, 81 Ga. 288; *Glenn v. Eddy*, 51 N. J. L. 255; *Joseph Spiedel Grocery Co. v. Armstrong*, 8 Ohio Cir. Ct. 489, 4 Ohio Cir. Dec. 498; *Spalding v. Bernhard*, 76 Wis. 368.

Georgia — Fourth of July. — In *Hamer v. Sears*, 81 Ga. 288, it was held that a judgment rendered on the Fourth of July is not void, although that day is a legal holiday, and some things, such as noting and protesting of notes, etc., may not be done upon it, there being no statute prohibiting the transaction of business by the court on that day.

Ohio — Labor Day. — In *Joseph Spiedel Grocery Co. v. Armstrong*, 8 Ohio Cir. Ct. 489, 4 Ohio Cir. Dec. 498, it was held that a judgment rendered on the legal holiday known as Labor Day is void.

Observance Optional with Court. — In *Tennessee* it has been held that a judgment is not void for having been rendered on one of the legal holidays (*e. g.* the twenty-second day of February), created by Acts 1889, c. 63, "on which all public offices of this state may be closed, and business of every character, at the option of the parties in interest, or managing the same, may be suspended." It is held that under this statute the public officials, and not parties litigant, are the real parties in interest, and may at their option transact official business on such holidays. *Elrod v. Gray Lumber Co.*, 92 Tenn. 476.

2. *Wright v. Mills*, 4 H. & N. 488. See also *Herring v. Polley*, 8 Mass. 119.

Presumption as to Time of Day. — Under the English practice it is held that judicial proceedings are to be considered as taking place at the earliest period of the day on which they are done. Therefore where judgment

was signed at the opening of the office at its usual hour, eleven A. M., and the defendant died at half-past nine A. M. on the same morning, it was held that the judgment was regular. *Wright v. Mills*, 4 H. & N. 488.

3. *Norwood v. Thorp*, 64 N. Car. 682; *Withers v. Carter*, 4 Gratt. (Va.) 407.

In *Farley v. Lea*, 4 Dev. & B. L. (N. Car.) 169, it was held that the judgments of a court of record, on whatever day of the term they may be rendered, in law relate to, and are considered judgments of, the first day of the term; and this rule applies although the judgments were confessed upon writs which were noted by the clerk to have been issued, and the service of which was acknowledged, on a day subsequent to the first day of the term; and executions issued upon such last-mentioned judgments will have priority over a deed in trust proved and registered on the second day of the same term.

4. *Maine.* — *Chase v. Gilman*, 15 Me. 64.

Massachusetts. — *Portland Bank v. Maine Bank*, 11 Mass. 204; *Herring v. Polley*, 8 Mass. 119; *Hildreth v. Thompson*, 16 Mass. 191.

New Hampshire. — *Haynes v. Thom*, 28 N. H. 386.

Vermont. — *Bradish v. State*, 35 Vt. 452; *Hoar v. Jail Delivery Com'rs*, 2 Vt. 402; *Day v. Lamb*, 7 Vt. 426.

In *Bradish v. State*, 35 Vt. 452, where the question was raised as to whether a judgment was to be considered as rendered on the first or last day of the term, the court said: "This we regard as settled in this state by the early cases of *Hoar v. Jail Delivery Com'rs*, 2 Vt. 402, and *Day v. Lamb*, 7 Vt. 426. Ever since these decisions, the uniform understanding and practice of the profession and courts in the state has been to regard judgments as taking effect from the last day of the term."

Unless Special Judgment Entered. — In

adopted, but it is the practice to assign to judgments and decrees the exact date on which they were rendered or docketed, the judgment taking effect only from such date.¹

3. Rendition Without Issue Joined. — The rendition of a judgment without issue joined has been held to be erroneous, if not absolutely void.²

4. Rendition Before Determination of All Issues. — The rendition of a judgment before all issues properly raised have been tried and determined is erroneous.³

5. Mandamus to Compel Rendition. — Mandamus is the proper remedy for a refusal of a judge to render a judgment which it is clearly his duty to render;⁴ but the Supreme Court will not order the inferior tribunal to render judgment for or against either party,⁵ but will only, in a proper case, order such court to proceed to judgment.⁶ In order to justify such order, however, a plain case of refusal to proceed in the inferior court ought to be made out.⁷

Maine it is held that a judgment must be taken to have been rendered on the last day of the term, unless a special judgment be entered. *Chase v. Gilman*, 15 Me. 64.

Presumption as to Continuance of Session. — In *Alabama* it has been held that where it does not appear from the record on what day the judgment was rendered and when the court adjourned, if necessary to sustain the judgment an appellate court will intend that it continued its session up to the latest period authorized by law. *Sanford v. Richardson*, 1 Ala. 182.

Applies though Court Be Not Open on First Day. — In *North Carolina* it was held in *Norwood v. Thorp*, 64 N. Car. 682, that by the effect of the Act of March 16, 1869, suspending the Code of Civil Procedure in certain cases, the proceedings of the latter as to docketing such judgments as are taken in the court where docketed were suspended; and the eighteenth rule of practice laid down by the Supreme Court (63 N. Car. 669) operated to make all judgments during any term relate to the first day of such term, even where the judge failed to open court on the first day.

Exception — Where Rendition on First Day Impossible. — "The fiction of law which gives a judgment relation to the first day of the term is general, but not universal. It applies to all cases in which the judgment might have been rendered on that day, but not to a case in which it could not have been then

rendered." *Withers v. Carter*, 4 Gratt. (Va.) 407.

1. Alabama. — *Powe v. McLeod*, 76 Ala. 418; *Quinn v. Wiswall*, 7 Ala. 645; *Ex p. Dillard*, 68 Ala. 594; *Alabama Coal, etc., Co. v. State*, 54 Ala. 36; *Pope v. Brandon*, 2 Stew. (Ala.) 401. And see *Morris v. Ellis*, 3 Ala. 562; *Campbell v. Spence*, 4 Ala. 548.

Maryland. — *Dyson v. Simmons*, 48 Md. 207.

Oregon. — *Stannis v. Nicholson*, 2 Oregon 332.

2. See article JUDGMENTS, vol. II, p. 864.

3. See article JUDGMENTS, vol. II, p. 865.

4. *Branford v. Erant*, 1 N. Mex. 579; *Territory v. Ortiz*, 1 N. Mex. 5. See also article MANDAMUS, vol. 13, p. 562.

5. *Life, etc., Ins. Co. v. Adams*, 9 Pet. (U. S.) 573.

6. *Life, etc., Ins. Co. v. Adams*, 9 Pet. (U. S.) 573; *Territory v. Ortiz*, 1 N. Mex. 5.

7. In *Life, etc., Ins. Co. v. Adams*, 9 Pet. (U. S.) 573, it was held that though the Supreme Court will not order an inferior tribunal to render judgment for or against either party, it will, in a proper case, order such court to proceed to judgment. Should it be possible that in a case ripe for judgment, the court before whom it was depending could perseveringly refuse to terminate the cause, the Supreme Court, without indicating the character of the judgment, would be required by its duty to order the ren-

6. Judgment as Evidence of Rendition. — A judgment is always evidence of the fact that such a judgment has been given, and of the legal consequences which result from that fact, whether the person against whom it is offered in evidence was a party to the action in which it was rendered or not,¹ though it cannot be used to prove the cause of action involved.²

II. ENTRY — 1. Necessity of — General Rule. — The decisions of all

dition of some judgment; but to justify this mandate, a plain case of refusing to proceed in the inferior court ought to be made out.

In *State v. Hunter*, 4 Wash. 651, it was held that an alternative writ of mandamus to compel a judge to enter judgment will not be granted when it appears from the application that the judge will proceed to hear and determine the action at the next session of court. The writ will not be granted when the application therefor shows that service was had upon defendant by publication, and fails to show that such proofs had been offered before the court as to authorize an entry of judgment. Mandamus will not lie to compel action on the part of an inferior court until it is made clearly to appear that such inferior court has been regularly and properly moved to take the required action, and has unwarrantably refused to act.

The Entry of Judgment upon a Valid Verdict involves no judicial or discretionary powers, but is simply a ministerial act, and to enforce its performance a writ of mandamus will issue in a proper case. *Lloyd v. Brinck*, 35 Tex. 1.

Mandamus to Compel Entering and Signing Judgments and Orders. — See for a full discussion of this subject article MANDAMUS, vol. 13, p. 562.

1. *Ansley v. Carlos*, 9 Ala. 973; *Smith v. Chapin*, 31 Conn. 530; *Koren v. Roemheld*, 7 Ill. App. 646; *Maple v. Beach*, 43 Ind. 51; *Littleton v. Richardson*, 34 N. H. 179; *King v. Chase*, 15 N. H. 9; *Chamberlain v. Carlisle*, 26 N. H. 553; *McCamant v. Roberts*, 66 Tex. 260; *Spencer v. Dearth*, 43 Vt. 105.

The Purpose for Which a Judgment Is Sought to Be Introduced as evidence often and most generally determines whether it is admissible. If it is offered as proof of the mere fact that it was rendered and of those legal consequences which result from that fact, it is always admissible, even as against

strangers to it. *McCamant v. Roberts*, 66 Tex. 260.

In *Ansley v. Carlos*, 9 Ala. 973, the court said: "Although the general rule is well established that judgments are not evidence, except between the same parties, or those in privity with them, yet it is equally certain that evidence may be given of the fact of the judgment against third persons, not as evidence of the facts upon which the judgment is founded, but to prove the fact that such a judgment was rendered. For this purpose, and to prove the fact merely that such a judgment was rendered, every judgment is evidence against the whole world."

In *Spencer v. Dearth*, 43 Vt. 105, the court said: "A verdict or judgment is offered either to establish the mere fact of its own rendition, and those legal consequences which result from the fact, or is offered with a view to a collateral purpose; that is, to prove not only the fact that such a verdict has been rendered, or such judgment pronounced, and so let in all the necessary and legal consequences, but as a medium of proving some fact as found by the verdict, or upon whose supposed existence the judgment is based. For the first of these purposes, that is for establishing the fact that such a verdict has been given, or such a judgment pronounced, and all the consequences of such a judgment, the judgment itself is invariably not only admissible as the proper legal evidence, but usually conclusive to prove that fact."

2. *Taylor v. Means*, 73 Ala. 468; *Snodgrass v. Branch Bank*, 25 Ala. 161.

"A record of judgment is nothing more than evidence, and is the highest kind, and in most cases conclusive evidence of the judgment of the court. It is an authentic history of the proceedings and judgment in the suit. It is, nevertheless, only evidence. It is the fact or facts which it proves that is to have effect." *Van Orman v. Phelps*, 9 Barb. (N. Y.) 500.

courts must be preserved in writing in some record provided for that purpose.¹

The Reason for This does not lie in the fact that the entry is necessary to the completion of the judgment, for a judgment is as final when pronounced by the court as when entered and recorded by the clerk,² and an entire failure to make up the record will not necessarily affect the parties interested.³ The entry of the judgment is, however, as will be seen, essential not only to its admission as evidence, but also as a prerequisite to subsequent acts of

1. *California*. — McLaughlin v. Doherty, 54 Cal. 519.

Connecticut. — Davidson v. Murphy, 13 Conn. 213.

Iowa. — Callanan v. Votruba, 104 Iowa 672; Case v. Plato, 54 Iowa 64; *Ætna L. Ins. Co. v. Hesser*, 77 Iowa 381; Balm v. Nunn, 63 Iowa 641; Miller v. Wolf, 63 Iowa 233.

Maryland. — Truett v. Legg, 32 Md. 147.

New York. — Meeker v. Van Rensselaer, 15 Wend. (N. Y.) 397; Knapp v. Roche, 82 N. Y. 366; Appleby v. Barry, 2 Robt. (N. Y.) 689; Schenectady, etc. Plank Road Co. v. Thatcher, (Supm. Ct. Spec. T.) 6 How. Pr. (N. Y.) 226; Butler v. Lee, 3 Keyes (N. Y.) 76; Lentilhon v. New York, 3 Sandf. (N. Y.) 721.

Tennessee. — Jones v. Walker, 5 Verg. (Tenn.) 427.

In Balm v. Nunn, 63 Iowa 641, the court said: "There can be no judgment until it is entered in the proper record of the court. It cannot exist in the memory of the officers of the court, nor in memoranda entered upon books not intended to preserve the record of judgments. * * * It is not competent to prove a judgment in any other way than by the production of the proper record thereof."

Entry Cannot Be Presumed. — "We cannot infer that a judgment has been regularly entered because a suit has been instituted, or because a jury has found a verdict in the case, or because the clerk may make this recital: 'Judgment on verdict for three thousand dollars and costs.'" Martin v. Barnhardt, 39 Ill. 9.

If the Clerk Should Neglect to Enter the Judgment rendered, the court could undoubtedly direct him to do so. Case-ment v. Ringgold, 28 Cal. 335.

2. *Colorado*. — Sieber v. Frink, 7 Colo. 148.

California. — Casement v. Ringgold, 28 Cal. 335; McMillan v. Richards, 12

Cal. 467; Gray v. Palmer, 28 Cal. 416; Genella v. Relyea, 32 Cal. 159.

Nevada. — California State Tel. Co. v. Patterson, 1 Nev. 150; Kehoe v. Blethen, 10 Nev. 445.

New York. — Hadcock v. O'Rowke, (Buffalo Super. Ct. Tr. T.) 4 N. Y. Supp. 185; Van Orman v. Phelps, 9 Barb. (N. Y.) 500.

Ohio. — Newnam v. Cincinnati, 18 Ohio 323.

Oregon. — King v. Higgins, 3 Oregon 406.

Vermont. — Huntington v. Charlotte, 15 Vt. 46.

3. Newnam v. Cincinnati, 18 Ohio 323, where the court said: "What we call the complete record in a case is nothing but a history of what has been done in the case, copied by the clerk into a book called the book of records. It is not the writing of those things in this book which gives them validity. It is the previous action of the court upon the subject-matter. The record is but evidence of this action."

Enforcement Does Not Depend upon Entry. — In Los Angeles County Bank v. Raynor, 61 Cal. 145, it was held that the enforcement of a judgment does not depend upon either its entry or its docketing, but that these are merely ministerial acts, the first of which is required to be done for putting in motion the right of appeal from the judgment itself, and for limiting the time within which the right may be exercised or in which the judgment may be enforced, and the other for the purpose of creating a lien by the judgment upon the real property of the debtor; but neither is necessary for the issuance of an execution upon a judgment which has been duly rendered. Without docketing or entry, execution may be issued on the judgment, and land levied upon and sold.

Execution. — See generally as to entry of judgment as a requisite to the issuance of execution thereon, article

the clerk, such as making up the judgment roll and docketing and indexing the judgment.

Essential to Admission of Judgment as Evidence. — In order that a judgment may be admitted as evidence in another action, it is absolutely necessary that it should first have been entered of record.¹

Entry Prerequisite to Making Up Judgment Roll. — The proper entry of a judgment in the judgment book is a prerequisite to the making up and filing of the judgment roll.²

Entry Essential to Docketing. — In some states it is provided that in order that a judgment may be docketed it must have been entered in the judgment book.³

EXECUTIONS AGAINST PROPERTY, vol. 8, p. 303.

1. *Hall v. Hudson*, 20 Ala. 284; *Smith v. Steel*, 81 Mo. 455; *California State Tel. Co. v. Patterson*, 1 Nev. 150.

Difference Between Judgment and Decree in This Respect. — In regard to this requirement of entry as a prerequisite to admissibility in evidence, a judgment at law differs from a decree in chancery, since in the case of the latter, unless otherwise provided by statute, the final decree of a court of equity may be given in evidence in another suit although such decree has not been formally enrolled. *Bates v. Delavan*, 5 Paige (N. Y.) 303; *Butler v. Lee*, 3 Keyes (N. Y.) 73; *Winans v. Dunham*, 5 Wend. (N. Y.) 47. See also article DECREES, vol. 5, p. 1037.

In *Lynch v. Rome Gas Light Co.*, 42 Barb. (N. Y.) 591, it was held that the formal distinction between decrees in equity and judgments in actions at common law has not been abolished by the code, but is inherent in the two systems. The decree of the court of equity may never go upon the docket at all. It is only when a certain sum is directed to be paid that it is proper to enter it upon the docket. The delay of the clerk in entering it in the judgment book will not affect its validity. It takes effect from the time when it is published by the court. See to the same effect *Butler v. Lee*, 3 Keyes (N. Y.) 76.

2. *Rockwood v. Davenport*, 37 Minn. 533; *Emeric v. Alvarado*, 64 Cal. 529; *Lentilhon v. New York*, 3 Sandf. (N. Y.) 721. And see *infra*, IV. *Judgment Roll*. See, however *Appleby v. Barry*, 2 Robt. (N. Y.) 689, in which case the facts were as follows: In March, 1864, the plaintiff's attorney filed a quest in the office of the clerk of the court,

requiring him to docket a judgment against the defendant. The clerk filed it, and on the same day gave to the plaintiff a transcript, which was filed in the county clerk's office, as required by law; but no actual entry was made in the judgment book, by the clerk of the court, until May following (1864), after an execution had been issued upon the judgment. It was held that this was a substantial compliance with the code provision, as between the parties to the judgment, and that the docket in the county clerk's office was a sufficient foundation for the execution.

In *Stimson v. Huggins*, 16 Barb. (N. Y.) 659, it was said that a strict compliance with the code provision would seem to make it the duty of the clerk to enter a judgment on the verdict and make up and file a judgment roll immediately on receiving the verdict unless otherwise ordered by the court, but that this, however, was not so regarded, and was not the practice. "In practice the judgment roll is not usually made up and filed until the costs are adjusted and the party is prepared to have the judgment perfected and docketed."

3. *Rockwood v. Davenport*, 37 Minn. 533; *Lentilhon v. New York*, 3 Sandf. (N. Y.) 721. See also *Eastham v. Sallis*, 60 Tex. 576.

In *Rockwood v. Davenport*, 37 Minn. 533, the court, *per* Gilfillan, C. J., said: "Gen. Stat. 1878, c. 66, § 273, reads: 'The judgment shall be entered in the judgment book, and specify clearly the relief granted or other determination of the action.' By section 275 the clerk is required, 'immediately after entering the judgment,' to attach and file, as the judgment roll, certain papers, among them a copy of the judgment. Section 277 provides for

2. What Constitutes. — The entry of a judgment is completed when it is actually entered by the act of the clerk in the judgment book¹ and attested by the signature of the clerk.² Such entry must specify clearly the relief granted or other determination of the action.³

docketing the judgment 'on filing the judgment roll.' These acts follow in regular sequence: first, the entry of the judgment; second, the making up and filing the judgment roll; third, the docketing. To support either a judgment roll or docketing, there must be a judgment entered. As this court said in *Williams v. McGrade*, 13 Minn. 46: 'If a copy of the judgment constitutes a part of the judgment roll, the original must exist.' There can be no judgment capable of being docketed or enforced in any manner till it is entered in the judgment book. Until that is done, it does not matter that the party is entitled to judgment, either by default of defendant, or upon a decision or direction of the court. It has frequently been decided that an order or direction for judgment by the court, or by a referee, is not a judgment so that an appeal can be taken from it. That to constitute a judgment it must be entered in the judgment book, as the statute directs, has always been held by this court." *Citing* *Brown v. Hathaway*, 10 Minn. 303; *Williams v. McGrade*, 13 Minn. 46; *Washburn v. Sharpe*, 15 Minn. 63; *Hodgins v. Heaney*, 15 Minn. 185; *Thompson v. Bickford*, 19 Minn. 17; *Hunter v. Cleveland Co-operative Stove Co* 31 Minn. 505.

1. *McLaughlin v. Donerty*, 54 Cal. 519.

"The final entry, made by direction of the court on the docket of a given term of court, is the conclusive evidence of the disposition made of the case for that term." *Foster v. Redfield*, 50 Vt. 285.

In *Menzies v. Watson*, 105 Cal. 109, it was held that a judgment is not "entered" until it is copied in the judgment book, under the provision of the code that judgment shall be entered in such book and that after such entry the judgment roll can be made up and filed, the judgment docketed, and a lien created.

"The judgment itself is to be entered by the clerk in the judgment book, as provided in sections 279 and 280. In order to make this entry,

the clerk, besides the judge's direction as provided in section 264, was required in this case to adjust the amount of the plaintiff's costs and disbursements, and the interest accrued on the verdict. Code, §§ 310, 311. Both of these items must be inserted in the entry of the judgment. Then, and not before, the judgment would be complete and perfect, and the clerk could make up the judgment roll, and the judgment could be docketed and collected. Code, §§ 281, 282, 287." *Lentilhon v. New York*, 3 Sandf. (N. Y.) 721.

2. *Knapp v. Roche*, 82 N. Y. 366.

Entry Sufficient Without Clerk's Signature. — In some cases it has been held that, in the absence of statutory requirements, the entry of judgment in the judgment book is sufficient without the signature of the clerk. *Clink v. Thurston*, 47 Cal. 21; *Jorgensen v. Griffin*, 14 Minn. 464. See generally, as to signature of judgments by the clerk, article JUDGMENTS, vol. II, p. 963.

3. *Callanan v. Votruba*, 104 Iowa 672; *Rockwood v. Davenport*, 37 Minn. 533; *Overton v. National Bank*, (Supm. Ct. Spec. T.) 3 N. Y. St. Rep. 169; *Schenectady, etc., Plank Road Co. v. Thatcher*, (Supm. Ct. Spec. T.) 6 How. Pr. (N. Y.) 226; *Appleby v. Barry*, 2 Robt. (N. Y.) 689. See also *Jorgensen v. Griffin*, 14 Minn. 464; *Brown v. Hathaway*, 10 Minn. 303.

An entry by the prothonotary on his docket, of a suit, and that a bond confessing judgment was filed of record therein, stating the particulars of it, and the date of entry, is a good entry of a judgment. *Helvete v. Rapp*, 7 S. & R. (Pa.) 306.

Mere Memorandum Not Sufficient. — A mere memorandum of the clerk from which a final judgment could thereafter be drawn up is not sufficient. *Tombeckbee Bank v. Godbold*, 3 Stew. (Ala.) 240.

The memorandum handed down by the general term of its decision on appeal is not a judgment, but simply an authority to enter one, and upon the filing of such decision a formal judgment

3. Book of Entry — Entry in Judgment Book. — It is the duty of the clerk to keep a judgment book in which all judgments should be entered.¹

ment should be prepared and entered in the judgment book, attested by the signature of the clerk. *Knapp v. Roche*, 82 N. Y. 366.

Entry in Judge's Calendar Insufficient. — A judge's calendar is not a part of the court records, and an entry therein will not constitute a judgment. Such calendar is simply for the use of the judge in entering memoranda intended for the guidance of the clerk in entering orders and judgments. *Traer v. Whitman*, 56 Iowa 443.

Must Disclose Cause for Which Judgment Rendered. — The record must disclose the cause for which judgment is rendered, and advantage of the want of such record may be taken by writ of error. *Ayres v. Dobson*, 5 Stew. & P. (Ala.) 441.

Name of Garnishee, Costs, and Damages Left Blank. — In *Rigglesworth v. Reed*, 1 Morr. (Iowa) 19, the judgment was reversed for the reason that the name of the garnishee and the damages and costs had been left blank.

Blanks Left for Insertion of Costs. — In *Cotes v. Smith*, (Supm. Ct. Gen. T.) 29 How. Pr. (N. Y.) 326, it was held that on receiving a verdict, or on filing a decision or report, the clerk should immediately make up the judgment roll and enter the proper judgment, leaving blanks for the insertion of the costs, which, when taxed, should be inserted in the blanks. The court said: "The practice prescribed by the code contemplates that the judgment is entered by the clerk, leaving blanks, as was done in this case, for the costs to be inserted by him when they are adjusted. *Stimson v. Huggins*, 16 Barb. (N. Y.) 658; *Dresser v. Shufeldt*, (Supm. Ct. Spec. T.) 7 How. Pr. (N. Y.) 86; *Heinemann v. Waterbury*, 5 Bosw. (N. Y.) 686. The adjustment of the costs, and inserting the same in the record, is but a means of completing the judgment (*Curtis v. Leavitt*, (Supm. Ct. Gen. T.) 1 Abb. Pr. (N. Y.) 120; *Bulkley v. Keteltas*, (Super. Ct.) Code Rep. N. S. (N. Y.) 119), and is not amending or impairing the record within the meaning of the 9th section of title 5, c. 7, pt. 3, of the Revised Statutes (3 R. S., 5th ed., 723), and if it were it is fully authorized by the subsequent enactments of the code."

1. *California*. — *Matter of Blythe*, 110 Cal. 226.

Minnesota. — *Brown v. Hathaway*, 10 Minn. 303; *Jorgensen v. Griffin*, 14 Minn. 464; *Thompson v. Bickford*, 19 Minn. 17.

New York. — *Lentilhon v. New York*, 3 Sandf. (N. Y.) 721; *Schenectady, etc., Plank Road Co. v. Thatcher*, (Supm. Ct. Spec. T.) 6 How. Pr. (N. Y.) 226; *Butler v. Lee*, 3 Keyes (N. Y.) 76; *Sheridan v. Linden*, 81 N. Y. 182; *Appleby v. Barry*, 2 Robt. (N. Y.) 689; *Blydenburgh v. Northrop*, (Supm. Ct. Spec. T.) 13 How. Pr. (N. Y.) 289; *Knapp v. Roche*, 82 N. Y. 366; *Whitney v. Townsend*, 67 N. Y. 40; *Overton v. National Bank*, (Supm. Ct. Spec. T.) 3 N. Y. St. Rep. 169; *Artisans' Bank v. Treadwell*, 34 Barb. (N. Y.) 553; *De Laney v. Blizard*, 7 Hun (N. Y.) 66.

North Carolina. — *Logan v. Harris*, 90 N. Car. 7.

South Dakota. — *Locke v. Hubbard*, 9 S. Dak. 364.

Wisconsin. — *Lathrop v. Snyder*, 17 Wis. 110.

And see the statutes and codes of the various states.

"The clerk must keep among the records of the court a book for the entry of judgments, to be called the judgment book. The judgment must be entered in the judgment book and must specify clearly the relief granted, or other determination of the action." *Brown v. Hathaway*, 10 Minn. 303.

In *Logan v. Harris*, 90 N. Car. 7, it was held that an appeal will be dismissed where the transcript fails to show a judgment of record from which the appeal was taken.

Necessary Where Decision Is Given in Writing. — In *Schenectady, etc., Plank Road Co. v. Thatcher*, (Supm. Ct. Spec. T.) 6 How. Pr. (N. Y.) 226, it was held that the clerk must enter in the judgment book "the judgment," as required by the code, in a case where the court's decision is given in writing and filed, just as in all other cases.

Probate Minute Book. — In *California* a proceeding under Code Civ. Pro., § 1664, to establish heirship is not a civil action within the meaning of section 668 of the code, requiring a judgment in a civil action to be entered in the judgment book, and the entry of

Effect of Entry in Other than Judgment Book. — Should the judgment, however, be entered in a book other than that directed by law, this fact will not render the judgment invalid, at least as between the parties.¹

that decree in a probate minute book under Code Civ. Pro., § 1704, is sufficient. *Matter of Blythe*, 170 Cal. 226.

Entry in Judgment Record Before Entry in Trial Docket. — In *Bond v. Citizens' Nat. Bank*, 65 Md. 498, it was held that the failure to enter a judgment in the original trial docket before entry thereof in the judgment record, a record kept for the permanent registration of all judgments and decrees, is nothing more than a mere clerical error or misprision that would at once be corrected by the court upon application for that purpose. The court said: "Section 16 of article 18 of the code directs that the clerks shall, immediately after the expiration of each term of the court, enter and transcribe into well-bound books the docket entries of each civil suit or action, legal and equitable, which shall have been ended during the term, by trial, judgment, decree, agreement, *non pros.*, or abatement; and such transcript shall contain the style or names of the parties, the nature of the case, the docket entries, etc., and the judgment, decree, order, or agreement by which the several actions or suits were terminated, etc.; and the said books shall be truly and regularly paged, and alphabetically indexed with the names of plaintiffs and defendants, and the whole completed before the ensuing term. It was in the record book thus directed to be kept, and entries of all judgments and decrees to be therein made, that the judgment in question was entered, instead of the original trial docket. And seeing that it was entered in the record book intended to contain a faithful and permanent registration of all judgments and decrees entered by the court, it would be indulging a technical objection to the greatest extreme to hold that the judgment is illegal, or so irregular as to require it to be stricken out, because it had not first been entered in the original trial docket. Judgments should never be vacated for any other than substantial causes, and to prevent injustice made plainly to appear; and in this case, at most, the entry of the judgment was nothing more than a mere clerical

error or misprision, that would at once be corrected by the court upon application for that purpose."

1. **Where Separate Books Are Kept**, a departure from the usual practice of the office by entering a judgment in one book which properly belongs in another may be disregarded or the error corrected by the court, in its discretion, and its action is not reviewable on appeal. *Whitney v. Townsend*, 67 N. Y. 40.

Entry in Register of Actions. — Though by statute it is required that the clerk should keep among the records a register of actions and also a book for the entry of judgments, this does not necessitate the keeping of separate books for these purposes, and an entry of a judgment in a book kept as a register of actions was held valid. *Jorgensen v. Griffin*, 14 Minn. 464. See also *Brown v. Hathaway*, 10 Minn. 303.

"Judgment Book" — "Decree Book." — In *Thompson v. Bickford*, 19 Minn. 17, it was held that where the clerk kept two books for the entry of judgments, one styled "judgment book" and the other "decree book," the entry of a judgment of foreclosure in the latter was at most a mere irregularity, and did not affect its validity.

Entry in "Journal of Proceedings." — If judgments are required to be entered by the clerk in a record of the court, to be called the "judgment book," the entry of a judgment in a book designated as a "journal of proceedings," although irregular, does not impair or invalidate the judgment as between the parties to the action. *Work v. Northern Pac. R. Co.*, 11 Mont. 513.

Entry in "Minute Book." — In *Wolf v. Great Falls Water Power, etc., Co.*, 15 Mont. 49, it was held that the entry of a judgment by the clerk in a book labelled "minute book," instead of in that labelled "judgment by the court," would not render the judgment void or require the dismissal of an appeal therefrom.

Separate Books for Judgments in Legal and Equitable Actions Unnecessary. — "The law recognizes no distinction between legal and equitable relief, nor

4. Time of Entry — *a.* **STATUTORY PROVISIONS AS TO TIME — Entry Within Certain Time.** — By some statutes it is expressly provided that judgment shall be entered within a certain time.¹

Entry on Filing Referee's Report or Decision of Court. — The usual provisions as to the entry of judgments in case of trial by court or referee are to the effect that, except where it is otherwise expressly prescribed by law, judgment upon a referee's report, where the whole issue of fact was tried by the referee, or upon the decision of the court upon the trial of the whole issue of fact without a jury, may be entered by the clerk, as directed therein, upon filing the decision or report.²

Effect of Noncompliance. — When statutes exist prescribing the time for the entry of judgments, it would seem that failure to enter within the proper time, or entry before the lapse of the prescribed period, while irregular, does not render the judgment void.³

requires different judgment books for different classes of actions." *Whitney v. Townsend*, 67 N. Y. 40.

1. *Bundy v. Maginess*, 76 Cal. 532; *Oakland First Nat. Bank v. Wolff*, 79 Cal. 69; *Waters v. Dumas*, 75 Cal. 563; *Raymond v. Smith*, 1 Met. (Ky.) 65; *McClain v. Davis*, 37 W. Va. 330; *Brown v. Porter*, 7 Wash. 327. And see the codes and statutes of the various states.

After Filing of Decision. — It was at one time provided in *New York* that in case of the trial of a case by the court a certain time must elapse between the filing of the decision and the entry of the judgment. *Marvin v. Marvin*, 75 N. Y. 240; *Kidd v. Phillips*, 45 N. Y. Super. Ct. 633; *De Laney v. Blizzard*, 7 Hun (N. Y.) 66.

Lapse of Thirty Days After Filing of Referee's Report. — In *Pennsylvania*, by Act of May 14, 1874, thirty days must elapse after the filing of a referee's report before its entry by the prothonotary, but on error an entry before that time has elapsed will not be treated as material, where the mistake did not affect the rights of either of the parties. *Pittsburgh, etc., R. Co. v. Shaw*, (Pa. 1888) 14 Atl. Rep. 323.

2. See Code Civ. Pro. N. Y., § 1228.

Entry of Judgment on Referee's Report. — In *Crook v. Crook*, 14 Daly (N. Y.) 298, the court, after stating the law as set out in the text, said: "It follows from this language that judgment can be regularly entered upon the report of the referee simply upon filing the same with the clerk of the court, and without serving a copy thereof upon the attorney for the opposite party.

Under the old code the rule was different, and provided that judgment might be entered, not 'upon filing the decision or report,' but 'after the expiration of four days from the filing of the decision or report, and the service upon the attorney for the adverse party of a copy thereof and notice of the filing, but not before.' Code Pro., §§ 267-272. The language of the old code was unmistakable and imperative that a judgment upon the report of a referee could be regularly entered only after the expiration of four days and the service upon the opposite party of a copy thereof. The omission of this language in the present law is equally significant, and shows that the intention of the legislature was to allow judgment to be entered under such circumstances simply upon filing the referee's report. This having been done, the judgment was regularly entered, and all that the said defendant was entitled to in order to have his time to appeal limited was service of a copy of the judgment and the notice of entry thereof." And see generally as to entry of judgment on report of referee, article REFERENCES, vol. 17, p. 1068 *et seq.*

3. *Oakland First Nat. Bank v. Wolff*, 79 Cal. 69; *Bundy v. Maginess*, 76 Cal. 532; *Waters v. Dumas*, 75 Cal. 563; *Marvin v. Marvin*, 75 N. Y. 240; *Kidd v. Phillips*, 45 N. Y. Super. Ct. 633; *Brown v. Porter*, 7 Wash. 327.

Failure to Enter Judgment Within Twenty-four Hours After Verdict. — The failure of the clerk to enter a judgment on the verdict within twenty-four hours after its rendition, as required by stat-

b. ENTRY PENDING MOTION FOR NEW TRIAL. — The entry of a judgment will not deprive a party of his right thereafter to file a motion for a new trial within the time prescribed for such motion,¹ nor will the fact that a judgment has been entered while a motion for a new trial is pending, and before a ruling on such motion, deprive the court of power to grant the new trial.² In

ute, does not affect the validity of the judgment afterwards entered, the injunction of the statute being merely directory. *Oakland First Nat. Bank v. Wolff*, 79 Cal. 69. See also *Waters v. Dumas*, 75 Cal. 563, wherein the court said: "The motion to set aside the verdict because judgment was not entered thereon within twenty-four hours after its rendition was properly denied. It is true, section 664 of the Code of Civil Procedure requires judgment to be entered by the clerk in conformity with the verdict within twenty-four hours after its rendition, unless the cause is reserved for argument or consideration, or a stay of proceedings is granted. The court does not, however, lose jurisdiction of the cause by a failure to enter the judgment within the time prescribed, or by failure of the clerk to perform his duty. The only penalty provided for such a case is to be found in subdivision 6 of section 581, Code of Civil Procedure, which authorizes the court to dismiss the action where, for six months after verdict or final submission, the party entitled to judgment neglects to demand or have the same entered."

Entry Before Lapse of Prescribed Time. — In *Kidd v. Phillips*, 45 N. Y. Super. Ct. 633, it was held that though the entry of judgment before the lapse of the four days prescribed by statute is irregular, such judgment will not be set aside if the one against whom it was entered is not thereby prejudiced.

In *Droz v. Lakey*, 2 Sandf. (N. Y.) 681, it was held that a party obtaining a verdict is not bound to wait four days before entering and perfecting his judgment. The four days mentioned in the code, after which judgment becomes final, are intended to enable the losing party to obtain a stay of proceedings in reference to a case. If he obtains an order staying proceedings within the four days, he may move to set aside the verdict as against evidence, notwithstanding the entry of the judgment. The court said: "Upon the rendition of a verdict, the justice

who tries the cause directs an entry of the judgment to be rendered thereon, unless he desires to consider the matter further. And judgment shall be entered by the clerk, in conformity to the verdict, which shall be final after the expiration of four days, unless there be an order reserving the case or staying the proceedings. Amended Code, §§ 264, 265. The clerk is to make up the judgment roll immediately after entering the judgment. *Ib.*, § 281. This is restricted in effect by the two days' previous notice required for the adjustment of the costs. We think the intent of section 265 was not to delay the entry of the judgment, or its completion in form, until after the expiration of four days; but that a judgment so entered and completed will become absolute and final unless before the end of four days the losing party shall obtain from the court or a justice a stay of proceedings. If he desire to move for a new trial on the ground that the verdict is against evidence, he may obtain a stay for that purpose within the four days, and then move at special term on a case. If his motion be granted, the judgment never becomes final, and will be vacated of course. The defendants have been regular, and the plaintiff must be content with the order at chambers, which preserves all his rights."

1. *Cox v. Baker*, 113 Ind. 62; *Beals v. Beals*, 20 Ind. 163; *Hinkle v. Margum*, 50 Ind. 240.

2. *Hasted v. Dodge*, (Iowa, 1887) 35 N. W. Rep. 462, where the court said: "It is claimed that the judgment should be reversed because the same was entered up while a motion for a new trial was on file, and the motion for a new trial was afterwards overruled. This was all done at the same term, and was not prejudicial to the defendants. If the court should have been of the opinion that the defendants were entitled to a new trial, the fact that a judgment had been entered a day or two before the ruling on the motion would not deprive the court of the power to grant the new trial."

fact, according to some decisions, it is held to be the better practice in all cases where there is no question as to the proper judgment to be entered on a verdict, for the judgment to be entered at once without waiting for a motion for a new trial,¹ since a suspension of proceedings under the judgment will fully protect the losing party.²

c. ENTRY PENDING STAY OF PROCEEDINGS. — According to some decisions it is held that a judgment entered while an order that all proceedings be stayed in the suit for a definite time is in force is irregular.³ According to other decisions, however, the

1. *Hutchinson v. Bours*, 13 Cal. 50; *Moss's Estate*, (Supm. Ct. Spec. T.) 24 Civ. Pro. (N. Y.) 438; *Morrison v. New York, etc., R. Co.*, 32 Barb. (N. Y.) 568.

In *Morrison v. New York, etc., R. Co.*, 32 Barb. (N. Y.) 568, the court said: "Those cases in which the entry of judgment has been stayed to allow a review of the trial have constituted the exceptions to the ordinary practice, and that form of procedure has been resorted to when it has been supposed there were reasons for making the case an exception, and excusing the unsuccessful party from the costs and trouble of an appeal in the first instance."

In *Hutchinson v. Bours*, 13 Cal. 50, it was said: "We think it well, in order to secure uniformity of practice, to suggest that we consider it better, in all cases where there is no question as to the proper judgment to be entered on a verdict, for the court to direct judgment to be entered at once, without waiting for a motion for a new trial, or any proceedings to set aside the verdict. The judgment can be as well set aside as the verdict, while there may be some embarrassments, as in this case, attending the postponement of the entry, and the plaintiff ought to have the benefit of the security, which is sometimes very important, afforded by the lien of the judgment. A suspension of all proceedings under the judgment fully protects the losing party from all losses or injury, if, from any cause, the verdict be set aside or the judgment vacated."

Contra. — In *St. Louis Domicile, etc., Loan Assoc. v. Augustin*, 2 Mo. App. 133, it was held that the entry of judgment should be suspended until the expiration of the time within which a motion for a new trial can be made. And see in this connection *Van Vliet v. Conrad*, 95 Pa. St. 494, in which case

it was held that where a rule for a new trial is discharged, but a motion for a reargument is granted, judgment cannot be entered on the verdict until the latter motion is disposed of.

2. *Hutchinson v. Bours*, 13 Cal. 50.

3. *Uhe v. Chicago, etc., R. Co.*, 4 S. Dak. 505. In this case the court said: "We are satisfied, from answers to direct inquiries, that the effect of such an order is understood differently in different circuits, and that the order in one circuit would be held to permit the entry of judgment, while in another it would be held otherwise; and that, if intended to allow it, the order itself should be so qualified. If convinced that the former view was general, and the practice well established under it, we should be reluctant to disturb it, although we should still think it incorrect. It cannot be questioned but that the order, in terms, prohibited any further proceeding in the case. The entry of judgment is a proceeding — taking another step forward. This is what is forbidden. Uncontrolled by local construction, we think the order would plainly suggest the thought that the court intended that the status of the case and the record should remain unchanged by any act of the parties for the time designated. If a defendant in default procured such an order against the plaintiff, it would not be claimed that the plaintiff might still enter judgment. It not infrequently happens that the very object sought by a defendant is the staying of the entry of judgment against him, and in such a case it would be difficult for a court or judge, if such effect were intended, to make an order more absolutely prohibiting it. We are referred to no reported case where the effect of such an order is considered, and we find very few. In *Hempstead v. Hempstead*, (Supm. Ct. Spec. T.) 7 How. Pr. (N. Y.)

entry of a judgment after a verdict, though a stay of proceedings, granted for the purpose of giving time to make a motion in arrest of judgment and for a new trial, has not expired, is not error, since the judgment is only provisional, and does not deprive a party of the right to move for a new trial.¹

d. ENTRY IN VACATION — (1) *In General*. — Since, as has been seen, the act of the clerk in entering a judgment upon a record is purely ministerial, a judgment properly rendered may be entered by the clerk in vacation.² In fact, during the term of

8, the court held that an 'order staying proceedings for twenty days' prohibited the entry of judgment during that time. In that case there had been no trial and verdict, as in the case now before us, and the opinion is relevant only so far as it indicates the general scope of such an order. In *Danner v. Capehart*, 41 Minn. 294, the court recognized the force of 'an order staying all proceedings' to prevent the entry of judgment on a referee's report finding the facts and directing judgment, and the irregularity of a judgment so entered. In *Ackerman v. Horicon Iron Mfg. Co.*, 16 Wis. 155, the court set aside a judgment as irregular, because entered while an order staying proceedings was in force. The defendant was in default, and plaintiff was entitled to judgment before and when the stay was obtained." See also *Lukens v. Rea*, 29 W. N. C. (Pa.) 65.

Entry Pending Stay. — If the clerk of a court can properly enter a judgment after the close of the term of court, in a case where a motion for a new trial has been made on the minutes of the judge and a subsequent day fixed for the hearing thereof, he cannot do so after a stay of proceedings on the verdict until such hearing has been granted. *Nau v. Suelflohn*, 45 Wis. 438.

1. *Harvey v. McAdams*, 32 Mich. 473, wherein Cooley, J. said: "There is nothing in the objection that the judgment was prematurely entered. It was, in fact, entered fifteen days after the verdict; but the time of entering it was a matter of practice within the discretion of the court. The judgment is only provisional; it does not deprive a party of the right to move for a new trial. This is recognized by *People v. Bay Circuit Ct.*, 14 Mich. 169."

Effect of Entry on Right to Move in Arrest of Judgment. — Since a motion in arrest of judgment may be made at any time before the adjournment of the

court at which the cause is finally disposed of, the defendant's right to make such motion will not be defeated by the entering up of a judgment by the plaintiff on the record before the adjournment of the court at which the cause is finally determined. *Hartridge v. Wesson*, 4 Ga. 101.

2. *California*. — *Casement v. Ringgold*, 28 Cal. 335; *Hutchinson v. Bours*, 13 Cal. 50; *McMillan v. Richards*, 12 Cal. 467; *Genella v. Relyea*, 32 Cal. 160; *Wakelee v. Davis*, 62 Cal. 514; *People v. Jones*, 20 Cal. 55; *Leese v. Clark*, 28 Cal. 36; *Ex p. Bennett*, 44 Cal. 84.

Colorado. — *Sieber v. Frink*, 7 Colo. 148.

Iowa. — *Lind v. Adams*, 10 Iowa 398.

Kansas. — *Iliff v. Arnott*, 31 Kan. 672.

Missouri. — *Gibbs v. Southern*, 116 Mo. 204.

North Carolina. — *Osborne v. Toomer*, 6 Jones L. (N. Car.) 440.

Pennsylvania. — *Beyerle v. Hain*, 61 Pa. St. 226.

Wisconsin. — *Seymour v. Laycock*, 47 Wis. 272; *Wells v. Morton*, 10 Wis. 468; *Manitowoc County v. Sullivan*, 51 Wis. 115.

"Of course, if a judgment is in fact rendered at a term, it does not cease to be a judgment of that term because the work of writing out the entry on the record is not performed until after its close." *Per Brewer, J.*, in *Iliff v. Arnott*, 31 Kan. 672.

In *Sieber v. Frink*, 7 Colo. 148, it was held that the pronouncing of judgment is a judicial act; the entry of record thereof is a ministerial duty. The judgment is complete when properly declared, though the mechanical act of recording it has not been performed. It is not essential that this be done in term time. The court said: "Counsel for plaintiffs in error express a desire to have this court review the case upon its merits, and 'determine the

court clerks can, as a rule, make only short minutes, from which they must make out their more formal record out of term time, and they are at liberty then to put all orders and judgments in proper form.¹

(2) *Necessity of Memoranda for Guidance of Clerk.* — Although the clerk may, in vacation, enter judgments at length in technical language according to established forms, he cannot, it would seem, do this merely from his own recollection, but must be guided by some memoranda, such as the minutes and docket entries of the court's proceeding.²

e. ENTRY AFTER EXPIRATION OF JUDGE'S TERM. — The entry

rights of the parties so that the proper decree may be made below.' And under the fourteenth and fifteenth assignments of error the argument and answer discusses but one proposition, viz., the validity of a judgment entered in vacation. The question therefore, which we shall consider under these assignments, is whether a judgment regularly rendered by a court in the transaction of its judicial business may be entered of record in vacation. In *Stearns v. Aguirre*, 7 Cal. 443, cited, the clerk attempted to enter a judgment in vacation, when it was neither rendered by a court nor pronounced by law. Such a judgment is of course void; it is an attempt by a mere ministerial officer to perform judicial duties. The case is not in point upon the question above stated. The pronouncing of judgment is a judicial act; the entry of record thereof is a ministerial duty. The judgment is complete when properly declared, though the mechanical act of recording the same has not been performed. In jury trials our code directs the clerk to discharge this duty within a specified time after verdict, but if he fails or neglects to do so within the statutory period, the judgment itself, being pronounced on the verdict, is none the less valid, and may still be recorded; the code does not require the entry to be made in term time. And in no event does the provision limiting the time apply to trials by the court. The practice of entering judgments in vacation prevailed at common law."

1. *Osborne v. Toomer*, 6 Jones L. (N. Car.) 440. See also, to the same effect, *Sieber v. Frink*, 7 Colo. 148; *Phelan v. Ganabin*, 5 Colo. 14; *Iliff v. Arnott*, 31 Kan. 672; *Montgomery v. Murphy*, 19 Md. 576; *Manitowoc County v. Sullivan*, 51 Wis. 115.

2. *Montgomery v. Murphy*, 19 Md. 576.

Entry of "Judgment." — According to some decisions, the mere entry of "judgment" by the clerk is a memorandum which may, as between the plaintiff and the defendant, be put in the shape of a formal judgment at any time. *Jacobs v. Burgwyn*, 63 N. Car. 195; *Dick v. Dickson*, 63 N. Car. 490; *Davis v. Shaver*, Phil. L. (N. Car.) 18. According to other decisions, however, the clerk may not make the single entry of "judgment," and fix the liability of parties out of court from mere recollection. In *Montgomery v. Murphy*, 19 Md. 576, the court said: "Though this court has said, in the case of *Weighorst v. State*, 7 Md. 450, 'it has always been the habit of clerks to take minutes and docket entries of the court's proceedings, and subsequently to enter them at length in technical language, according to established forms,' we cannot sanction the extension of this habit to a case in which the clerk has made the single entry of 'judgment,' and then, out of court, fixing the liability of plaintiff or defendant from mere recollection as to how the judgment should be entered at length. If the 'judgment' had indicated, when placed on the minutes of the court, for or against whom it should have been entered, the recording clerk might, by reference to the character of the action, have followed the recognized forms in making the record complete."

Entry Based on Findings of Fact and Conclusions of Law. — Where the findings of fact and conclusions of law in an action, filed by the court during the term of trial, sufficiently state the nature of the judgment awarded, the clerk may, during vacation, formally enter and sign the judgment as of that

of a judgment may be performed even after the expiration of the term of office of the judge rendering the decision.¹

f. ENTRY AFTER DEATH OF PARTY. — If the court renders a judgment during the lifetime of a party, the clerk may perform the ministerial act of entering it and recording it after his death.²

5. Form of Entry. — The proper form of a judgment entry, and what must be shown by the judgment, have already been treated in another place in this work.³

6. Powers and Duties of Clerk — *a. ENTRY IN ACCORDANCE WITH DIRECTION OF COURT* — *Act of Clerk Ministerial.* — The act of the clerk in entering a judgment being ministerial, and the entry by him being simply the evidence of a judgment already rendered,⁴

term. *Manitowoc County v. Sullivan*, 51 Wis. 115, citing *Seymour v. Laycock*, 47 Wis. 272.

1. *Crim v. Kessing*, 89 Cal. 478.

Entry on Findings Signed During Term of Office. — In *Roberts v. White*, 39 N. Y. Super. Ct. 272, the court, in holding that where the findings have been signed by a judge during his term, judgment may be entered after the expiration thereof, said: "Reducing the decision to writing concludes the trial and authorizes the judgment. No *allocatur* of the justice is required. The clerk on filing the decision enters the judgment strictly in conformity with the decision. It is very clear, I think, that when the late chief justice reduced his findings of fact and law to writing, and subscribed them with his name and office — as he did in this case — he had completed the trial, and the clerk was authorized at once to enter the appropriate judgment. Had he done so, any errors in it could have been corrected only on appeal. The judgment would have been entirely regular. If, therefore, the only remaining duty was upon the clerk, he could discharge it at any time afterwards; and no lapse of time, nor the expiration of the judicial term of the justice, would render the entry irregular."

Entry After Re-election of Trial Judge. — In *Holt v. Holt*, 107 Cal. 258, which was an action for divorce, the court, upon a special verdict by the jury, ordered judgment for the defendant. The clerk, however, failed to enter it at the time, and the trial judge was re-elected before its entry. In holding that this delay did not affect the validity of the judgment, the court said: "It is true, the action was an equitable one, and the verdict was only advisory; but it appears to have been regularly

returned and entered in the minutes of the court, and thereupon the court orally ordered judgment to be entered thereon. This order necessarily included an approval and adoption of the verdict and constituted a rendition of judgment in favor of the defendant. And when the order was made it became the duty of the clerk to transcribe it into the minute book of the court, and to enter the judgment as ordered. The failure of the clerk to do so was a failure to perform a ministerial duty which could afterward be performed at his own instance, or by direction of the court at any time. * * * It follows that, notwithstanding the judge of the court below was re-elected between the time of the trial and the completion of the record thereof, the proceedings complained of were authorized and proper." Citing *Matter of Cook*, 77 Cal. 220; *Baker v. Brickell*, 102 Cal. 620.

2. *Franklin v. Merida*, 50 Cal. 289; *Matter of Cook*, 77 Cal. 220. As to the manner of entering a judgment where a party dies after the verdict and before the rendition of judgment, see article JUDGMENTS, vol. 11, p. 843.

3. See article JUDGMENTS, vol. 11, p. 925 *et seq.*

4. *McMillan v. Richards*, 12 Cal. 467; *Leese v. Clark*, 28 Cal. 26; *Genella v. Relyea*, 32 Cal. 159; *Crim v. Kessing*, 89 Cal. 478; *Gray v. Palmer*, 28 Cal. 416; *Sieber v. Frink*, 7 Colo. 148; *American Exch. Nat. Bank v. Moxley*, 50 Ill. App. 314; *California State Tel. Co. v. Patterson*, 1 Nev. 150; *Kehoe v. Blethen*, 10 Nev. 445. See also *supra*, I. 1. *What Constitutes.*

"The judgment is a judicial act of the court; the entry is the ministerial act of the clerk. The judgment is as final when pronounced by the court as when it is entered and recorded by the

such entry should, theoretically at least, be in accordance with the direction of the court,¹ though in actual practice it would seem that the entry is usually made by the clerk without the actual direction of the court to that effect.²

Filing of Decision Sufficient Warrant. — The statutes of some of the states expressly provide, however, that where a final judgment is awarded by the decision of the court or the report of a referee, it shall be the duty of the clerk, on filing the decision or report,

clerk as required by statute. * * * The decision of the court is the judgment; the entry by the clerk is the evidence of it." *California State Tel. Co. v. Patterson*, 1 Nev. 150.

1. *Lee v. Carrollton Sav., etc., Assoc.*, 58 Md. 301; *Truett v. Legg*, 32 Md. 147; *Maicas v. Leony*, 50 Hun (N. Y.) 178; *Gould v. Duluth, etc., Elevator Co.*, 3 N. Dak. 96; *Stahl v. Gotzenberger*, 45 Wis. 121. See also *Kayser v. Hall*, 85 Ill. 511.

Express Direction from Court. — In *Wadsworth v. Willard*, 22 Wis. 238, it appearing that a statute provided that judgment upon an issue of fact or law could be entered only upon the order of the court, except in certain cases mentioned, *Dixon, C. J.*, said: "To authorize the entry of judgment by the clerk, an action must have been commenced by personal service of the summons and complaint, or of the summons, or the defendant must, by answer, either expressly or by not denying, have admitted the whole or some part of the plaintiff's claim to be just; in which case also at least five days' previous notice of the intended application for judgment must have been given to the defendant. * * *

In no other case can the clerk enter a judgment without express direction from the court, a judge, or a court commissioner." And see *Stahl v. Gotzenberger*, 45 Wis. 121.

2. **Sufficient Authority for Entry.** — "On the coming in of a verdict, an order for judgment entered in the minutes, or subsequently written out, signed by the judge, and filed, will give the clerk authority to enter judgment pursuant to the order. Where the action is tried by the court, the findings should indicate clearly the character of the judgment to be entered; and such findings, without further direction from the court or judge, will authorize the entry of judgment. In no case should a judge be called upon to sign a judgment." *Gould v.*

Duluth, etc., Elevator Co., 3 N. Dak. 96.

A declaration by the court, in its conclusions of law, of its judgment in an equitable action is a sufficient authority to the clerk to enter the judgment so declared although there is no express order directing him to do so. *Seymour v. Laycock*, 47 Wis. 272.

The filing of findings of fact and conclusions of law by the court, during the trial term, which sufficiently show the nature of the judgment awarded, is a sufficient direction to the clerk to enter judgment, and he may in vacation formally enter a judgment as of that term. *Manitowoc County v. Sullivan*, 51 Wis. 115.

Sufficient Authority for Insertion of Allowance. — When the clerk has before him on taxation the minutes kept by the deputy clerk, together with his affidavit that the court ordered an allowance to be made to a party, that is sufficient, without any written order, to authorize him to insert such allowance in the judgment. *Smith v. Coe*, 7 Robt. (N. Y.) 477.

Entry Without Written Order. — A judgment entered by the clerk in exact conformity with the agreement of counsel and the verbal order of the court thereon will not be disturbed upon the mere ground that there was no written order of the court, and that the docket entries were not made in open court, but in the clerk's office by a deputy. *Johns v. Fritchey*, 39 Md. 258.

Effect of Subsequent Order Directing Continuance. — In *Claggett v. Simes*, 31 N. H. 56, it was held that a judgment entered by the clerk in pursuance of an express order of the court will not be void, or a mere nullity, though the court, by a subsequent order, not noticed by the clerk, may have directed the case to have been continued. Such a judgment, it is held, is irregular and voidable, and liable to be set aside upon seasonable application.

to enter judgment in conformity therewith, without any further warrant.¹

Entry in Conformity to Verdict. — The duty of the clerk to enter a judgment in conformity with the general verdict of a jury, unless otherwise directed by the court, or prevented by law, has already been considered.²

Limitation of Clerk's Powers. — The clerk's powers are limited to the recording of the judgment as actually rendered by the court, and he has no power to alter or amend such judgment.³

Decision of Court Only Guide for Entry. — In an action tried by a court without a jury, the only guide for the entry of the judgment by the clerk is the formal decision filed by the judge before whom it was tried, containing his findings.⁴ The clerk has no judicial

1. See *supra*, II. 4. a. *Statutory Provisions as to Time.*

In *Clapp v. Hawley*, 97 N. Y. 610, the court said: "The only objection to the copy judgment now suggested is that the draft judgment filed for the purpose of entry, in the clerk's office, had appended to it the signature of the judge upon whose decision the judgment was to be entered, while no copy of such signature was appended to the copy of the judgment, as entered, served on the defendant's attorneys. This signature was no part of the judgment entered, nor was it necessary for any purpose. Where a final judgment is awarded by the decision of the court, or the report of a referee, after the trial of issues of fact, it is made by section 1228 of the code the duty of the clerk, on filing the decision or report, to enter judgment in conformity therewith, without any further warrant. It is only where an interlocutory judgment is rendered, with a direction that the final judgment be settled by the court or referee, that the signature of the judge or referee to the final judgment is required. Code, § 1231. The judgment entered in this case on the decision of the court was a final one, as appears from the affidavits, and needed no signature."

2. See *supra*, I. 1. *What Constitutes.*

3. *Cloughton v. Black*, 24 Miss. 185; *Paine v. Aldrich*, (Supm. Ct. Gen. T.) 13 N. Y. Supp. 455.

Omission of Amount Adjudged. — "If the judgment as entered upon the minutes fails to give the amount of money adjudged to plaintiff, it is void and cannot be corrected or rendered valid by the entry of the clerk in making up the final record." *Cloughton v. Black*, 24 Miss. 185.

Alteration of Entry on Judgment Index.

— In *Prowattain v. McTier*, 1 Phila. (Pa.) 105, 7 Leg. Int. (Pa.) 183, it was held that the clerk has no power to alter the entry of a judgment index without an order of the court. The court said: "On the 9th of May, 1850, a judgment was entered on a single bill, and was entered by the clerk against McTill, when the real name was McTier. No blame can be attributed to the clerk in so stating the name, as he was without instructions from the plaintiff, and the signature looks like McTill. The clerk, on the 19th of September, altered it at the suggestion of the plaintiff on the index. We think this an improper act on his part, to make an alteration without authority. It was from the plaintiff's negligence that it was not entered correctly at first, and we would be justified under the circumstances, perhaps, in striking the judgment off entirely; but we will make an order ratifying the alteration on the 19th of September, and we order that the judgment stand, as on the 9th of May, 1850, against William McTier, saving the rights of all persons accruing between that day and the 19th of September, when it was correctly entered."

Power of Clerk to Amend Entry on Minutes. — The clerk of a court may amend an entry made by him in his minutes so as to correct an error therein and conform the entry to the decision made by the court. *Smith v. Coe*, 7 Robt. (N. Y.) 477.

4. Deviation from Decision. — In *Loeschigk v. Addison*, 3 Robt. (N. Y.) 331, it was held that if the clerk, in entering the judgment, deviates from the decision, the judgment must be set aside.

functions, and no power except to enter the judgment directed by the court or referee, and the latter must settle the judgment and direct such judgment to be entered.¹

Can neither Enlarge nor Abridge Scope of Judgment.—Where the clerk has authority to enter a general judgment, his power is exhausted by the entry of such general judgment, and he can neither enlarge nor abridge the scope or operation of the judgment which he is authorized to enter.²

Entry of Judgment upon Noncompliance with Conditional Order.—Under the practice of some courts the clerk has power to enter a judgment under a conditional order of the court, upon proof of a noncompliance with the condition.³

1. *Paine v. Aldrich*, (Supm. Ct. Gen. T.) 36 N. Y. St. Rep. 999. In this case the court said: "It has been determined by this court that in the case of a trial before a court or referee, the court or referee must settle the judgment to be entered, which is the language of the code, and that the clerk has no power to determine whether a judgment comports with a direction to enter judgment or not. The clerk has no judicial functions and no power except to enter the judgment directed by the court or referee. Consequently, the court or referee must settle the judgment and direct that judgment to be entered; and it is not for the clerk to determine whether any paper corresponds with the judgment which the court or referee has directed to be entered." See also *Chamberlain v. Dempsey*, (N. Y. Super. Ct. Gen. T.) 14 Abb. Pr. (N. Y.) 241.

Entry upon Referee's Report.—A referee's report, in order to authorize a clerk to enter judgment in an equity action, must settle the form of the judgment so to be entered, otherwise the judgment can be entered only upon application to the court. *Maicas v. Leony*, 50 Hun (N. Y.) 178.

Assessment of Damages.—In an action upon a note which was submitted to the court, it was held that the court, having found the plaintiff entitled to recover, might order the clerk to assess damages. *Rife v. Inghram*, 3 Greene (Iowa) 125.

2. *Brusie v. Peck*, 62 Hun (N. Y.) 248.

Unauthorized Entry of Limitations on Judgment.—In *Brusie v. Peck*, 62 Hun (N. Y.) 248, it was held that, as there was nothing before the clerk to justify a different entry, he had power only to enter a general judgment. The

court said: "We think the motion was erroneously denied; there was nothing before the clerk to justify the interpolation of the objectionable words. He had authority to enter a general judgment in favor of the plaintiff against the defendant, and then his power was exhausted. His duties in making the entry were ministerial, and he could neither enlarge nor abridge the scope or operation of the judgment he was authorized to enter."

Adding Interest to Amount of Verdict.

—In *Robostelli v. New York, etc., R. Co.*, 34 Fed. Rep. 507, the action was for damages for personal injuries causing death of intestate. The state statute provided that in entering judgment upon verdict in such causes the clerk should add to the amount of the verdict interest from the date of the death. The plaintiff having filed a waiver with the clerk, that officer entered judgment for the amount of verdict without interest. In setting aside such judgment the court said: "The clerk should not have entered judgment for any sum other than what the verdict and statute called for, and his action in that respect must be set aside. The court undoubtedly possesses the power to regulate the amount of its own judgments, even though by so doing the recovery is reduced below the amount to which appellate jurisdiction attaches. *Omaha First Nat. Bank v. Redick*, 110 U. S. 224, and cases cited. But that function is to be exercised by the court, not by the clerk. The judgment entered upon the verdict is set aside, with leave to plaintiff to move before the judge who tried the case for permission to enter judgment without interest or costs."

3. *Hanna v. Dexter*, (Supm. Ct.) 15

b. PAYMENT OF FEES. — Where a fee is provided for the entry of a judgment, the clerk is entitled to payment before performing such service, but he is bound to perform each service required of him in the entry of judgment upon being paid his fee therefor. He cannot insist that before doing so he be paid the fee for some previous service for which he has given credit.¹

7. Clerk's Liability for Neglect in Entering. — A clerk of a court is undoubtedly liable in damages to the owner of a judgment which he has failed to enter properly, where the plaintiff can show an absolute loss of his judgment through the clerk's neglect.²

8. Irregularities, Clerical Errors or Omissions. — An irregularity in the entry of a judgment or a clerical error or omission in such entry will not invalidate the judgment.³

Abb. Pr. (N. Y.) 135, the court saying: "Plaintiff's counsel contend that the clerk has no power to enter a judgment under a conditional order, upon proof of noncompliance with the condition. This doctrine is at variance with the long-established practice of this court. If judgment is given for plaintiff upon a demurrer, with leave to defendant to answer on payment of costs, etc., it has never been the practice to apply to the court for leave to enter judgment on proof of noncompliance with the condition. The case now before the court is not distinguished from the one put. The effect of the order of March 27th is to grant a judgment of nonsuit unless the plaintiff complied with certain conditions."

Entry of Judgment After Default in Amending, as Permitted by Interlocutory Judgment. — Where, in an equitable action, a demurrer to the defendant's answer was sustained, and an order and interlocutory judgment were duly entered, directing the entry of final judgment for the relief demanded in the complaint, with costs, unless the defendant serve an amended answer and pay certain costs, the plaintiff may, without any further application to or direction from the court, upon the defendant's failure to pay such costs and answer as so permitted, enter final judgment. *Hecla Consol. Gold Min. Co. v. O'Neill*, (Supm. Ct. Gen. T.) 23 Civ. Pro. (N. Y.) 143, holding that there was a sufficient application to the court for judgment upon the trial of the demurrer.

1. *Purdy v. Peters*, (Supm. Ct.) 15 Abb. Pr. (N. Y.) 160. The court said: "The clerk is entitled, before performing any service, to insist on payment of the fees for such service. In which

case the party desiring the service to be performed must either pay the fees, or, if he is not bound to pay them, must take measures to compel the party who is bound to pay. It is immaterial to the clerk who pays the fees, but he may refuse to perform any service till he has been paid for it. If, however, he performs the service without insisting on payment of the fees therefor, he gives credit to the party who is bound to pay them, and must look to him personally."

2. *Blossom v. Barry*, 1 Lans. (N. Y.) 190. And see in general title *Clerks of Courts*, 6 Am. and Eng. Encyc. of Law (2d ed.) 138.

Duty of Plaintiff to See Judgment Properly Entered. — In *Saylor v. Com.*, (Pa. 1886) 5 Atl. Rep. 227, it was held that the rule that it is the duty of the plaintiff to see that his judgment is properly entered applies only between the parties and those affected by the want of constructive notice, and does not refer to the prothonotary's liability to the plaintiff whose judgment he has wrongly entered. The court said: "It is no longer an open question that it is the duty of a creditor to see that his judgment is properly entered of record; but if there is any mistake his remedy is against the prothonotary for any loss that may occur in consequence thereof. By far the most important and responsible duty of the prothonotary is to enter judgments correctly. * * * Where a prothonotary makes a mistake in entering a judgment, and the plaintiff sustains a loss, he has a remedy on the prothonotary's official bond."

3. *California*. — *Mann v. Haley*, 45 Cal. 653; *Rousset v. Boyle*, 45 Cal. 64.

9. Effect of Failure to Enter — In General. — Since, as has been seen,¹ the judgment is a judicial act of the court, and the act of the clerk in entering it is merely ministerial, the validity of the judgment, at least as between the parties, is not affected by the failure of the clerk to enter it.²

Dismissal for Failure to Enter. — According to some statutes an action may be dismissed where, after verdict or final submission, the party entitled to judgment neglects to have it entered.³

Georgia. — *Bridges v. Thomas*, 50 Ga. 378.

Missouri. — *Kansas City First Nat. Bank v. Landis*, 34 Mo. App. 433.

New York. — *Renoul v. Harris*, 2 Sandf. (N. Y.) 641; *Cook v. Dickerson*, 1 Duer (N. Y.) 679.

Ohio. — *Newnam v. Cincinnati*, 18 Ohio 323.

Pennsylvania. — *Lewis v. Smith*, 2 S. & R. (Pa.) 142.

Texas. — *Lowdon v. Fisk*, (Tex. Civ. App. 1894) 27 S. W. Rep. 180.

Virginia. — *Roach v. Blakey*, 89 Va. 767.

Wisconsin. — *Lathrop v. Snyder*, 17 Wis. 110.

United States. — *Bird v. McClelland Stumpf, etc., Brick Mfg. Co.*, 45 Fed. Rep. 458.

Who May Take Advantage of Irregularities in Entry. — Mere irregularities in the entry of the judgment are not available in a collateral action by those who were not parties in the former action. *Gilmore v. Ham*, (Supm. Ct. Gen. T.) 29 N. Y. St. Rep. 751.

As to Clerical Errors in the Designation of Parties in the judgment entry, see article JUDGMENTS, vol. 11, pp. 949, 951-954.

Amendment of Judgment Entry. — As to the proper proceedings for the amendment of clerical errors or omissions in the entry of a judgment upon the record, see article RECORDS, vol. 17, p. 905.

1. See *supra*, I. 1. *What Constitutes.*

2. *Bridges v. Thomas*, 50 Ga. 378; *Newnam v. Cincinnati*, 18 Ohio 323.

It is presumed that clerks record all judgments of their courts, until the contrary is proven. But their neglect, whatever its consequences in other respects, cannot authorize reversal of a judgment. *Hubbell v. Clannon*, 13 La. 496.

Failure of Clerk to Perform Duty. — In *Newnam v. Cincinnati*, 18 Ohio 323, the court said: "The fact that the clerk did not perform his entire duty

in making up the record cannot deprive parties of their rights. Even although he should entirely fail to make up a record, such neglect would not affect those interested in the matter decided, if sufficient could be found upon the files and books of the court to show what had been done. What we call the complete record in a case is nothing but a history of what has been done in the case, copied by the clerk into a book called the book of records. It is not the writing of those things in this book which gives them validity. It is the previous action of the court upon the subject-matter. The record is but evidence of this action, and if, in copying, the clerk makes a mistake, that mistake will be corrected by entries made from time to time of the action of the court, and which entries, made in other books of the court, lay the foundation for the complete records."

3. In *California* it is provided by Code Civ. Pro., § 581, that an action may be dismissed if judgment is not entered within six months after its rendition. *Jones v. Chalfant*, (Cal. 1892) 31 Pac. Rep. 257; *Rosenthal v. McMann*, 93 Cal. 505; *Marshall v. Taylor*, 97 Cal. 422.

And in *Minnesota*, under a statute which provided that an action might be dismissed without a final determination of its merits for sufficient cause shown, it was held that the defendant may move to dismiss the cause if the plaintiff unreasonably neglects to enter a judgment to which he is entitled. *Deuel v. Hawke*, 2 Minn. 50.

Provision Not Mandatory — Excusable Neglect. — The provision of the *California Code* as to dismissal for failure to enter within the prescribed time is not mandatory and does not confer an absolute right to the dismissal, where the neglect to enter the judgment is shown to be excusable when the order of dismissal is applied for. *Rosenthal v. McMann*, 93 Cal. 505.

10. Entry Without Written Decision. — In many of the states it is provided by statute that a written decision, in case of a trial by the court, must be filed with the clerk as a basis for the entry of judgment;¹ and it has been held that such statutory provisions are mandatory and not merely directory.²

11. Application for Order Directing Entry — *a. IN GENERAL* — **Ex Parte Application.** — Where the judgment is a matter of course an application for an order directing the entry thereof may be made *ex parte*. It seems that notice of such application is not necessary unless a stay exists, or the court or judge, for some special reason, directs that such notice be given.³

Interlocutory Judgment. — It would seem that in any case the clerk

1. See *Lewis v. Jones*, (N. Y. Super. Ct.) 13 Abb. Pr. (N. Y.) 427; *Thomas v. Tanner*, (Supm. Ct. Spec. T.) 14 How. Pr. (N. Y.) 426; *Roberts v. White*, 39 N. Y. Super. Ct. 272; *Garr v. Spaulding*, 2 N. Dak. 414.

As to the necessity for reducing to writing the decision of the court, see article DECISIONS, vol. 5, pp. 936, 941.

As to the necessity for reducing to writing the findings of the court, see article FINDINGS OF COURT, vol. 8, p. 931.

"Upon the trial of an issue of fact by the court its decision shall be given in writing, and shall contain a statement of the facts found and the conclusions of law." Monell, C. J., in *Roberts v. White*, 39 N. Y. Super. Ct. 272.

Representative Statute. — By Comp. Laws Dak., § 5066, it is provided that where a jury is waived and the court hears the evidence, "its decision must be given in writing, and filed with the clerk, * * * and no judgment shall be rendered or entered until after the filing of such decision." *Garr v. Spaulding*, 2 N. Dak. 414.

Decision Distinguished from Opinion. — In *Thomas v. Tanner*, (Supm. Ct. Spec. T.) 14 How. Pr. (N. Y.) 426, it was held that the decision which is required to be "given in writing and filed with the clerk" is a very different thing from the opinion which the judge may think proper to write. The decision can appear only by his signature or allocatur. The opinion never should be carried bodily into the record.

And see, as to the difference between a decision such as is required to be given in writing and filed with the clerk and any opinion which the judge may think it proper to write, article DECISIONS, vol. 5, p. 937, note.

How Advantage of Omission Taken. — Where the requisite decision in writing is not filed, and the judgment has been irregularly entered, the proper remedy is by motion below to set such irregular judgment aside, and not by appeal from the judgment in the first place. *Garr v. Spaulding*, 2 N. Dak. 414.

2. *Garr v. Spaulding*, 2 N. Dak. 414. In *Lewis v. Jones*, (N. Y. Super. Ct.) 13 Abb. Pr. (N. Y.) 427, however, it was held that a judgment, in an action tried by the court, is not void by reason of the failure of the judge who tried the cause to file the decision in writing, if the record shows that the action is tried before the court, and if there is no pretense of merits and nothing to create suspicion that the action was not correctly decided, and upon competent and sufficient evidence, since in such case the omission could not be considered as affecting the substantial rights of the adverse party.

3. *Gould v. Duluth, etc., Elevator Co.*, 3 N. Dak. 96. In this case the court said: "The practice of entering judgments in the District Courts in contested cases without notice, and in the absence of the defeated party, was extensively prevalent in those portions of the late territory which are now embraced within the boundaries of this state, and since the state has been admitted the practice still continues to be prevalent. The number of such *ex parte* judgments is very great, and unless the most imperative reasons exist for so doing we certainly ought not to establish a rule in this or in any case which could be used, or sought to be used, as a lever to upset the results of so much of the litigation which belongs to the past. But we know of no express statute or governing rule of

has no power to enter an interlocutory judgment, except after application has been made to the court, and direction in that behalf has been given.¹

Application of Unsuccessful Party. — Where the successful party fails to enter judgment the unsuccessful party may, it seems, obtain an order directing him to do so,² for the purposes of an appeal,³ or, as it has been held, the court may, in its discretion, instead of compelling the successful party to enter a formal judgment, direct that unless judgment is so entered within a time specified the defeated party may enter it.⁴ The exercise of such discretion is

practice that makes such holding necessary. Section 5095, Comp. Laws, provides that a judgment 'may be entered by the clerk upon the order of the court, or the judge thereof.' At the time this section was enacted the line dividing the duties of the court while in session from those of the judge at chambers was much more distinctly marked than it has become under the operation of more recent statutes. The existing practice of entering judgments without notice probably grew up under the statute in consonance with the theory that only *ex parte* matters, followed by orders made as of course, could be entertained by a judge when not sitting as a court. The section cited confers upon the 'judges,' as well as the courts, authority to direct the entry of judgment. We think this implies that the legislature intended judgments to be entered, except in cases where the statute otherwise specially directed, without notice or other formalities than the simple direction of the court, or of the judge at chambers. There seems to be no necessity for such notice ordinarily. None is expressly required in cases tried by the court. Section 5067, Comp. Laws. On the other hand, a motion is expressly required by the terms of a recent statute regulating the entry of judgments based upon the reports of referees. Laws 1889, p. 151."

Equitable Relief for Violation of Agreement Staying Entry. — In *Jay v. De Groot*, (Supm. Ct. Gen. T.) 28 How. Pr. (N. Y.) 107, it was held that where an agreement is entered into between a creditor and his debtors for staying the entry of judgment against the latter, on certain conditions and payments being performed, and, during the performance of the agreement by the debtors, the creditor, without any previous notice to the debtors, enters

up judgment, issues execution, and levies upon the debtors' property, the judgment and execution will be set aside with costs, and the judgment canceled, even if the agreement was unlawful and could not be enforced by legal process.

Service of Copy of Referee's Report. — In *Crook v. Crook*, 14 Daly (N. Y.) 298, it was held that where the whole issue in a case is one of fact which is tried by a referee, judgment can be regularly entered upon his report, under Code Civ. Pro., § 1228, simply upon filing the report with the clerk of the court, and without serving a copy thereof upon the attorney for the opposite party. And see generally as to entering judgment upon report of referee as of course, article REFERENCES, vol. 17, p. 1074.

1. *Maicas v. Leony*, 50 Hun (N. Y.) 178.

2. *Skinner v. Quin*, 43 N. Y. 99; *Wilson v. Simpson*, 84 N. Y. 674.

3. *Skinner v. Quin*, 43 N. Y. 99, the court saying: "The practice pursued by the appellant has been entirely regular, and it is difficult to see by what other course he could obtain a review by this court of the legal questions finally decided adverse to him by the Supreme Court." *Citing Seneca Nation v. Knight*, 19 N. Y. 587.

4. *Wilson v. Simpson*, 84 N. Y. 674.

Entry by Defeated Party. — The unsuccessful party may, if the successful party neglects to enter the proper judgment, enter it himself in order to appeal therefrom. *Thompson v. Schieffelin*, (N. Y. City Ct. Gen. T.) 4 Clv. Pro. (N. Y.) 270; *Wilson v. Simpson*, 84 N. Y. 674.

In *Richmond v. Hamilton*, (Supm. Ct.) 9 Abb. Pr. (N. Y.) 71, note, the case was referred to a referee, who reported in favor of the defendants. They refused to take up the report on

not reviewable on appeal.¹

Application by Defendant for Leave to Enter Judgment for Costs. — Where nominal damages have been recovered, and the plaintiff does not enter judgment, the proper course is for the defendant to move for leave to enter judgment for his costs. A judgment entered without leave should not, it seems, be vacated, since upon the same papers the defendant would be entitled to leave to enter it again.²

6. ENTRY OF DEFAULT JUDGMENTS. — As to the necessity for an application to the court before entry by the clerk of a judgment by default, see article DEFAULTS, vol. 6, p. 1.

12. Reading of Entry in Court. — In some jurisdictions it is expressly required that all entries of judgments and orders shall be read in open court before being signed by the judge.³

13. Signature — *a. GENERAL RULE AS TO TIME AND PLACE.* — As in the rendition of judgments,⁴ the signature of the final judgment by the judge, when required, is a judicial act which can be

account of the amount charged by the referee for his fees. They paid him a portion and demanded the report, which he retained for the balance of the fee. Upon a motion by the plaintiff for an order vacating the order of reference and setting aside the subsequent proceedings, Ingraham, J., said: "This relief certainly is not the proper one. The case has been tried and decided, and it would be very unnecessary to put the parties to the trouble and expense of a new trial. The plaintiff may take an order directing the defendants to file the report within ten days, and enter up judgment thereon; and in default thereof, giving plaintiff leave so to do without costs. Any dispute as to the amount of the referee's fees may be settled by requiring the referee to have the same taxed."

1. *Wilson v. Simpson*, 84 N. Y. 674.

2. *Runnell v. Griffin*, (Supm. Ct. Spec. T.) 8 Abb. Pr. (N. Y.) 39. In this case the court said: "Where the plaintiff recovers a verdict for an amount not sufficient to carry costs, and the defendant is entitled to costs, the former practice I suppose to be still in force, viz., that there can be but one judgment roll, and that the defendant's costs must be inserted in the judgment of the plaintiff for his recovery. If the plaintiff will not enter up judgment, the defendant must move for leave to do so. If the plaintiff enters up his judgment, the prevailing party (which in *Johnson v. Sagar*, (Supm. Ct. Spec. T.) 10 How. Pr. (N. Y.) 554,

is construed to mean the party prevailing as to costs) may on two days' notice have his costs inserted in the judgment by the clerk, and in such case a motion would be unnecessary. In the present case the plaintiff has not entered up any judgment, because the damages are nominal, and, as was stated on the argument of the motion, because they were paid at the time of trial. It would have been a matter of course to grant the defendant leave to enter the judgment for his costs, and there is no ground for vacating the judgment entered by him, because no other judgment can be entered in the action. It would be an idle ceremony to set aside this judgment, for the purpose of compelling the defendant to move for leave to enter up the judgment, and then give him leave to file the same papers anew, and enter his judgment. The same end will be better attained by denying this motion."

3. See *Indiana*, etc., R. Co. v. *Bird*, 116 Ind. 217; *Weatherman v. Com.*, 91 Va. 796; *Catterlin v. Frankfort*, 87 Ind. 45; *Cooper v. Cooper*, 14 La. Ann. 675.

Reading in Open Court — Presumption. — It will be presumed, in the absence of a showing to the contrary, that a judgment was read in open court as the law requires, before being signed by the judge, and that it is such a judgment as the judge intended should be entered. *Indiana*, etc., R. Co. v. *Bird*, 116 Ind. 217.

4. See *supra*, I. 2. *Time and Place of Rendition.*

performed only in term time, and, according to some decisions, in open court, and a signature out of term will have no effect.¹

b. IN VACATION.—This rule is subject, however, in some jurisdictions, to the same exception as that controlling the rendition of judgment, *i. e.*, that by consent of the parties a valid judgment may be signed after the expiration of the term.²

Signature by Special Judge.—The fact that a special judge has failed to sign the record of a final judgment during the term at which such judgment was rendered will not render his judgment void, since the authority of a special judge continues until the final determination of a cause for which he was chosen, and this includes not only the rendition, but the entry and signature, of the judgment.³

1. *James v. Fellowes*, 23 La. Ann. 523; *Culver v. Leovy*, 21 La. Ann. 306; *State v. Judge*, 26 La. Ann. 119; *Hernandez v. James*, 23 La. Ann. 483; *State v. Judges*, 48 La. Ann. 905; *Morrison v. Citizens' Bank*, 27 La. Ann. 401; *Laurent v. Beelman*, 30 La. Ann. 363; *New Orleans v. Gauthreaux*, 32 La. Ann. 1126; *Bougere's Succession*, 29 La. Ann. 378; *Branch v. Walker*, 92 N. Car. 87; *Foley v. Blank*, 92 N. Car. 476. And see generally as to rendition and entry of judgment at chambers or in vacation, article CHAMBERS AND VACATION, vol. 4, p. 343 *et seq.*

Signature in Open Court.—In *Cooper v. Cooper*, 14 La. Ann. 675, it was held that the date of a judgment may be fixed by reference to the record of proceedings in the case, and it is not necessary that the judge should sign it in open court or that it should be stated that it was read in open court.

2. *Rust v. Faust*, 15 La. Ann. 477; *State v. Judges*, 48 La. Ann. 905; *Morrison v. Citizens' Bank*, 27 La. Ann. 401; *Green v. Reagan*, 32 La. Ann. 974; *New Orleans v. Gauthreaux*, 32 La. Ann. 1126. And see article CHAMBERS AND VACATION, vol. 4, p. 345.

Judgment Signed in Vacation Irregular, but Not Void.—In *Catterlin v. Frankfort*, 87 Ind. 45, the court, in holding that the fact that the entries were not signed until vacation after the term does not make the judgment void, said: "The fact that the judge may not have signed the record until in July, 1881, and after the adjournment of the court, may have been an irregularity, but did not affect the validity of the judgment. The statute requires the record of the proceedings of the court to be daily signed by the judge, and that no execution shall issue upon

any judgment or decree until the record has been so signed; if for any cause it has not been so signed during the term at which the proceedings were had, it may be afterwards signed. R. S. 1881, §§ 1330, 1331; *Griffith v. State*, 36 Ind. 406; *Kent v. Fullenlove*, 38 Ind. 522. While the judgment is irregular, though not void, for the reason that it was signed by the judge in vacation, it may be that it cannot be enforced until it has been read in open court by the clerk and signed by the judge in term, though it is not necessary for us to decide this question in this case, and we do not decide it."

3. *Beitman v. Hopkins*, 109 Ind. 177. Generally as to the powers and duties of a special judge, see article JUDGES, vol. 11, p. 794.

Failure to Sign Judgment on Forfeited Bail Bond.—In *Lockhart v. State*, 32 Tex. Crim. 149, it was held that the judgment was not rendered void by the failure of a special judge, after rendering judgment *nisi* on a forfeited bail bond, to sign the judgment within the term at which it was rendered. The court said: "A special judge who tries a case occupies the same position and has 'all the power and authority of the district judge that may be necessary to enable him to conduct, try, determine, and finally dispose of such case.' Code Crim. Pro., art. 572; *Willson's Crim. Stat.*, §§ 2193, 2194. That the minutes of the court were not signed by the judge does not render the judgment of that court invalid or void is, as we understand it, well settled in this state. This being true, the subsequent act of the trial judge signing and approving such minutes cannot operate to invalidate the judgments theretofore legal."

c. AT SUBSEQUENT TERM. — Where through inadvertence a judgment has not been signed at the term when it was rendered, it may, according to some decisions, be signed *nunc pro tunc* at the term succeeding.¹ Where a judgment has been continued by *curia advisare vult*, and is not given until the term succeeding that at which the verdict was rendered, the judgment must not only be entered, but must be signed, as of such succeeding term.²

d. ON DIES NON JURIDICUS. — A valid judgment cannot, it would seem, be signed on a *dies non juridicus*.³

e. PREMATURE SIGNATURE. — Where, by statute, a certain time is given between the rendition and signature of a judgment for a motion for a new trial, the signing of the judgment before the expiration of that time is not assignable in error as between the parties.⁴

III. RENDITION AND ENTRY OF JUDGMENTS NUNC PRO TUNC —

1. Definition and Use of Term. — By a *nunc pro tunc* entry of judgment is meant, according to the usual acceptation of that term, an entry made now, of something which was actually previously done, to have effect as of the former date.⁵

2. Power of Court — In General. — The power to enter judgment *nunc pro tunc* (in the common use of the term) has been possessed

1. State v. Wyatt, 6 La. Ann. 701. And see *infra*, III. *Rendition and Entry of Judgments Nunc pro Tunc*.

In Weatherman v. Com., 91 Va. 796, in holding that a judge may sign *nunc pro tunc* the record of a judgment rendered, or a proceeding had, at a previous term and duly entered by the clerk, where he failed to sign such judgment during the term, the court said: "If a court would have the right to enter a judgment and authenticate the record thereof now for then, it follows, as clearly as the greater includes the less, the whole a part, that the judge may sign in like manner the record of a judgment rendered or a proceeding had at a previous term and duly entered by the clerk upon the order book."

2. Thorpe v. Corwin, 20 N. J. L. 311.

3. Harrison v. Smith, 9 B. & C. 243, 17 E. C. L. 367.

4. Opthlarholer v. Gardiner, 15 La. 512.

A New Trial May Still Be Granted within the prescribed period, and a judgment becomes final only after the expiration of such period. Marigny v. Stanley, 2 La. 323; Hubbell v. Clannon, 13 La. 496; Gardere v. Murray, 5 Mart. N. S. (La.) 244.

If the Motion for a New Trial Be Made

and Disposed of before the expiration of the prescribed time, the judgment may be signed immediately. Dicks v. Barton, 5 Mart. N. S. (La.) 657.

5. Bouv. L. Dict., title *Nunc pro tunc*.

Inaccurate Use of Term. — Under the general title of entry of judgment *nunc pro tunc* are usually embraced all cases of omissions to render a judgment at the proper time and omissions actually to enter such a judgment when properly rendered. This use of the term would seem to be misleading, since the two classes of cases embraced under it are entirely distinct. In the first class are found those in which, though ripe for final judgment, as for instance after a verdict returned, the judicial function of actually rendering the judgment has not been performed. In the second class are found those cases where the judgment, though actually rendered at the proper time by the court, has for some reason not been entered by the clerk. For convenience of treatment of this subject, the term rendition *nunc pro tunc* will be used in speaking of the first class of cases, while the second class — those in which the omission is that of the ministerial act of the clerk — will be treated under the head of entry *nunc pro tunc*.

by courts from the earliest times.¹ It is not confined to courts of law, but is possessed by courts of equity as well,² and applies also to referees' decrees³ and to criminal cases.⁴

Power Inherent. — This power is inherent in the court and is not the creation of statute.⁵

Exercise of Power Not Limited as to Time. — In the absence of an express statute, the time within which the court may exercise this power is not limited.⁶

3. Rendition Nunc pro Tunc — *a.* **WHEN PROPER** — (1) *General Rule.* — As a general rule the court may exercise its power of rendering judgment *nunc pro tunc* when the omission to render such judgment at the proper time was caused by the act of the

1. *Alabama.* — Wilkerson v. Goldthwaite, 1 Stew. & P. (Ala.) 159; Mays v. Hassell, 4 Stew. & P. (Ala.) 222.

California. — Swain v. Naglee, 19 Cal. 127.

Florida. — Hagler v. Mercer, 6 Fla. 721.

Indiana. — Chissom v. Barbour, 100 Ind. 1.

Iowa. — Shephard v. Brenton, 20 Iowa 41.

New Jersey. — Hess v. Cole, 23 N. J. L. 116.

North Carolina. — Bright v. Sugg, 4 Dev. L. (N. Car.) 492; Long v. Long, 85 N. Car. 415.

Ohio. — Dial v. Holter, 6 Ohio St. 228.

Virginia. — Weatherman v. Com., 91 Va. 796.

United States. — Mitchell v. Overman, 103 U. S. 62.

England. — Evans v. Rees, 12 Ad. & El. 167, 40 E. C. L. 46; Mohun's Case, 6 Mod. 59; Hodges v. Templer, 6 Mod. 191; Norwich v. Berry, 4 Burr. 2277.

2. *Burnham v. Dalling*, 16 N. J. Eq. 310.

3. *Burnham v. Dalling*, 16 N. J. Eq. 310.

4. *Smith v. State*, 1 Tex. App. 416.

In *Ex p. Beard*, 41 Tex. 234, it was held that when the defendant in a criminal cause has been found guilty by the verdict of a jury, and appeals before an entry of final judgment against him, the District Court may enter final judgment *nunc pro tunc* after a term has intervened since the verdict.

5. *Chissom v. Barbour*, 100 Ind. 1; *Fuller v. Stebbins*, 49 Iowa 376; *Burnham v. Dalling*, 16 N. J. Eq. 310; *Long v. Long*, 85 N. Car. 415; *Mitchell v. Overman*, 103 U. S. 62; *Norwich v.*

Berry, 4 Burr. 2277; *Hodges v. Templer*, 6 Mod. 191; *Evans v. Rees*, 12 Ad. & El. 167, 40 E. C. L. 46.

6. *Nabers v. Meredith*, 67 Ala. 333; *Fuller v. Stebbins*, 49 Iowa 376; *Long v. Long*, 85 N. Car. 415; *Donne v. Lewis*, 11 Ves. Jr. 601; *Lawrence v. Richmond*, 1 Jac. & W. 241.

Courts possess the inherent authority to enter judgment *nunc pro tunc*, and lapse of time will not bar its exercise. Such power is not taken away, nor is the time within which it may be exercised affected, by the provisions of the statute with regard to proceedings to correct mistakes in the proceedings of the clerk. Therefore, where the judgment had in fact been rendered by the court as shown by the minutes in the judge's calendar, but had not been entered up by the clerk, a motion three years and six months afterwards for the entry of judgment *nunc pro tunc* was proper. *Fuller v. Stebbins*, 49 Iowa 376.

Statute of Limitations Does Not Apply. — In *Risser v. Martin*, 86 Iowa 392, it was held that the statute of limitations has no application with regard to the court's exercise of its right to enter judgments *nunc pro tunc*.

Entry Pending Appeal. — As holding that a judgment may be entered *nunc pro tunc* by the trial court, although an appeal therefrom has been taken, see *Gamble v. Daugherty*, 71 Mo. 599. See, however, *Turner v. Keokuk First Nat. Bank*, 30 Iowa 191, in which case it was held that a judgment *nunc pro tunc* entered while an appeal from the ruling upon a demurrer was pending in the Supreme Court, and without the appellee having elected to stand upon his demurrer, and entered without notice to him, was unauthorized and void.

court, or by its failure to act,¹ or by an act of the opposing party; in other words, where the delay is not caused by any neglect or laches of the prevailing party.²

Case Must Be Ripe for Judgment. — It is essential to the exercise of the court's power that the action must have been ready for the rendition of the final judgment when the cause arose preventing such rendition at the proper time.³

(2) *Delay by Act of Court* — **In General.** — The power of the court to render a judgment *nunc pro tunc* may be exercised whenever such judgment was not rendered at the proper time by reason of some act of the court, and where, by reason of such delay, the successful party, being free from laches, would otherwise suffer an injustice.⁴

1. See *infra*, III. 3. a. (2) *Delay by Act of Court*; III. 3. u. (3) *Delay by Act of Adversary*.

2. Mitchell v. Overman, 103 U. S. 62; Stapler v. Hoffman, 1 Dem. (N. Y.) 63.

3. Jennings v. Ashley, 5 Ark. 128; Gray v. Thomas, 12 Smed. & M. (Miss.) 111; Hall v. Brown, 59 N. H. 198; North v. Pepper, 20 Wend. (N. Y.) 677; Kissam v. Hamilton, (Supm. Ct. Spec. T.) 20 How. Pr. (N. Y.) 375; Hazard v. Durant, 14 R. I. 25; O'Riordan v. Walsh, Ir. R. 8 C. L. 158. See, however, Webber v. Webber, 83 N. Car. 280, wherein it was held that where the plaintiff in a suit for divorce on the ground of adultery dies pending the trial, after it has been entered upon and before the retirement of the jury, if all the issues are found by the jury in favor of the plaintiff, judgment of divorce will be entered as of the first day of the term while the plaintiff was still alive.

In Perkins v. Dunlavy, 61 Tex. 241, it was held that in every case, to entitle an applicant to have his judgment entered *nunc pro tunc* on account of the death of one of the parties, the action must, at the time of the death, have been ready for the rendition of the final judgment. Such is not the case when a trial has still to take place.

4. Alabama. — Powe v. McLeod, 76 Ala. 418.

Arkansas. — Jennings v. Ashley, 5 Ark. 128; Pool v. Loomis, 5 Ark. 110.

Connecticut. — Brown v. Wheeler, 18 Conn. 199.

Illinois. — Dowden v. Wilson, 108 Ill. 257.

Massachusetts. — Perry v. Wilson, 7 Mass. 393; Springfield v. Worcester, 2 Cush. (Mass.) 52.

New Jersey. — McNamara v. New York, etc., R. Co., 56 N. J. L. 56; Hess v. Cole, 23 N. J. L. 116; Teneick v. Flagg, 29 N. J. L. 25; Ruckman v. Decker, 27 N. J. Eq. 244; Thorpe v. Corwin, 20 N. J. L. 311; Jones v. Oliver, 8 N. J. L. 86.

New York. — Campbell v. Mesier, 4 Johns. Ch. (N. Y.) 334, 8 Am. Dec. 570; Wood v. Keyes, 6 Paige (N. Y.) 478.

North Carolina. — Ferrell v. Hales, 119 N. Car. 199; Bright v. Sugg, 4 Dev. L. (N. Car.) 492; Long v. Long, 85 N. Car. 415; Wilson v. Myers, 4 Hawks (N. Car.) 73, 15 Am. Dec. 510.

Ohio. — *In re* Jarrett, 42 Ohio St. 199.

Oregon. — Mitchell v. Schoonover, 16 Oregon 211, 8 Am. St. Rep. 282.

South Carolina. — Allston v. Sing, Riley L. (S. Car.) 199; State v. Fullmore, 47 S. Car. 34.

Tennessee. — McLean v. State, 8 Heisk. (Tenn.) 22; Davis v. Jones, 3 Head (Tenn.) 603.

Texas. — Johnson v. Smith, 14 Tex. 412; Smith v. State, 1 Tex. App. 408.

Vermont. — Snow v. Carpenter, 54 Vt. 17.

Wisconsin. — Shakman v. U. S. Credit System Co., 92 Wis. 366.

United States. — Richardson v. Green, 130 U. S. 104; Citizens' Bank v. Brooks, 23 Fed. Rep. 21; Borer v. Chapman, 119 U. S. 587; Griswold v. Hill, 1 Paine (U. S.) 483; Beaver v. Taylor, 1 Wall. (U. S.) 637.

England. — Ireland v. Champneys, 4 Taunt. 884; Heathcote v. Wing, 11 Exch. 355; Freeman v. Tranah, 12 C. B. 406, 74 E. C. L. 406; Fishmongers v. Robertson, 3 C. B. 970, 54 E. C. L. 970; Lawrence v. Hodgson, 1 Y. & J. 368; Evans v. Rees, 12 Ad. & El. 167, 40 E. C. L. 46; Jones v. Le Davids, 2 Fowler's Ex. Pr. 169; Davies v. Davies,

Application of Rule — Death of Party. — The most usual occasion for the exercise of this power is where, the cause being in the hands of the court and ready for final judgment, the death of one of the parties occurs before the final judgment has been rendered,¹ and this is true whether the death be that of the defendant² or of the plaintiff.³ Where a party prosecuting an action fails, by a delay of the court, to obtain judgment when he is entitled to it, and his adversary dies, it is the duty of the court, upon proper application, to render judgment in favor of such party as of a time

9 Ves. Jr. 461; *Astley v. Reynolds*, 2 Stra. 917; *Neil v. McMillan*, 27 U. C. Q. B. 258; *Davy v. Cameron*, 15 U. C. Q. B. 175; *Abington v. Lipscomb*, 11 L. J. Q. B. 15; *Miles v. Bough*, 15 L. J. Q. B. 30; *Turner v. London, etc.*, R. Co., 43 L. J. Ch. 430; *Key v. Goodwin*, 1 Moo. & S. 620, 28 E. C. L. 272.

1. *Alabama*. — *Powe v. McLeod*, 76 Ala. 418.

Arkansas. — *Pool v. Loomis*, 5 Ark. 110; *Jennings v. Ashley*, 5 Ark. 128.

California. — *Matter of Page*, 50 Cal. 40.

Connecticut. — *Brown v. Wheeler*, 18 Conn. 199; *Collins v. Prentice*, 15 Conn. 423.

Indiana. — *Hilker v. Kelley*, 130 Ind. 356.

Maine. — *Goddard v. Bolster*, 6 Me. 427, 20 Am. Dec. 320.

Massachusetts. — *Springfield v. Worcester*, 2 Cush. (Mass.) 52; *Tapley v. Goodsell*, 122 Mass. 176; *Perry v. Wilson*, 7 Mass. 395.

New Hampshire. — *Blaisdell v. Harris*, 52 N. H. 191; *Hall v. Harvey*, 3 N. H. 61.

New Jersey. — *Hess v. Cole*, 23 N. J. L. 116.

New York. — *Arthur v. Schriever*, 60 N. Y. Super. Ct. 59; *Beach v. Gregory*, (C. Pl. Spec. T.) 2 Abb. Pr. (N. Y.) 203, 3 Abb. Pr. (N. Y.) 78; *Ryghtmyer v. Durham*, 12 Wend. (N. Y.) 245; *Spalding v. Congdon*, 18 Wend. (N. Y.) 543; *Holmes v. Honie*, (Supm. Ct. Spec. T.) 8 How. Pr. (N. Y.) 383; *De Agreda v. Mantel*, (N. Y. Super. Ct. Spec. T.) 1 Abb. Pr. (N. Y.) 130; *Campbell v. Mesier*, 4 Johns. Ch. (N. Y.) 334, 8 Am. Dec. 570; *Wood v. Keyes*, 6 Paige (N. Y.) 478; *Kissam v. Hamilton*, (Supm. Ct. Spec. T.) 20 How. Pr. (N. Y.) 369; *Fulton v. Fulton*, (Supm. Ct. Spec. T.) 8 Abb. N. Cas. (N. Y.) 210; *Long v. Stafford*, 103 N. Y. 275.

North Carolina. — *Wilson v. Myers*, 4 Hawks (N. Car.) 73, 15 Am. Dec. 510;

Isler v. Brown, 66 N. Car. 556; *Beard v. Hall*, 79 N. Car. 506.

Ohio. — *In re Jarrett*, 42 Ohio St. 199; *Dial v. Holter*, 6 Ohio St. 228.

South Carolina. — *Allston v. Sing*, *Riley L.* (S. Car.) 199.

Tennessee. — *McLean v. State*, 8 Heisk. (Tenn.) 22.

United States. — *Citizens' Bank v. Brooks*, 23 Fed. Rep. 21; *Mitchell v. Overman*, 103 U. S. 62; *Griswold v. Hill*, 1 Paine (U. S.) 483.

England. — *Cumber v. Wane*, 1 Stra. 426; *Key v. Goodwin*, 1 Moo. & S. 620, 28 E. C. L. 272; *Toulmin v. Anderson*, 1 Taunt. 385; *Bridges v. Smyth*, 8 Bing. 29, 21 E. C. L. 209; *Blewett v. Tregonning*, 4 Ad. & El. 1002, 31 E. C. L. 244; *Green v. Cobden*, 4 Scott 486; *Harrison v. Heathorn*, 1 Dowl. & L. 529; *Evans v. Rees*, 12 Ad. & El. 167, 40 E. C. L. 46; *Moor v. Roberts*, 3 C. B. N. S. 844, 91 E. C. L. 844; *Seymour v. Greenwood*, 30 L. J. Exch. 189; *Abington v. Lipscomb*, 11 L. J. Q. B. 15; *Davies v. Davies*, 9 Ves. Jr. 461; *Neil v. McMillan*, 27 U. C. Q. B. 257; *Crispe v. Berwick*, 1 Vent. 90; *Lure v. Rest*, 10 Mod. 30.

"Personal actions, by the common law, as well as by our statute, abate by the death of the party. If, before verdict, such an event happens to one of the suitors, the cause is brought to an end. But if after verdict, and before judgment, he dies, the rule is different. The right to recover being established and the amount of damages determined by the verdict, it shall continue in force, and a judgment may be given upon it as of the term when it was rendered." *Dial v. Holter*, 6 Ohio St. 246.

2. *Perry v. Wilson*, 7 Mass. 393; *Mitchell v. Schoonover*, 16 Oregon 211; *Harrison v. Heathorn*, 1 Dowl. & L. 529.

3. *Jackson v. Berwick*, 1 Mod. 36; *Turner v. London, etc.*, R. Co., L. R.

when the adversary was living.¹

Occasion Other than Death.—Although the death of one of the parties is, as has been said, the most usual occasion for the rendition of a judgment *nunc pro tunc*, yet it is by no means the only one.²

Decision to Be Governed by Circumstances of Each Case.—A *nunc pro tunc* order should be granted or refused, as justice may require, in view of the circumstances of the particular case.³

(3) *Delay by Act of Adversary*—(a) **Motion in Arrest or for New Trial, etc.**—The second class of cases in which the failure to render a judgment at the proper time may be remedied by rendition of judgment *nunc pro tunc* arises where the rendition of the judgment is delayed after verdict by some act of the unsuccessful party, and one of the parties dies pending a decision of a motion in arrest of judgment⁴ or for a new trial⁵ or other such

17 Eq. 561, 43 L. J. Ch. 430; *Springsted v. Jayne*, 4 Cow. (N. Y.) 423.

1. *Mitchell v. Schoonover*, 16 Oregon 211.

2. *Lewis v. Soper*, 44 Me. 72, *Springfield v. Worcester*, 2 Cush. (Mass.) 52; *Currier v. Lowell*, 16 Pick. (Mass.) 170.

The usual rule established by the general concurrence of the American and English courts is that where the delay in rendering a judgment or a decree arises from the act of the court, that is, where the delay has been caused either for its convenience, or by the multiplicity or press of business, or by the intricacy of the question involved, or by any other cause not attributable to the laches of the parties, the judgment or decree may be rendered after the proper time and may be entered retrospectively as of a time when it should or might have been entered up. In such cases, in accordance with the maxim *actus curiæ neminem gravabit*, it is the duty of the court to see that the parties shall not suffer by the delay. *Mitchell v. Overman*, 103 U. S. 62; *Borer v. Chapman*, 119 U. S. 587. See also *Gray v. Thomas*, 12 Smed. & M. (Miss.) 111.

Repeal of Statute After Verdict and Before Judgment.—Where an action was brought upon a statute which was afterwards repealed, but before the repealing statute went into operation the action was tried and a verdict rendered for the plaintiff, and questions of law were reserved, which after the repeal took effect were decided in favor of the plaintiff, the court ordered judgment to be entered on the verdict as of a day previous to that on which the repealing

act took effect. *Springfield v. Worcester*, 2 Cush. (Mass.) 52.

3. *Mitchell v. Overman*, 103 U. S. 62, 4. *Griffith v. Ogle*, 1 Binn. (Pa.) 172; *Fitzgerald v. Stewart*, 53 Pa. St. 343; *Brown v. Wheeler*, 18 Conn. 199; *Witten v. Robison*, 31 Mo. App. 525; *Dial v. Holter*, 6 Ohio St. 228.

5. *California*.—*Hutchinson v. Bours*, 13 Cal. 50.

Connecticut.—*Collins v. Prentice*, 15 Conn. 423; *Brown v. Wheeler*, 18 Conn. 199.

Illinois.—*Danforth v. Danforth*, 111 Ill. 236.

Massachusetts.—*Cowley v. McLaughlin*, 137 Mass. 221; *Terry v. Briggs*, 12 Cush. (Mass.) 319; *Currier v. Lowell*, 16 Pick. (Mass.) 170; *Tapley v. Martin*, 116 Mass. 275; *Springfield v. Worcester*, 2 Cush. (Mass.) 52.

Missouri.—*Witten v. Robison*, 31 Mo. App. 525.

New Hampshire.—*Blaisdell v. Harris*, 52 N. H. 191.

New Jersey.—*Den v. Tomlin*, 18 N. J. L. 14, 35 Am. Dec. 525.

New York.—*Spalding v. Congdon*, 18 Wend. (N. Y.) 543; *Ryghtmyer v. Durham*, 12 Wend. (N. Y.) 245; *Mackay v. Rhineland*, 1 Johns. Cas. (N. Y.) 408.

Ohio.—*Dial v. Holter*, 6 Ohio St. 228.

Pennsylvania.—*Fitzgerald v. Stewart*, 53 Pa. St. 343; *Irvin v. Hazleton*, 37 Pa. St. 465.

England.—*Bridges v. Smyth*, 8 Bing. 29, 21 E. C. L. 209; *Key v. Goodwin*, 1 Moo. & S. 620, 28 E. C. L. 272; *Miles v. Williams*, 9 Q. B. 47, 58 E. C. L. 47; *Seymour v. Greenwood*, 30 L. J. Exch.

motions of the unsuccessful party.¹

Reason for Rule. — The reason for this rule, as in the first class of cases, is that the successful party should not suffer by any delay to which he has in no way contributed by his laches.²

(b) **Appeal.** — When one of the parties to an action dies after judgment in the lower court and while an appeal therefrom is pending, the practice is to affirm or reverse such judgment *nunc pro tunc*.³ Where the appellee dies after the argument of a motion to dismiss an appeal, it has been held proper to enter the

189; *Moor v. Roberts*, 3 C. B. N. S. 844, 91 E. C. L. 844, 4 Jur. N. S. 241, 27 L. J. C. Pl. 161; *Tooker v. Beaufort*, 1 Burr. 147.

Meaning of Words "Motion for a New Trial." — In *Springfield v. Worcester*, 2 Cush. (Mass.) 52, it was held, under a statute providing that "whenever any motion for a new trial shall be overruled, the court shall render judgment as of the term when the verdict was rendered, whenever it shall be necessary or expedient so to do," that the words "motion for a new trial" were not used in their technical sense, but were intended to include any case which is continued on motion of a dissatisfied party, for the purpose of obtaining some new disposition thereof which shall relieve him from a verdict.

1. *Tapley v. Martin*, 116 Mass. 275; *Blaisdell v. Harris*, 52 N. H. 191; *McLean v. State*, 8 Heisk. (Tenn.) 22; *Bridges v. Smyth*, 8 Bing. 29, 21 E. C. L. 209.

Motion Touching Award. — A judgment for a defendant is valid although not entered up within two terms after the death of the defendant, the verdict having been given during her life, and the delay occasioned by a motion touching an award. *Bridges v. Smyth*, 8 Bing. 29, 21 E. C. L. 209, 1 Moo. & S. 93.

Death Pending Rule to Set Aside Verdict. — A plaintiff died after verdict and before judgment, a rule to set aside the verdict being pending at the time of his death. After that rule had been discharged, the court allowed judgment to be entered *nunc pro tunc*. *Seymour v. Greenwood*, 30 L. J. Exch. 189.

Death Pending Argument of Rule to Show Cause. — Where a rule to show cause has been obtained by a defendant who dies before an argument of the rule can be had, judgment, if in favor of the plaintiff, may be entered *nunc pro tunc* as of the term of return

of the *postea*. *Den v. Tomlin*, 18 N. J. L. 14; *Corlies v. Little*, 14 N. J. L. 382.

Death Pending Delay by Case or Bill of Exceptions. — Where a party has a verdict, or obtains a nonsuit, and is delayed by a case or bill of exceptions, and dies while the matter is *sub judice*, the court will, on common-law principles, and without regard to lapse of time, allow judgment to be entered as of a term or time when the party was alive. The statute does not apply in such case. *Ryghtmyer v. Durham*, 12 Wend. (N. Y.) 245; *Spalding v. Congdon*, 18 Wend. (N. Y.) 543; *Gurney v. Parks*, (Supm. Ct. Spec. T.) 1 How. Pr. (N. Y.) 140; *Crawford v. Wilson*, 4 Barb. (N. Y.) 504.

This rule was applied in the case of a trial by the court without a jury, where, after delay, the suit was dismissed. *Ehle v. Moyer*, (Supm. Ct. Spec. T.) 8 How. Pr. (N. Y.) 244. But compare *Kissam v. Hamilton*, (Supm. Ct. Spec. T.) 20 How. Pr. (N. Y.) 375.

Death Pending Consideration of Transferred Case. — In *Blaisdell v. Harris*, 52 N. H. 191, after verdict for the plaintiff, the case was transferred to the law term for the consideration of the full bench, upon exceptions taken by the defendant. While the cause was thus pending in the law term, the defendant died. Afterwards, the defendant's exceptions being overruled, it was held that the plaintiff should have judgment as of the term when the verdict was rendered.

2. *Matter of Page*, 50 Cal. 40; *Skidaway Shell-Road Co. v. Brooks*, 77 Ga. 136; *Goddard v. Bolster*, 6 Me. 427, 20 Am. Dec. 320; *Tapley v. Goodsell*, 122 Mass. 176; *Witten v. Robison*, 31 Mo. App. 525; *Long v. Stafford*, 103 N. Y. 275; *Beard v. Hall*, 79 N. Car. 506; *Mitchell v. Schoonover*, 16 Oregon 211, 8 Am. St. Rep. 282; *Mitchell v. Overman*, 103 U. S. 62.

3. *Snow v. Carpenter*, 54 Vt. 17. See also *Powe v. McLeod*, 76 Ala. 418;

order on the motion *nunc pro tunc* as of the day of the argument.¹ So where, after verdict, no judgment has been signed and an appeal is taken but is subsequently withdrawn, the verdict is revived and judgment may be rendered thereon *nunc pro tunc*.²

b. WHEN NOT PROPER — In General. — The power of the court to render a judgment *nunc pro tunc* is limited to such cases as have been set out, and its exercise on other grounds is improper.³ The court should not so render judgment merely to modify past acts or supply omissions of the court,⁴ or where the delay was caused by a neglect or mistake of the applicant for judgment.⁵

4. Nunc pro Tunc Entry of Judgment Previously Rendered — a. WHEN PROPER — (1) In General. — When a judgment has in fact been rendered, but through some omission of the clerk has not been entered, the court may in a proper case order its entry *nunc pro tunc*.⁶

Citizens' Bank v. Brooks, 23 Fed. Rep. 21.

Judgment Affirmed Generally as of Time of Rendition. — Exceptions are of the nature of a writ of error; hence, when a judgment has been rendered by the County Court on a verdict, and while the cause is pending in the Supreme Court, but after a hearing there, one of the defendants dies, and a minute of his death is made on the record, and afterwards the judgment below is affirmed, not *nunc pro tunc*, but generally as of the time of its rendition, such judgment is not void, and has full force until reversed. Snow v. Carpenter, 54 Vt. 17.

1. Richardson v. Green, 130 U. S. 104.

2. Hardee v. Stovall, 1 Ga. 92.

3. Tuomy v. Dunn, 77 N. Y. 515.

4. Nabers v. Meredith, 67 Ala. 333; King v. Burnham, 129 Mass. 598; Hyde v. Curling, 10 Mo. 359; Gibson v. Chouteau, 45 Mo. 171; Smith v. Hood, 25 Pa. St. 218; Perkins v. Dunlavy, 61 Tex. 241; Gray v. Brignardello, 1 Wall. (U. S.) 627. Compare Long v. Long, 85 N. Car. 415.

5. Aydelotte v. Brittain, 29 Kan. 98; Hall v. Brown, 59 N. H. 198; Stapler v. Hoffman, 1 Dem. (N. Y.) 63; Puget Sound Agricultural Co. v. Pierce County, 1 Wash. Ter. 75; Lawrence v. Hodgson, 1 Y. & J. 368; Fishmongers v. Robertson, 3 C. B. 970, 54 E. C. L. 970, 4 Dowl. & L. 656; Heathcote v. Wing, 11 Exch. 355; Freeman v. Tranah, 12 C. B. 406, 74 E. C. L. 406, 21 L. J. C. Pl. 214.

Delay Result of Mutual Understanding. — Where judgment on the verdict has

been prevented by steps of the opposing party to obtain a new trial, a delay of more than two terms does not prevent judgment *nunc pro tunc*. And although the court should not interfere if the delay is by laches, yet where it was the result of a mutual understanding, and the verdict may be conclusive as to title, the cause should be deemed still in court. Dieffendorf v. House, (Supm. Ct. Gen. T.) 9 How. Pr. (N. Y.) 243.

6. Alabama. — Whorley v. Memphis, etc., R. Co., 72 Ala. 20, 74 Ala. 264; Bentley v. Wright, 3 Ala. 607; Wilkerson v. Goldthwaite, 1 Stew. & P. (Ala.) 159.

California. — Marshall v. Taylor, 97 Cal. 422; Franklin v. Merida, 50 Cal. 289; Dreyfuss v. Tompkins, 67 Cal. 339; Swain v. Naglee, 19 Cal. 127; Matter of Cook, 83 Cal. 415; Matter of Cook, 77 Cal. 220, 11 Am. St. Rep. 267.

Florida. — Hagler v. Mercer, 6 Fla. 721.

Georgia. — Mountain v. Rowland, 30 Ga. 929.

Illinois. — Gebbie v. Mooney, 121 Ill. 255; Howell v. Morlan, 78 Ill. 162; Reid v. Morton, 119 Ill. 118; Ives v. Hulce, 17 Ill. App. 30.

Indiana. — Hartford Security Co. v. Arbuckle, 123 Ind. 518.

Iowa. — Shepard v. Brenton, 20 Iowa 41; Flock v. Wyatt, 49 Iowa 466.

Kansas. — Aydelotte v. Brittain, 29 Kan. 98.

Louisiana. — State v. Cox, 33 La. Ann. 1056.

Michigan. — In re Shepard, 109 Mich. 631.

Mississippi. — Forbes v. Navra, 63

Judgments by Confession. — This power of the court to order the entry of a judgment *nunc pro tunc* applies to judgments by confession and the like, as well as to judgments actually rendered by the court.¹

(2) *Amendment of Clerical Errors or Omissions.* — The subject of the amendment of clerical errors or omissions in the record of the judgment by *nunc pro tunc* entry has been discussed in another article.²

(3) *Previous Act of Court Essential.* — In order that a judgment be entered *nunc pro tunc*, it is absolutely essential that a judgment shall have been previously rendered by the court.³

(4) *Entry as Affected by Rights of Third Persons — Must Not Prejudice Rights of Innocent Parties.* — The object of allowing entries *nunc pro tunc* being the furtherance of justice,⁴ such entries will

Miss. 1; Cotten v. McGehee, 54 Miss. 621.

Missouri. — Gamble v. Daugherty, 71 Mo. 599; Jackson v. St. Louis, etc., R. Co., 89 Mo. 104; Belkin v. Rhodes, 76 Mo. 643; Evans v. Fisher, 26 Mo. App. 541; Groner v. Smith, 49 Mo. 318; Gibson v. Chouteau, 45 Mo. 171, 100 Am. Dec. 366; Hansbrough v. Fudge, 80 Mo. 307; Hyde v. Curling, 10 Mo. 359.

Montana. — Parrott v. McDevitt, 14 Mont. 203; Harvey v. Whitlatch, 1 Mont. 713; Territory v. Clayton, 8 Mont. 17; Barber v. Briscoe, 9 Mont. 341.

Nebraska. — State v. Moran, 24 Neb. 103.

New Hampshire. — Hall v. Brown, 59 N. H. 198.

New York. — Chichester v. Cande, 3 Cow. (N. Y.) 39, 15 Am. Dec. 238; Fulton v. Fulton, (Supm. Ct. Spec. T.) 8 Abb. N. Cas. (N. Y.) 210.

North Carolina. — McDowell v. McDowell, 92 N. Car. 227.

Ohio. — Ladd v. State, 5 Ohio Cir. Ct. 276, 3 Ohio Cir. Dec. 137; Hammer v. McConnel, 2 Ohio 31; Ludlow v. Johnston, 3 Ohio 553; Benedict v. State, 44 Ohio St. 679.

Texas. — Whittaker v. Gee, 63 Tex. 435.

Washington. — Hale v. Finch, 1 Wash. Ter. 517.

United States. — Gray v. Brignardello, 1 Wall. (U. S.) 627.

England. — Hodges v. Templer, 6 Mod. 191.

A judgment actually rendered, but not entered on the record because of the neglect of the court or the neglect or misprision of the clerk, may be entered *nunc pro tunc* after the expira-

tion of the six months which by the California statute are allowed to a plaintiff for entering judgment. Marshall v. Taylor, 97 Cal. 422.

Omission of Clerk to Enter Order. — When it appears satisfactorily to the court that an order was actually made at the former term and that its entry was omitted by the clerk, the court may at any time direct such order to be entered upon the records as of the term when it was made. Benedict v. State, 44 Ohio St. 679.

1. Mountain v. Rowland, 30 Ga. 929; Davis v. Barker, 1 Ga. 559.

2. See article RECORDS, vol. 17, p. 914 et seq.

3. Gray v. Brignardello, 1 Wall. (U. S.) 627; Limerick's Petition, 18 Me. 183; Cassidy v. Woodward, 77 Iowa 355; Garrison v. People, 6 Neb. 274; Gibson v. Chouteau, 45 Mo. 171; Fetters v. Baird, 72 Mo. 389. See also Kansas City, etc., R. Co. v. Tontz, 29 Kan. 460.

The Entire Purpose of Allowing the Nunc pro Tunc Entry of orders or judgments is to supply matters of evidence, and the failure of the court to act will not authorize such entry. Adams v. Higgins, 23 Fla. 13; Garrison v. People, 6 Neb. 274.

Entire Omission of Court. — An order or judgment made or rendered at a former term, but not entered of record, may be entered *nunc pro tunc* at a subsequent term; but where the court has wholly omitted to make an order which it might or ought to have made, it cannot afterwards be entered *nunc pro tunc*. Hyde v. Curling, 10 Mo. 359.

4. Ludlow v. Johnston, 3 Ohio 553; Tompkins v. Clackamas County, 11 Oregon 364.

not be allowed where they will prejudice the rights of third parties who are without notice of the original rendition of the judgment.¹

Entry on Conditions Expressed or Implied.—As a general thing, the entry of a judgment *nunc pro tunc* will be made only on such conditions, expressed or implied, as will preserve the rights of third persons having no notice.²

(5) *Entry as Affected by Termination of Jurisdiction.*—It has been held that a judgment may not be entered *nunc pro tunc* where the jurisdiction of the court has ceased.³

1. *Alabama.*—Acklen *v.* Acklen, 45 Ala. 609.

Georgia.—Perdue *v.* Bradshaw, 18 Ga. 287.

Illinois.—Shirley *v.* Phillips, 17 Ill. 471.

Indiana.—Leonard *v.* Broughton, 120 Ind. 536, 16 Am. St. Rep. 347.

Iowa.—Miller *v.* Wolf, 63 Iowa 233.

Kansas.—Small *v.* Douthitt, 1 Kan. 335.

Kentucky.—Graham *v.* Lynn, 4 B. Mon. (Ky.) 18, 39 Am. Dec. 493.

Massachusetts.—Tapley *v.* Goodsell, 122 Mass. 176.

Michigan.—Ninde *v.* Clark, 62 Mich. 124, 4 Am. St. Rep. 823.

Missouri.—Koch *v.* Atlantic, etc., R. Co., 77 Mo. 354.

Montana.—Harvey *v.* Whitlach, 1 Mont. 713; Parrott *v.* McDevitt, 14 Mont. 206.

New York.—Newburgh Bank *v.* Seymour, 14 Johns. (N. Y.) 219; Vroom *v.* Ditmas, 5 Paige (N. Y.) 528.

Pennsylvania.—Smith *v.* Hood, 25 Pa. St. 218, 64 Am. Dec. 692; Murray *v.* Cooper, 6 S. & R. (Pa.) 126.

South Carolina.—Galpin *v.* Fishburne, 3 McCord L. (S. Car.) 22, 15 Am. Dec. 614.

Washington.—Hays *v.* Miller, 1 Wash. Ter. 143.

England.—Hemming *v.* Batchelor, 23 W. R. 398, 33 L. T. N. S. 16, 44 L. J. Exch. 54.

Leave to enter up a judgment *nunc pro tunc* after the year and day will not be granted unless the court is satisfied that there was some good reason for the delay, and that the rights of others will not be affected. Galpin *v.* Fishburne, 3 McCord L. (S. Car.) 22.

After a verdict has been rendered and the clerk has failed to enter judgment thereon at the proper term, the court can enter a judgment *nunc pro tunc* at any succeeding term, if the rights of third parties are not affected. Harvey *v.* Whitlach, 1 Mont. 713.

Third Persons Bound in Absence of Superior Equities.—All persons are bound by the entry of a *nunc pro tunc* judgment, and their rights are to be determined as if said judgment had been at first entered and signed, unless they have some superior or intervening equities in their behalf. Leonard *v.* Broughton, 120 Ind. 536.

2. *Alabama.*—Acklen *v.* Acklen, 45 Ala. 609.

Florida.—Jordan *v.* Petty, 5 Fla. 326.

Illinois.—McCormick *v.* Wheeler, 36 Ill. 114.

Indiana.—Urbanski *v.* Manns, 87 Ind. 585.

Kansas.—Small *v.* Douthitt, 1 Kan. 335.

Kentucky.—Graham *v.* Lynn, 4 B. Mon. (Ky.) 18.

New York.—Vroom *v.* Ditmas, 5 Paige (N. Y.) 528.

Pennsylvania.—Smith *v.* Hood, 25 Pa. St. 218.

South Carolina.—Galpin *v.* Fishburne, 3 McCord L. (S. Car.) 22, 15 Am. Dec. 614.

Washington.—Hays *v.* Miller, 1 Wash. Ter. 143.

Third parties affected should have notice of the application. Koch *v.* Atlantic, etc., R. Co., 77 Mo. 354.

3. Ludlow *v.* Johnston, 3 Ohio 577, the court saying: "There is, to my mind, an insuperable objection to giving this order the effect wished for by the defendants. This is strictly a question of power. Had the Court of Common Pleas power—had they jurisdiction to make the order in question? Could they in any shape act upon the subject-matter? It is not sufficient that they might once have had jurisdiction, that they might have had it in May for instance, but the jurisdiction must still remain when the act is done. Turn whatever way we can, view the question in whatever position it has been or can be presented, still the fact

b. BASIS OF ENTRY — (1) Evidence of Rendition — Necessity for. — In order that a judgment be entered *nunc pro tunc* it is absolutely necessary that there be evidence that a judgment was actually rendered.¹

Evidence Should Be in Writing. — Although, according to a few decisions, it would seem that parol evidence of the fact of rendition will suffice,² the great weight of authority is to the effect that in order to authorize a *nunc pro tunc* entry of a judgment there must be record evidence of some kind of the fact of its rendition.³

remains, and is proved by the record itself, that the order was actually made in August. The court, it is true, attempt to give it effect by directing that it shall 'be considered as of May.' But this adds nothing to its validity unless, when the direction is given, the jurisdiction remains as it was at the time from which the order is directed to be considered. When jurisdiction over any particular subject is withdrawn from a court, the effect is the same, as to that subject, as if the court itself was abolished. It will hardly be contended that a *nunc pro tunc* entry could have been made by the direction of those who once constituted the Court of Probate, or Orphans' Court, subsequent to the Judiciary Act of 1803, which 'abolished' those courts, which would be of any validity. Neither can a court, after any particular jurisdiction has been withdrawn from them, by a similar entry correct any mistake or error which may have been committed while they possessed the jurisdiction, although the same court continues in existence, and possesses jurisdiction over other subjects. To decide differently would be to adopt a principle by which a court would be enabled to retain a jurisdiction once possessed, and exercise that jurisdiction contrary to the will of the legislature, merely by making *nunc pro tunc* entries. Such a principle must be fraught with infinite mischief."

1. *Yonge v. Broxson*, 23 Ala. 684; *Tynan v. Weinhard*, 153 Ill. 598; *Gebbie v. Mooney*, 121 Ill. 255; *Perkins v. Hayward*, 132 Ind. 95; *Aydelotte v. Brittain*, 29 Kan. 98; *Parrott v. McDevitt*, 14 Mont. 207. See also cases cited in two succeeding notes.

2. *Bobo v. State*, 40 Ark. 224, wherein it was held that parol evidence of a judgment which was omitted from the record is sufficient to authorize a *nunc pro tunc* judgment, but that such

correction after the term at which the original judgment was rendered should be made with caution and only on satisfactory evidence. See also *Eakin v. McCraith*, 2 Wash. Ter. 112.

In *Shea v. Mabry*, 1 Lea (Tenn.) 319, it was held that a *nunc pro tunc* order or decree ought not to be entered except upon the clearest evidence, such as the recollection of the presiding judge, or some memorandum by him or the clerk, or perhaps a solicitor under his order, or the agreement of counsel.

3. *Alabama.* — *Metcalfe v. Metcalfe*, 19 Ala. 319, 54 Am. Dec. 190; *Draughan v. Tombeckbee Bank*, 1 Stew. (Ala.) 66, 18 Am. Dec. 38, *Herring v. Cherry*, 75 Ala. 376; *Harris v. Bradford*, 4 Ala. 214; *Hudson v. Hudson*, 20 Ala. 364, 56 Am. Dec. 200; *Yonge v. Broxson*, 23 Ala. 684; *State v. Mobile*, 24 Ala. 701.

California. — *Hegeler v. Henckell*, 27 Cal. 491; *Swain v. Naglee*, 19 Cal. 127; *Matter of Cook*, 77 Cal. 220, 11 Am. St. Rep. 267.

Georgia. — *Robertson v. Pharr*, 56 Ga. 245.

Illinois. — *Tynan v. Weinhard*, 153 Ill. 598.

Indiana. — *Perkins v. Hayward*, 132 Ind. 95.

Iowa. — *Cadwell v. Dullaghan*, 74 Iowa 239.

Kansas. — *Aydelotte v. Brittain*, 29 Kan. 98.

Mississippi. — *Shackelford v. Levy*, 63 Miss. 125.

Missouri. — *Fletcher v. Coombs*, 58 Mo. 430; *Hyde v. Curling*, 10 Mo. 359; *Witten v. Robison*, 31 Mo. App. 525; *Gibson v. Chouteau*, 45 Mo. 171, 100 Am. Dec. 366; *Hansbrough v. Fudge*, 80 Mo. 307.

Tennessee. — *Carter v. McBroom*, 85 Tenn. 377.

Texas. — *Camaron v. Thurmond*, 56 Tex. 22.

In *Witten v. Robison*, 31 Mo. App.

(2) *Evidence of Nature of Judgment and Relief Afforded*—
 (a) *Written Evidence*.—According to numerous decisions it would seem that, in order to authorize a *nunc pro tunc* entry of judgment, record evidence is necessary, not alone of its rendition, but also of the character and terms of the judgment.¹ Entry must be based on the judge's minutes, or the clerk's entries, or on some paper on file in the case. It cannot be made merely upon the judge's recollection of what took place at the trial, or upon outside evidence.²

525, the court said: "Under the established rule in force in this state, whatever the rule on the subject may be elsewhere, to justify the court in directing the entry of the judgment *nunc pro tunc*, it was essential for the records of the court to show two things: (1) that the court had rendered a judgment in this case at the October term, 1883; (2) that the judgment rendered was the judgment the entry of which was directed. It is not necessary that the records of the court should show, in order to enable it to direct a judgment *nunc pro tunc*, in express terms that such judgment had been rendered. If the facts shown by the records are such as to reasonably and fairly carry conviction that the judgment was in fact rendered, that is sufficient."

Entries on Motion Docket.—"The motion docket is a book of the court required by law to be kept by the clerk, and the entries and proceedings appearing upon it as of a particular term may properly be looked to as showing the orders taken by the court in relation to the case at that term, and to show that there was no discontinuance. They are, also, sufficient evidence of what was done at a previous term to authorize the court to enter a judgment *nunc pro tunc* at a subsequent one, if they show that the court had ordered a particular judgment which the clerk omitted to enter." *Yonge v. Broxson*, 23 Ala. 684.

Written Opinion of Presiding Judge.—"The written opinion of the presiding judge, when the circuit judges were required to file their opinions in writing, was sufficient to authorize the rendition of a judgment *nunc pro tunc* at any subsequent stage of the proceedings; and if it recited the fact of the defendant's appearance, it would be sufficient to sustain the judgment without service of process. *State v. Mobile*, 24 Ala. 701.

1. *Alabama*.—*Perkins v. Perkins*, 27 Ala. 479; *Hudson v. Hudson*, 20 Ala. 364, 56 Am. Dec. 200; *Metcalf v. Metcalf*, 19 Ala. 319, 54 Am. Dec. 190; *Yonge v. Broxson*, 23 Ala. 684; *Ex p. Jones*, 61 Ala. 399; *Ex p. Gilmer*, 64 Ala. 234; *Lilly v. Larkin*, 66 Ala. 122; *Herring v. Cherry*, 75 Ala. 376; *Kemp v. Lyon*, 76 Ala. 212; *Farmer v. Wilson*, 34 Ala. 75; *Harris v. Bradford*, 4 Ala. 214; *Glass v. Glass*, 24 Ala. 468; *Dickens v. Bush*, 23 Ala. 849; *Draughan v. Tombeckbee Bank*, 1 Stew. (Ala.) 66. *California*.—*Swain v. Naglee*, 19 Cal. 127; *Hegeler v. Henckell*, 27 Cal. 491.

Florida.—*Adams v. Re Qua*, 22 Fla. 250.

Georgia.—*Short v. Kellogg*, 10 Ga. 180.

Illinois.—*Coughran v. Gutcheus*, 18 Ill. 390; *Cairo, etc., R. Co. v. Holbrook*, 72 Ill. 419; *Gebbie v. Mooney*, 121 Ill. 255.

Kentucky.—*Raymond v. Smith*, 1 Met. (Ky.) 65, 71 Am. Dec. 458. See also *Wade v. Bryant*, (Ky. 1888) 7 S. W. Rep. 397.

Louisiana.—*Ferguson v. Millaudon*, 12 La. Ann. 348.

Mississippi.—*Shackelford v. Levy*, 63 Miss. 125.

Missouri.—*Hyde v. Curling*, 10 Mo. 359; *Gibson v. Chouteau*, 45 Mo. 171, 100 Am. Dec. 366; *Fletcher v. Coombs*, 58 Mo. 430; *Atkinson v. Atchison, etc., R. Co.*, 81 Mo. 50; *Blize v. Castlio*, 8 Mo. App. 290; *Mead v. Brown*, 65 Mo. 552; *Gamble v. Daugherty*, 71 Mo. 599; *Farley v. Cammann*, 43 Mo. App. 168.

Montana.—*Parrott v. McDevitt*, 14 Mont. 207.

Ohio.—*Ludlow v. Johnston*, 3 Ohio 553, 17 Am. Dec. 609; *Ladd v. State*, 5 Ohio Cir. Ct. 276, 3 Ohio Cir. Dec. 137.

Texas.—*Burnett v. State*, 14 Tex. 455, 65 Am. Dec. 131.

2. *Schoonover v. Reed*, 65 Ind. 313;

(b) *Parol Evidence.* — According to other decisions, however, while the proof of rendition must be absolute and definite from the record,¹ it would seem that, when this is shown, the terms and conditions of the judgment may be established by competent parol evidence.²

(3) *Presumption as to Evidence.* — The presumption is that a judgment entered *nunc pro tunc* at a subsequent term was based upon competent evidence. Where, however, the facts appear, the action of the court may be reviewed on appeal.³

c. PROCEEDINGS TO OBTAIN ENTRY NUNC PRO TUNC —

(1) *Nature of Proceedings.* — In proceedings to obtain entry of a judgment *nunc pro tunc*, no pleadings are required, nor can the sufficiency of a motion for this purpose be tested by demurrer on motion to strike out.⁴

(2) *On Court's Own Motion.* — The entry of a judgment *nunc pro tunc* may be ordered by the court upon its own motion and without notice.⁵

Nye v. Lewis, 65 Ind. 326; *Belkin v. Rhodes*, 76 Mo. 643; *Blize v. Castlio*, 8 Mo. App. 290; *Gamble v. Daugherty*, 71 Mo. 599; *Atkinson v. Atchison*, etc., R. Co., 81 Mo. 50.

Illustrations of Sufficient Record Evidence. — The pleadings, the minutes of the court, and the verdict in an action are sufficient record evidence to sustain the action of a court in ordering an entry of a judgment *nunc pro tunc*, although more than six months have elapsed from the rendition of the verdict. *Marshall v. Taylor*, 97 Cal. 422.

Entry *nunc pro tunc* may be made upon memoranda by the clerk in his issue docket, or upon a special finding of facts by the court in the cause, with his conclusions of law thereon. *Chissom v. Barbour*, 100 Ind. 1, wherein the court said: "Without extending this opinion by elaboration, we think that the special finding of facts, and the conclusions of law made thereon by the court, and the note made by the clerk in a docket which the law requires him to keep (Rev. Stat. 1881, § 402) without reference to the affidavit of Judge Hines that he rendered and announced the judgment, are sufficient to authorize the court to order the *nunc pro tunc* entry."

Facts Ascertained from Records and Immediate Officers of Court. — According to some decisions, the facts upon which to base an order for an act to be done *nunc pro tunc* should be ascertained from the records of the court and from

its immediate officers. *Waldo v. Beckwith*, 1 N. Mex. 97; *Secou v. Leroux*, 1 N. Mex. 388.

Bench Notes of Judge. — The proper judgment may be entered by order of the court at a subsequent term, when all the necessary data are shown by the judge's bench notes. *Kuehlthau v. State*, 92 Ala. 91.

1. *Camoron v. Thurmond*, 56 Tex. 22.

2. *Camoron v. Thurmond*, 56 Tex. 22; *Johnson v. Roe*, 27 Ga. 555; *Aydelotte v. Brittain*, 29 Kan. 98. See also *State v. McAlpin*, 4 Ired. L. (N. Car.) 140; *Davis v. Shaver*, Phil. L. (N. Car.) 18.

"If the character of the judgment delivered is to be so established by evidence outside the record, the testimony should be as full and ample and with all the sanctions necessary to establish any other fact." *Camoron v. Thurmond*, 56 Tex. 22.

3. *Belkin v. Rhodes*, 76 Mo. 643, where the court said: "It may be conceded, also, that when a judgment is entered up *nunc pro tunc* by order of the court, the presumption should be (in the absence of any facts shown to the contrary) in favor of the action of the court and that it was based on competent and sufficient evidence. Yet where the facts fully appear upon which such entries are based, this court will judge of their competency and sufficiency and review any error that may appear to have been made."

4. *Urbanski v. Manns*, 87 Ind. 585.

5. *Crim v. Kessing*, 89 Cal. 478.

(3) *The Application.* — The entry of judgment *nunc pro tunc* may be directed by the court upon application made to it for such entry.¹

Who May Apply. — The application may be made at the instance of any party interested.²

Time of Application. — Since, as has been seen,³ the exercise of the court's power to direct the entry of a judgment or order *nunc pro tunc* is not barred by lapse of time, it follows that the right to apply for such entry will not be thus barred.⁴

Form of Application. — As a general rule, it would seem that the application for the entry of a judgment *nunc pro tunc* should be in the form of a motion to that effect.⁵

Notice of Application. — The decisions differ as to the necessity of notice by the moving party, to his opponent, of his application for the entry of judgment *nunc pro tunc*, but according to the weight of authority it would seem that notice is unnecessary where such entry is based entirely upon the record.⁶ Where,

1. *Crim v. Kessing*, 89 Cal. 478; *Matter of Cook*, 77 Cal. 220.

2. *Matter of Cook*, 77 Cal. 220, 11 Am. St. Rep. 267; *Crim v. Kessing*, 89 Cal. 478; *Reid v. Morton*, 119 Ill. 118; *Douglas County Road Co. v. Douglas County*, 5 Oregon 406.

Entry at Request of One Not a Party. — After the rendition of a judgment it is the duty of the clerk to enter it, and the fact that the entry was made at the request of a person not a party is immaterial. *Matter of Cook*, 77 Cal. 220.

3. See *supra*, III. 2. *Power of Court.*

4. In *Risser v. Martin*, 86 Iowa 392, the court said: "It is said the right of the plaintiffs to judgment against the appellant is barred by the statute of limitations. It was held in *Fuller v. Stebbins*, 49 Iowa 376, that a motion for judgment *nunc pro tunc* was not governed by section 3156 of the code, and that courts possess the inherent right to enter such judgments, the exercise of which is not barred by the lapse of time. Such appears to be the general rule. *Freeman on Judgments*, § 56. It may be conceded that the affidavit filed in support of the motion under consideration fails to show diligence on the part of the plaintiffs to discover the true condition of the record; but we are of the opinion that they were not required to show diligence. Nothing shown in the record imposed that burden upon them. They had done what the law required at their hands to entitle them to judgment,

and the delay in rendering it was chargeable to the court. What the rule would have been had the rights of innocent third parties intervened, we are not required to determine. As between the parties now in court, this action may be treated as having been pending since the confession of judgment was filed, and the right of the plaintiffs to the relief demanded is not barred." See also to the same effect *Chissom v. Barbour*, 100 Ind. 1.

5. *California.* — *Crim v. Kessing*, 89 Cal. 478; *Matter of Cook*, 77 Cal. 220. *Illinois.* — *Reid v. Morton*, 119 Ill. 118.

Indiana. — *Urbanski v. Manns*, 87 Ind. 585.

Kansas. — *Aydelotte v. Brittain*, 29 Kan. 98.

Massachusetts. — *King v. Burnham*, 129 Mass. 598.

Minnesota. — *Berthold v. Fox*, 21 Minn. 51.

Missouri. — *Koch v. Atlantic*, etc., R. Co., 77 Mo. 354.

6. *Alabama.* — *Nabers v. Meredith*, 67 Ala. 333; *Glass v. Glass*, 24 Ala. 468; *Clemens v. Judson*, Minor (Ala.) 395; *Allen v. Bradford*, 3 Ala. 281.

Arkansas. — *Portis v. Talbot*, 33 Ark. 218.

California. — *Matter of Cook*, 77 Cal. 220; *Crim v. Kessing*, 89 Cal. 478.

Mississippi. — *Stokes v. Shannon*, 55 Miss. 583.

New York. — *Long v. Stafford*, 103 N. Y. 274.

however, such entry must be based, in part at least, upon other than record evidence, notice of the motion should be given to the adverse party.¹

d. EFFECT OF NUNC PRO TUNC ENTRY. — When the entry of a judgment is made *nunc pro tunc*, it is made as of the time when the proceedings of the court actually took place, and becomes a part of the record as of that date, the same as if entered then.²

IV. JUDGMENT ROLL — 1. **Definition.** — The file comprising the papers necessary to support the judgment, when attached in order, is called the judgment roll.³ Although changed in some particulars from its common-law form, the judgment roll, or an equivalent therefor, is still essential in the various states of the Union, and the time and manner of making it up and its requisites are, as a rule, expressly prescribed by statute.⁴

2. **Necessity of.** — The filing of a judgment roll in the manner prescribed by law is an indispensable essential to the docketing of the judgment.⁵

1. *Weed v. Weed*, 25 Conn. 337; *King v. Burnham*, 129 Mass. 598; *Berthold v. Fox*, 21 Minn. 51; *Koch v. Atlantic, etc., R. Co.*, 77 Mo. 354; *Hill v. Hoover*, 5 Wis. 386.

2. *Bush v. Bush*, 46 Ind. 70; *Chisom v. Barbour*, 100 Ind. 1; *Graham v. Lynn*, 4 B. Mon. (Ky.) 17; *Tapley v. Goodsell*, 122 Mass. 176; *Ludlow v. Johnston*, 3 Ohio 553; *Burnett v. State*, 14 Tex. 455.

3. *Anderson's L. Dict.*, tit. Roll.

"The judgment roll is a parchment roll upon which all proceedings in the cause up to the issue and the award of *venire* inclusive, together with the judgment which the court has awarded in the cause, are entered. This roll, when thus made up, is deposited in the treasury of the court, in order that it may be kept with safety and integrity. In practice, the making up and depositing the judgment roll is generally neglected, unless in cases where it becomes absolutely necessary to do so; as when, for instance, it is required to give the proceedings in the cause in evidence in some other action, for in such case the judgment roll, or an examined copy thereof, is the only evidence of them that will be admitted." *Abbott's L. Dict.*

4. See the statutes of the various states.

Copies of Detached Papers, severally certified to be copies of papers filed, and of minutes of the court, purporting to pertain to a cause, are not proper evidence of the proceedings and judgment when offered for the purpose

of showing a judgment. The process, pleadings, proceedings, entry of verdict, and final judgment, forming the complete judgment record, or a copy thereof certified to be such record, and the whole thereof, should be produced. *Stark v. Billings*, 15 Fla. 318.

Representative Statute. — "The clerk, upon entering final judgment, must immediately file the judgment roll; which must consist, except where special provision is otherwise made by law, of the following papers: the summons; the pleadings, or copies thereof; the final judgment, and the interlocutory judgment if any, or copies thereof; and each paper on file, or a copy thereof, and a copy of each order which in any way involves the merits or necessarily affects the judgment. If judgment is taken by default, the judgment roll must also contain the papers required to be filed, upon so taking judgment, or upon making application therefor; together with any report, decision, or writ of inquiry, and return thereto. If judgment is taken after a trial, the judgment roll must contain the verdict, report, or decision; each offer, if any, made as prescribed in this act; and the exceptions or case then on file." *Code Civ. Pro. N. Y.*, § 1237.

5. *Rockwood v. Davenport*, 37 Minn. 533; *Blashfield v. Smith*, 27 Hun (N. Y.) 114; *De Agreda v. Mantel*, (N. Y. Super. Ct. Spec. T.) 1 Abb. Pr. (N. Y.) 130.

Execution on Judgment Docketed Without Judgment Roll Set Aside. — In *Blach-*

3. Time of Making and Filing.—It is usually provided by statute that the clerk shall make up the judgment roll immediately after the entry of the judgment.¹

field v. Smith, 27 Hun (N. Y.) 114, it was held that when a judgment is docketed, upon the decision or order for judgment, without any judgment roll having been made up and filed, the court will set aside an execution thereafter issued upon the judgment docket, unless the defect be cured and a proper judgment roll be made up within a reasonable time. The court said: "There was no such judgment roll as the law requires. The code makes it the duty of the clerk to make up the judgment roll. Practically it is rarely or never made up unless by the attorney of the successful party. It should always be made up before the judgment should be docketed by the clerk. The docket should be sustained by the judgment roll. Perhaps in this case the court should not hold the docket void or the execution issued upon it; but a proper conduct of judicial proceedings requires such irregularities or defects to be corrected by the party in fault. Executions should be sustained by the judgment roll. Where, by carelessness or inadvertence, the roll has not been made up, the court should set aside the execution unless the defect be supplied within a reasonable time."

Review of Motion to Set Aside Judgment for Omission to File Roll.—In *Whitney v. Townsend*, 67 N. Y. 40, it was held that an order denying a motion to set aside a judgment because of failure to file a proper judgment roll is not reviewable on appeal, on the ground that if what was done amounts to a legal nullity, no substantial rights of the defendant are impaired by the denial. If the roll is not in due form, or the filing, for any reason, is irregular, the granting or refusing the application is discretionary. The court said: "If the merits of the application are reviewable upon this appeal, the order should be affirmed for the reasons assigned in the Supreme Court. But in any view of the case the order is not appealable to this court. If, as is claimed in behalf of the appellants, there has been no judgment perfected by the filing of a judgment roll so as to limit the time for an appeal, and all that was done in that direction was a legal nullity, the sub-

stantial rights of the plaintiffs were not impaired, but the way was open to them to proceed as if no paper purporting to be a judgment roll had been filed, or any other proceeding taken after the entry of the decision by the Supreme Court. They had no clear legal right to require a paper by which their legal rights were not affected to be taken from the files of the court. Whether it should be removed from or remain in the pigeonholes of the clerk was discretionary with the court below. *Genesee Bank v. Spencer*, 18 N. Y. 150; *Foot v. Lathrop*, 41 N. Y. 358; *Ives v. Memphis, etc., R. Co.*, 58 N. Y. 630. If the roll was not in due form, or the filing thereof was for any reason irregular, the granting or refusing the application was discretionary, and the order was not appealable. It affected merely the mode of procedure, which in all cases is within the control of the court of original jurisdiction. *Arthur v. Griswold*, 55 N. Y. 400."

1. *Rockwood v. Davenport*, 37 Minn. 533; *Macomber v. New York*, (N. Y. Super. Ct.) 17 Abb. Pr. (N. Y.) 35; *Townshend v. Wesson*, 4 Duer (N. Y.) 342; *Cotes v. Smith*, (Supm. Ct. Gen. T.) 29 How. Pr. (N. Y.) 326; *Schenectady, etc., Plank Road Co. v. Thatcher*, (Supm. Ct. Spec. T.) 6 How. Pr. (N. Y.) 226.

The *California* Code of Civil Procedure does not provide for a judgment roll until final judgment has been entered. *Emeric v. Alvarado*, 64 Cal. 529.

Sequence of Clerk's Act.—The acts of the clerk upon the rendition of a judgment follow in this sequence: first, the entry of the judgment; second, making up and filing the judgment roll; third, the docketing. *Rockwood v. Davenport*, 37 Minn. 533.

Issue of Execution Before Filing.—In *California* it was held that executions may be issued as soon as the judgment is entered although the judgment roll has not been made up and filed. *Sharp v. Lumley*, 34 Cal. 611. But see *Blashfield v. Smith*, 27 Hun (N. Y.) 114. See further article EXECUTIONS AGAINST PROPERTY, vol. 8, p. 315 *et seq.*

A Strict Compliance with the Code would seem to make it the duty of the

4. By Whom Made Up and Filed.—Although the filing of the judgment roll is usually made the duty of the clerk,¹ it would seem that, practically, it is rarely or never made up save by the attorney of the successful party.² In fact, in some states it is expressly made the duty of such attorney to prepare and furnish the judgment roll to the clerk,³ the clerk attaching thereto the necessary papers on file.⁴

5. Requisites and Contents — *a. IN GENERAL.* — As a general rule, the essentials of a judgment roll are prescribed by statute in the various states.⁵ Substantial compliance with the require-

ment to enter a judgment on the verdict and make up and file a judgment roll immediately on receiving the verdict, unless otherwise ordered by the court. This, however, is not so regarded, and such is not the practice. In practice the judgment roll is not usually made up and filed until the costs are adjusted and the party is prepared to have the judgment perfected and docketed. *Stimson v. Huggins*, 16 Barb. (N. Y.) 659.

1. *Rockwood v. Davenport*, 37 Minn. 533; *Blashfield v. Smith*, 27 Hun (N. Y.) 114; *Townshend v. Wesson*, 4 Duer (N. Y.) 342; *Renouil v. Harris*, 2 Sandf. (N. Y.) 641.

2. *Blashfield v. Smith*, 27 Hun (N. Y.) 114.

"Whatever may have been the practice heretofore, the correct course is for the plaintiff to make up the record of judgment, the defendant to procure his costs to be taxed, and to require the plaintiff to insert them in the record, or, if the record be already made up and filed, to enter a suggestion on it stating the taxation of the costs and the amount thereof. No inconvenience can result from this practice; for if the plaintiff should neglect to make up and file the record, the court would give leave to the defendant to do it, as in cases where he wishes to bring error and the plaintiff neglects to file the record." *Fobes v. Meigs*, 3 Wend. (N. Y.) 309.

3. In *New York* it is provided by section 1238 of the Code of Civil Procedure that "the judgment roll must be prepared and furnished to the clerk by the attorney for the party at whose instance the final judgment is entered; except that the clerk must attach thereto the necessary original papers on file. But the clerk may, at his option, make up the entire judgment roll." *Knapp v. Roche*, 82 N. Y. 366. And see *St.*

Croix Lumber Co. v. Pennington, 2 Dak. 467.

Order Directing Plaintiff to File Judgment Roll. — According to the decision in *Knapp v. Roche*, 82 N. Y. 366, the memorandum handed down by a general term of its decision of an appeal is not a judgment, but simply an authority to enter one. Upon the filing of such decision a formal judgment should be prepared and entered in the judgment book, attested by the signature of the clerk; and, to constitute a judgment roll, a copy thereof should be annexed to the papers upon which the appeal was heard. It was accordingly held in this case that, as the duty of preparing such judgment roll is imposed upon "the attorney for the party at whose instance the final judgment is entered" (Code, § 1238), an order was properly granted directing the plaintiff to enter judgment and file a judgment roll, and for that purpose authorizing him to file a printed copy of the case on appeal.

Time of Filing in Clerk's Office. — A judgment delivered to the clerk to be filed before the hour prescribed by law for opening the office will be considered as filed at the hour for opening. *Wardell v. Mason*, 10 Wend. (N. Y.) 573; *France v. Hamilton*, (Supm. Ct. Gen. T.) 26 How. Pr. (N. Y.) 180.

4. *Knapp v. Roche*, 82 N. Y. 366.

In *Macomber v. New York*, (N. Y. Super. Ct.) 17 Abb. Pr. (N. Y.) 35, it was held that by section 281 of the code in force in 1860, "unless the party or his attorney shall furnish a judgment roll, the clerk, immediately after entering the judgment, shall attach together and file" the papers enumerated as constituting the judgment roll.

5. See the statutes of the various states; and see *Bosworth v. Vandewalker*, 53 N. Y. 597; *Townshend v. Wesson*, 4 Duer (N. Y.) 342; *Granite*

ments of the statute as to the manner of making up and filing a judgment roll is sufficient.¹

b. EVIDENCE OF JURISDICTION. — Every judgment roll should contain evidence within itself that the court had authority to render judgment and that a judgment has in fact been rendered by the court.² Thus in the case of a judgment upon default, the roll should contain evidence that the summons was served and that no answer had been received, thus showing that the court had jurisdiction over the defendant and that he had waived his right to defend.³

Mountain Min. Co. v. Weinstein, 7 Mont. 346.

"The constituent elements of this roll are, and must be, the summons, pleadings, verdict, and judgment, as a perpetual memorial and testimony of the litigation and of the rights of the parties." *St. Croix Lumber Co. v. Pennington*, 2 Dak. 467.

An ordinary judgment roll furnishes no information of what took place upon the trial. That is not its office. *Conolly v. Conolly*, (Supm. Ct. Gen. T.) 16 How. Pr. (N. Y.) 224.

The Affidavit and Order of Arrest are no part of the record, and should not be engrafted upon it or entered in it. *Corwin v. Freeland*, 6 N. Y. 560.

1. *Stimson v. Huggins*, (Supm. Ct. Gen. T.) 9 How. Pr. (N. Y.) 86; *Sears v. Burnham*, 17 N. Y. 445; *Appleby v. Barry*, 2 Robt. (N. Y.) 689; *Cook v. Dickerson*, 1 Duer (N. Y.) 679.

Judgment Roll to Be Constituted in Manner Prescribed by Code. — In *Townshend v. Wesson*, 4 Duer (N. Y.) 342, it was held that a judgment roll can be constituted only by the attaching papers, which, for that purpose, are described in the code, and hence to give to a paper containing neither process nor pleadings the name and effect of a judgment roll would be not only an abuse of language, but a direct violation of the provisions of the code. The docketing of a judgment, when no judgment roll has been made and filed, is an unauthorized and illegal act, and creates no lien on the lands of the debtor.

Provision Directory. — The provisions of the code regulating the mode of making up and filing the judgment roll are not considered as imperative, but as merely directory. *Stimson v. Huggins*, (Supm. Ct. Gen. T.) 9 How. Pr. (N. Y.) 86, 16 Barb. (N. Y.) 658.

2. *Thomas v. Tanner*, (Supm. Ct. Spec. T.) 14 How. Pr. (N. Y.) 426.

"It should be made to appear in every judgment roll that the judgment has been rendered by a court which has jurisdiction of the proceedings, and when issues have been joined, that those issues have been tried in some manner prescribed by law, so as to authorize the judgment." *Harris, J.*, in *Thomas v. Tanner*, (Supm. Ct. Spec. T.) 14 How. Pr. (N. Y.) 426.

Recital Sufficient to Show Jurisdiction. — In *Maples v. Mackey*, 14 N. Y. Wkly. Dig. 349, it was held that the acquirement of jurisdiction by the court was sufficiently shown by the recital in the judgment that the summons and complaint had been served upon one of the defendants, and that a defect in the proof of service filed with the judgment roll does not show a want of jurisdiction or affect the validity of the judgment.

3. *Thomas v. Tanner*, (Supm. Ct. Spec. T.) 14 How. Pr. (N. Y.) 426; *Bosworth v. Vandewalker*, 53 N. Y. 597; *Macomber v. New York*, (N. Y. Super. Ct.) 17 Abb. Pr. (N. Y.) 35; *Cotes v. Smith*, (Supm. Ct. Gen. T.) 29 How. Pr. (N. Y.) 326. See also *Douville v. Merrick*, 25 Wis. 688.

Proof of Service of Summons. — In *Bosworth v. Vandewalker*, 53 N. Y. 597, the court said: "It is first claimed that the judgment roll contains no proof of service of process upon the infant defendants. If it was necessary that the roll should contain proof of service upon all defendants, this would be a weighty objection. The Code of Procedure has prescribed what papers shall necessarily go into the judgment roll (section 281). It is only in case the complaint be not answered by any defendant that proof of service of summons upon that defendant must appear in the rolls. And even this has an exception, for service of the summons is dispensed with when a defendant appears voluntarily in the action (Code,

Disposition of Issue. — Where the defendant in an action has appeared and the issue has been joined, it must appear from the judgment roll how that issue has been disposed of so as to authorize the court to proceed to judgment.¹

c. SUMMONS. — The judgment roll should as a rule contain the summons.² Where, however, the defendant appears and answers, the omission of the clerk to annex the summons will not, it has been held, affect the validity of the judgment, nor the admissibility of the judgment roll in evidence in another action.³

§ 139), and in such case no proof of service of summons can be made."

In *Macomber v. New York*, (N. Y. Super. Ct.) 17 Abb. Pr. (N. Y.) 35, the court in its enumeration of the papers constituting the judgment roll included, "in case the complaint be not answered by any defendant, the summons and complaint, or copies thereof, proof of service, and that no answer has been received."

Voluntary Appearance Equivalent to Service. — In *Christal v. Kelly*, 88 N. Y. 286, which was an action on an undertaking, the answer in the original action had been withdrawn and judgment entered by the clerk as upon default. Upon the objection that the record contained no proof of a personal service of summons essential to such entry the court said: "The defendants excepted to the reading of the original summons and complaint attached to the judgment roll, on the ground that they formed no part of the record. The original papers were admissible to show the identity of the action on which the judgment was recovered with the action mentioned in the undertaking. Assuming that these papers were not properly made a part of the record, their admission in connection with it was not error. The objection was not taken that they should have been proved *aliunde*. The defendants subsequently read the original complaint in evidence as part of their case. The point is now raised that the judgment recovered contains no proof of personal service of the summons, and that this was essential to authorize an entry of judgment by the clerk as upon a default. This objection was not taken on the trial. The judgment recites an appearance by the defendants. A voluntary appearance is equivalent to the personal service of a summons. We think this fact justified the entry of judgment by the clerk."

1. *Thomas v. Tanner*, (Supm. Ct. Spec. T.) 14 How. Pr. (N. Y.) 426; *Mead v. Nevill*, 2 Duv. (Ky.) 280.

2. *Thomas v. Tanner*, (Supm. Ct. Spec. T.) 14 How. Pr. (N. Y.) 426; *Renouil v. Harris*, 2 Sandf. (N. Y.) 641; *Miller v. White*, (Supm. Ct. Gen. T.) 10 Abb. Pr. N. S. (N. Y.) 385. See also *Jansen v. Hyde*, 8 Colo. App. 38; *Cotes v. Smith*, (Supm. Ct. Gen. T.) 29 How. Pr. (N. Y.) 326; *St. Croix Lumber Co. v. Pennington*, 2 Dak. 467.

3. *Miller v. White*, (Supm. Ct. Gen. T.) 10 Abb. Pr. N. S. (N. Y.) 385. The court said: "The defendants objected to the introduction of the judgment roll, upon the ground that the same was imperfect, having no summons or minutes of trial annexed. The complaint and answer were a part of the judgment roll, and the decision of the judge before whom the action was tried was included therein. The office of a summons is to bring parties into court. The judgment was not obtained by default for want of an answer. A very full answer was put in; the answer shows that the defendants had been brought into court. They did not appear, however, at the trial, and an inquest was taken against them, and if the clerk of the court did not annex the summons to the judgment roll, as is his duty, the omission will not deprive a prevailing party of his rights. *Renouil v. Harris*, 2 Sandf. (N. Y.) 641; *Earle v. Barnard*, (Supm. Ct. Spec. T.) 22 How. Pr. (N. Y.) 437; *Hoffnung v. Grove*, (Supm. C.) 18 Abb. Pr. (N. Y.) 14, 42 Barb. (N. Y.) 548. With respect to the minutes of trial the judgment roll shows a trial before the judge (a jury being waived); his findings in favor of the plaintiff; and directions for judgment. The judgment roll, with the exception of the summons, appears to meet the requirements of section 281 of the code; and as to its sufficiency, or the effect of any irregularity, the judgment roll

d. PLEADINGS — General Rule. — The pleadings in the case, or copies thereof, properly constitute a part of the judgment roll,¹ but it has been held that the omission of a pleading, while an irregularity, will not vitiate the judgment or execution.²

is not a nullity. *Renouil v. Harris*, 2 Sandf. (N. Y.) 641; *Clute v. Clute*, 4 Den. (N. Y.) 243; *Cook v. Dickerson*, 1 Duer (N. Y.) 686."

1. Code Civ. Pro. N. Y., § 1237; *Thomas v. Tanner*, (Supm. Ct. Spec. T.) 14 How. Pr. (N. Y.) 426; *Miller v. White*, (Supm. Ct. Gen. T.) 10 Abb. Pr. N. S. (N. Y.) 385; *St. Croix Lumber Co. v. Pennington*, 2 Dak. 467. See also *Jansen v. Hyde*, 8 Colo. App. 38; *Tyler v. Langworthy*, 37 Iowa 555.

Complaint. — The complaint in the action is a necessary part of the judgment roll. *Leitch v. Wells*, 48 N. Y. 585. See also *Renouil v. Harris*, 2 Sandf. (N. Y.) 641.

Answer. — The judgment roll should contain the defendant's answer. *Renouil v. Harris*, 2 Sandf. (N. Y.) 641.

Demurrer and Decision Thereon. — Where, after a demurrer to a complaint has been overruled, the defendant answers, the demurrer and the decision thereon are properly parts of the judgment roll. *Thornton v. St. Paul*, etc., R. Co., 6 Daly (N. Y.) 511.

Omission of Replication Demurred to. — Where a plaintiff puts in two replications to a plea, either of which is a good answer to it, and the defendant demurs to one and rejoins to the other, and the demurrer is overruled, and the issue joined on the other replication is found for the plaintiff, the court will, on motion, permit the plaintiff to omit the replication demurred to and the proceedings thereon, in making up the record of judgment. *Graham v. Schmidt*, 1 Sandf. (N. Y.) 74.

2. Omission of Answer. — In *Renouil v. Harris*, 2 Sandf. (N. Y.) 641, where the regularity of an execution was attacked on the ground that the judgment roll having omitted the defendant's answer, there was no legal judgment roll to sustain the docket on which the execution issued, Sandford, J., after stating the duty of the clerk to file the judgment roll, said: "Whether a total omission of the clerk in that behalf would impair the docket and execution, or whether we would order it filed by relation, so as to protect both, we need not now determine. Here there was a judgment

roll filed. It may have been irregular, for want of the answer. If it were, it was not the plaintiff's fault; the roll was not a nullity; and we would sustain it by directing the original answer or a copy to be attached, as of the date when the roll was filed. A copy was in fact attached, before the motion was brought on, and we hold that the roll is sufficient as it stands." *Citing Clute v. Clute*, 4 Den. (N. Y.) 241.

Omission of Both Summons and Complaint. — According to some decisions, omission of the summons and complaint in the judgment roll, while an irregularity, is not one which will prevent there being a judgment. *Martin v. Kanouse*, (Supm. Ct. Gen. T.) 2 Abb. Pr. (N. Y.) 390; *Calkins v. Packer*, 21 Barb. (N. Y.) 276; *Cook v. Dickerson*, 1 Duer (N. Y.) 679. See, however, *Townshend v. Wesson*, 4 Duer (N. Y.) 342, in which case it was held that to give to a paper containing neither process nor pleadings the name and effect of a judgment roll would not only be an abuse of language but a direct violation of the provisions of the code.

Such an omission, it has been held, will not give to the defendant the right to treat the judgment roll as no judgment, and so appeal from the order only. *Martin v. Kanouse*, (Supm. Ct. Gen. T.) 2 Abb. Pr. (N. Y.) 390, wherein the court said: "If the judgment were irregular and erroneous because the summons and complaint were not annexed to the judgment roll, that did not give a right to the defendant to treat the judgment roll as no judgment, and so appeal from the order only. It was a judgment entered, although irregularly entered and erroneous."

Admission of Record in Evidence. — It is no objection to the admission of a judgment record in evidence that no summons is attached thereto, and that it does not show any order of reference, although the judgment is founded on the report of a referee. These, at most, are defects which merely render the judgment erroneous, but do not make it void. *Calkins v. Packer*, 21 Barb. (N. Y.) 275.

Substitution of Amended Answer. — Where an original answer has been superseded by an amended answer, neither the order of substitution nor the original answer is properly a part of the judgment roll,¹ and if improperly incorporated therein they will, it seems, be stricken out on motion.²

Omission of Pleading Stated to Have Been Withdrawn or Misaid. — The omission of a plea which is stated to have been withdrawn before judgment, or to have been misaid, will not, it is held, affect the validity of the record or judgment.³

e. VERDICT AND FINDINGS. — When an issue of fact has been tried, a copy of the verdict of the jury or the findings of the court should be inserted in the judgment roll.⁴

1. *Dexter v. Dustin*, 70 Hun (N. Y.) 515.

Amended Pleading. — Where a pleading has been amended after a demurrer thereto has been sustained, the original pleading does not belong to the judgment roll. *Thornton v. St. Paul, etc.*, R. Co., 6 Daly (N. Y.) 511.

2. *Dexter v. Dustin*, 70 Hun (N. Y.) 515 the court saying: "A motion is made herein to strike from the judgment roll as filed with the clerk of the county of Franklin, where this action was tried, the original answer and the order of the court directing that the amended answer be received and treated as the answer in the case. The simple question is whether, as a matter of practice, the original answer, which has been superseded by an amended answer, is properly a part of the judgment roll, and whether the order directing the substitution is also a proper part of the judgment roll. I think not. The original answer can no longer affect the merits, nor can the usual order of substitution affect the merits of the action. The merits of the action must be discovered from the issues raised by the complaint and the amended answer, where the amended answer is a substitute for the original answer. The trial of the action is a determination of the merits appearing from the issues formed by the complaint and the amended answer only."

Abandoned Demurrer No Part of Record. — A demurrer which the party has abandoned, like a pleading which has been amended, is no longer a part of the record. *Brown v. Saratoga R. Co.*, 18 N. Y. 495.

3. *Hatcher v. Rocheleau*, 18 N. Y. 86, wherein the court said: "It is objected that the record is a partial and incomplete transcript of the proceed-

ings, and for that reason should have been rejected. I understand the statement that the defendant's first plea had been lost or misaid to be a part of the record, and not simply a matter certified by the clerk. The plea is said in the record to have been withdrawn by the defendant before judgment was obtained, and it was not, therefore, further material than as a formal step in the history of the case. It was in the power of the court to permit the judgment to be enrolled without it and to substitute a statement that it had been lost."

4. *Thomas v. Tanner*, (Supm. Ct. Spec. T.) 14 How. Pr. (N. Y.) 426; *Overton v. National Bank*, (Supm. Ct. Spec. T.) 3 N. Y. St. Rep. 169.

Findings of Court. — By a statute in *South Dakota* the findings of the court constitute a part of the judgment roll. *Colonial, etc., Mortg. Co. v. Bradley*, 4 S. Dak. 158.

Omission of Verdict. — In *Overton v. National Bank*, (Supm. Ct. Spec. T.) 3 N. Y. St. Rep. 169, all there was in the roll in regard to the verdict was the recital in the copy judgment forming part of the roll, which was as follows: "This action having been tried by a jury at a Circuit Court held at the court house in Auburn, N. Y., in and for said county, on the 7th day of May, A. D. 1886, before Hon. F. A. Macomber, and the jury having found a verdict for the defendant and against the plaintiff therein, and said verdict having been entered in the minutes of the said court, now, on motion of E. H. Avery, defendant's attorney, it is hereby adjudged that the defendant recover of the plaintiff the sum of \$67.74 for its costs and disbursements in said action." It was held that the roll was defective for not containing

f. **DECISION OR REPORT.** — Where the trial of the issue is had before a court without a jury, the decision should be in writing,¹ and upon the making up of the judgment roll the decision is a necessary part thereof.²

Report of Referee. — Where the issue has been tried before a referee, his report stands as the decision of the court, and must appear in the judgment roll.³

g. **FINAL AND INTERLOCUTORY JUDGMENTS.** — Not only the final but the interlocutory judgment, if any, or copies thereof, should be embodied in the judgment roll.⁴

the verdict of the jury as required by the code, but that such defect was not ground for setting aside the judgment.

In *Cook v. Dickerson*, 1 Duer (N. Y.) 679, it was also held that a judgment is not void merely because the roll does not contain a copy of the verdict.

1. See article DECISIONS, vol. 5, p. 936.

2. *Thomas v. Tanner*, (Supm. Ct. Spec. T.) 14 How. Pr. (N. Y.) 426; *Miller v. White*, (Supm. Ct. Gen. T.) 10 Abb. Pr. N. S. (N. Y.) 385.

Only Final Decision. — In *Kipper v. Sizer*, (Supm. Ct. Gen. T.) 2 N. Y. St. Rep. 386, the court held that the judgment roll ought not to show anything more than a final decision of the matters litigated.

Omission of Judgment on Demurrer. — The court will not order its judgments on demurrers to be inserted in the record of judgment, where the pleadings on which issues of fact were joined meet or traverse every material fact admitted by the demurrers. *Redman v. Hendricks*, 1 Sandf. (N. Y.) 32.

3. *Thomas v. Tanner*, (Supm. Ct. Spec. T.) 14 How. Pr. (N. Y.) 426; *Renouil v. Harris*, 2 Sandf. (N. Y.) 641. See also *Lyddy v. Chamberlain*, 24 Hun (N. Y.) 377.

In *Currie v. Cowles*, 7 Robt. (N. Y.) 3, it was held that it is improper for a referee to deliver two documents, each of which purports to be the original of his report, to both parties, even if they are duplicates, as it leads to confusion; but if a paper annexed to the judgment roll as the referee's report be that which was first delivered by the referee, and the two papers are substantially the same, it forms no ground for setting aside the judgment.

Where a New Report Is Made by the Referee, the original having been sent back to him for amendment as not showing the facts found, the original

report forms no portion of the judgment roll. *Lyddy v. Chamberlain*, 24 Hun (N. Y.) 377.

4. *Packard v. Bird*, 40 Cal. 378; *Rockwood v. Davenport*, 37 Minn. 533; *Williams v. McGrade*, 13 Minn. 46; Code Civ. Pro. N. Y., § 1237; *Artisans' Bank v. Treadwell*, 34 Barb. (N. Y.) 553; *Schenectady, etc., Plank Road Co. v. Thatcher*, (Supm. Ct. Spec. T.) 6 How. Pr. (N. Y.) 226.

Judgment Roll on Appeal. — In *Knapp v. Roche*, 82 N. Y. 366, it was held that upon the filing of the decision of an appeal the clerk should prepare and enter a formal judgment, and to constitute a judgment roll a copy thereof should be annexed to the papers upon which the appeal was heard. The court said: "What is called the judgment signed by Judge Speir is merely a memorandum of the decision of the general term on the appeal. On filing that decision a formal judgment of affirmance should have been prepared, which should have been entered in the judgment book and then been attested by the signature of the clerk. A copy of this judgment annexed to the papers on which the appeal was heard would then constitute the judgment roll on appeal. The code imposes the duty of preparing such judgment roll and furnishing it to the clerk upon the attorney for the party at whose instance the final judgment is entered (section 1238). That duty was not performed in the present case. The general term were, therefore, right in directing a proper judgment to be entered. There is no difficulty in so doing. If the papers now on file are those on which the appeal was heard, the copy of the judgment can be annexed to them. If they are not, the order appealed from has provided for the difficulty by allowing a copy of the printed papers used on the argument to be filed instead."

h. CASE OR EXCEPTIONS. — It is expressly provided in *New York* that if judgment is taken after a trial the judgment roll must contain "the exceptions or case then on file."¹ A judgment record is not a case nor a bill of exceptions, unless a case or exception has been made and settled and made a part of it.²

i. BILL OF PARTICULARS. — According to the decisions it would seem that it is only where a bill of particulars involves the merits or of necessity affects the judgment that it should be made part of the judgment roll.³

j. PAPERS MATERIALLY AFFECTING JUDGMENT. — If, in addition to those already set out, there are any other papers materially affecting the judgment, these also, it would seem, should appear in the roll.⁴

1. Code Civ. Pro. N. Y., § 1237; *Conolly v. Conolly*, (Supm. Ct. Gen. T.) 16 How. Pr. (N. Y.) 224.

2. **Effect of Failure to Make Case or Exceptions.** — In *Conolly v. Conolly*, (Supm. Ct. Gen. T.) 16 How. Pr. (N. Y.) 224, the court, after stating the rule as laid down in the text, said: "It does not follow from this, however, as I think, that the appeal should be dismissed. The right to bring or to maintain an appeal does not depend upon the parties making a case or exceptions. The only consequence of neglecting to make a case or exceptions is that the appellant thus situated loses the right of reviewing any questions which were the subject of objection and exception, leaving his case to stand upon the record proper alone. * * * He is confined to errors appearing upon the face of the record strictly, without reference to matters arising upon or after the trial, and which properly belong to a case or exceptions. I do not understand the Court of Appeals to have held that an appeal cannot be maintained unless a case or exceptions has been made. The motion must, therefore, be denied." Citing *Brown v. Heacock*, (Supm. Ct. Gen. T.) 9 How. Pr. (N. Y.) 345; *Robinson v. Hudson River R. Co.*, (C. Pl. Gen. T.) 3 Abb. Pr. (N. Y.) 115; *Rankin v. Pine*, (Supm. Ct. Gen. T.) 4 Abb. Pr. (N. Y.) 309. See also, to the same effect, *McLean v. Cole*, 13 Hun (N. Y.) 300; *Wilcox v. Hawley*, 31 N. Y. 648; *Magie v. Baker*, 14 N. Y. 435; *Oldfield v. New York, etc., R. Co.*, 14 N. Y. 310; *Smith v. Grant*, 15 N. Y. 590. And see articles **BILLS OF EXCEPTIONS**, vol. 3, p. 374; **CASE MADE ON APPEAL**, vol. 3, p. 879.

On Appeal After a Second Trial. — It

was held in *Wilcox v. Hawley*, 31 N. Y. 648, that on appeal after a second trial, the judgment record should not contain the case made on the first trial.

3. *Arrow Steamship Co. v. Bennett*, (Supm. Ct. Spec. T.) 23 Civ. Pro. (N. Y.) 234; *Kreiss v. Seligman*, 8 Barb. (N. Y.) 439.

Motion to Annul Bill Properly Denied. — In *Arrow Steamship Co. v. Bennett*, (Supm. Ct. Spec. T.) 23 Civ. Pro. (N. Y.) 234, it was held that where a demurrer to a complaint is overruled and interlocutory judgment is entered in favor of the plaintiff, a bill of particulars served by the plaintiff is not a proper part of the judgment roll and a motion that it be annexed thereto should be denied. The court said: "There is nothing in the code that expressly provides that the bill of particulars must be made part of the judgment roll. It is only where a bill of particulars involves the merits or necessarily affects the judgment that it should be made part of the roll (section 1237), and where the sole question determined by the judgment is that the pleading demurred to does or does not state facts sufficient to constitute a cause of action, the addition of any other paper except the pleadings, the demurrer, and the judgment would seem to be unnecessary."

4. *Thomas v. Tanner*, (Supm. Ct. Spec. T.) 14 How. Pr. (N. Y.) 426. See also *Campbell v. Ayres*, 6 Iowa 339.

Presumption in Case of Defective Judgment Roll. — In *Herrick v. Butler*, 30 Minn. 156, it was held that the presumption as to the validity of a judgment will not be overcome by showing that the judgment roll is defectively made up or that certain papers are

k. IMPROPER PAPERS. — Where the addition of papers which should not be included in a judgment roll does not produce harm to a party, a motion objecting for that reason is properly denied.¹

l. ITEMS OF COSTS. — In accordance with the general rule that the judgment roll should not include any papers except those enumerated in the statute, it has been held that the items of costs as adjusted by the clerk and the affidavit of disbursements, while they should be filed with it, should not be incorporated in the roll, as they form no part of it.²

m. AMENDMENTS. — It is held that all papers incorporated into the judgment roll and required by statute to form part of it may be detached by the clerk, and any amendments made which

missing therefrom. The court said: "As to the imperfect condition of the judgment roll, want of jurisdiction does not affirmatively appear, and a judgment of a court of general jurisdiction is presumed valid until the contrary is shown. It is not enough to overcome this presumption that the judgment roll is defective, or that some of the papers which should properly constitute a part of it are wanting.

* * * These omissions are, however, sufficiently supplied and explained in the amended return made to this court, which, we think, should be considered on this appeal." *Citing* *Gemmell v. Rice*, 13 Minn. 400; *Williams v. McGrade*, 13 Minn. 46; *Jorgensen v. Griffin*, 14 Minn. 464; *Holmes v. Campbell*, 12 Minn. 221; *Piper v. Packer*, 20 Minn. 274.

Addition of Omitted Papers. — As holding that if necessary or proper papers are omitted in the judgment roll, such papers may be added, see *Renouil v. Harris*, 2 Sandf. (N. Y.) 641; *Cook v. Dickerson*, 1 Duer (N. Y.) 679; *Church v. Rhodes*, (Supm. Ct. Spec. T.) 6 How. Pr. (N. Y.) 281; *Anderson v. Dickie*, (N. Y. Super. Ct. Gen. T.) 26 How. Pr. (N. Y.) 199.

In *Lynde v. Cowenhoven*, (Supm. Ct. Gen. T.) 4 How. Pr. (N. Y.) 327, the court, in holding that there is no implied stay of proceedings to make a case, but that the party desiring to make a case must get an order to stay, said: "It is said that the roll cannot be filed until after the time for making a case has expired, because the roll is to contain the case. * * * It is true that the section enumerates the case as one of the papers to be attached and filed, as constituting the judgment roll. But that section also requires

this to be done 'immediately after entering the judgment,' which, of course, must ordinarily be before a case can be made. It seems to me that these sections give the prevailing party a clear right to have his judgment entered up, and roll filed, immediately on the decision being made, unless his proceedings are stayed by an order for that purpose. If a case is afterwards made, it must be attached to the roll when it is filed, and if the clerk should neglect to do it, the court will order it be done. There is no hardship nor difficulty in this practice. If the case is made in good faith, the party can, ordinarily, obtain a stay of proceedings; and if not, he ought not to have any. The prevailing party ought not to be delayed in collecting his judgments by any implied stay of proceedings, as must be the case if the sections in question are construed to stay the judgment for ten days."

1. *Chester v. Jumel*, (Supm. Ct. Gen. T.) 24 N. Y. St. Rep. 229.

2. *Cook v. Dickerson*, 1 Duer (N. Y.) 679, wherein the court said: "There are many papers embraced in the judgment roll which should have been omitted. It should not be made to include any papers or orders except those enumerated in section 281 of the code. The costs, affidavit of service of the bill, a stipulation, and some orders in no way involving the merits or affecting the judgment should not be contained in it. Besides the fact that by section 281 of the code they form no part of the roll, if an appeal be taken, the expense of printing unnecessary matter must be incurred if they are not stricken out, and the papers to be furnished to the appellate court will be encumbered with extraneous matter."

are necessary to make it conform with precise accuracy to the proceedings that have been had.¹

6. Signature. — Though the judgment roll may properly be signed by the clerk, yet according to numerous decisions the omission to do so will not affect the validity of the judgment² where signature is not expressly required by statute.³

7. Variance. — A variance between an order as entered in his minutes by the clerk and such order as drawn up and inserted in the judgment roll is, it is held, a matter of mere irregularity.⁴

8. Lost Roll. — In an action upon a judgment, if the judgment roll has been lost or destroyed, secondary evidence may be given of its contents. In such case the judgment may be proved by the testimony of the clerk and his records.⁵

V. JUDGMENT DOCKET — 1. Definition and Nature. — The docket of a judgment is a brief writing or statement of the judgment made from the record or roll, kept by the clerk in a book alphabetically arranged.⁶ As in the case of the entry of a judgment,

1. *Cook v. Dickerson*, 1 Duer (N. Y.) 681.

2. *Van Alstyne v. Cook*, 25 N. Y. 489; *Lythgoe v. Lythgoe*, 75 Hun (N. Y.) 147; *Artisans' Bank v. Treadwell*, 34 Barb. (N. Y.) 553; *Goelet v. Spofford*, 55 N. Y. 647; *Macomber v. New York*, (N. Y. Super. Ct.) 17 Abb. Pr. (N. Y.) 35.

3. "The judgment roll is to contain a copy of the judgment, and however fit or unobjectionable it may be, as it has been decided to be, that the clerk should sign it, I do not regard it as indispensable to its validity." *Hogebloom, J.*, in *Artisans' Bank v. Treadwell*, 34 Barb. (N. Y.) 553.

4. *Goelet v. Spofford*, 55 N. Y. 647. See also *Macomber v. New York*, (N. Y. Super. Ct.) 17 Abb. Pr. (N. Y.) 35.

In *Goelet v. Spofford*, 55 N. Y. 647, a certified copy of a judgment roll in a former action between the parties for a prior instalment of rent was offered in evidence by the plaintiffs upon the trial. It was objected to upon the ground that, it appearing thereby that the original was not signed by the clerk of the court, it was not a valid judgment roll. The objection was overruled, and this was held to be no error, since by the code, prescribing what should constitute the judgment roll, it was not expressly required that the roll should be signed by the clerk.

Clerical Error — Amendment. — Such omission is usually held to be a clerical error, *Van Alstyne v. Cook*, 25 N. Y. 489; *Lythgoe v. Lythgoe*, 75 Hun (N.

Y.) 147; which the court may and should, at any time, allow to be amended *nunc pro tunc*, *Van Alstyne v. Cook*, 25 N. Y. 489.

4. *Martin v. Lott*, (Supm. Ct. Spec. T.) 4 Abb. Pr. (N. Y.) 365, where, upon objection for variance between the order of dismissal of the complaint, made at the circuit, as entered by the clerk, and that contained in the judgment roll, the court said: "That variance does exist. But it is shown to my satisfaction that the error is not that of the defendant or his attorney. The order which forms a part of the judgment roll was the one made by the court; it was then drawn up by the defendant's attorney, and handed to the clerk, from whom it was subsequently procured, to be inserted in the roll. The variance was also a mere irregularity, which could only be taken advantage of, if at all, within a year from the perfecting of the judgment."

5. *Mandeville v. Reynolds*, 68 N. Y. 528, holding that since it is the duty of the county clerk to have and keep the judgment roll on deposit in his office, if it cannot be found in the particular place provided for such deposit, the presumption is that it is lost or destroyed.

6. *Anderson's L. Dict.*; *Stevenson v. Weissner*, 1 Bradf. (N. Y.) 344. And see *Harrison v. Southern Porcelain Mfg. Co.*, 10 S. Car. 278.

Indexing as Part of Docketing. — In *Virginia*, under Code 1860, c. 186, §§ 4, 8, it was held that indexing was not a

the docketing of a judgment is a ministerial act to be performed by the clerk.¹

2. Purpose. — The judgment docket is always open to public inspection, and is intended to afford to interested parties official notice of the existence or lien of judgments.² The docketing of a judgment is constructive but conclusive notice to all the world of the lien of such judgment.³

3. Necessity — *a. DOCKETING ESSENTIAL TO CONSTITUTE LIEN* — (1) *In General.* — It is a usual statutory provision in the various states that a judgment, though complete upon rendition, must be entered on the judgment docket in order to constitute a lien upon the defendant's real estate, at least as against subsequent purchasers and incumbrancers in good faith without notice.⁴

necessary part of docketing, and that a judgment docketed but not indexed was a lien on the defendant's land. *Old Dominion Granite Co. v. Clarke*, 28 Gratt. (Va.) 617.

Judgment Roll. — As holding that the docket is in fact the judgment roll, and that all entries on it are matters of record, see *Anderson v. Tuck*, 33 Md. 225.

1. *In re Worthington*, 7 Biss. (U. S.) 455. See also *Scott v. Rohman*, 43 Neb. 618.

2. Black's L. Dict.

Docketing Not Essential to Conclusiveness of Judgment. — In *Sheridan v. Andrews*, 49 N. Y. 478, the court said: "The docketing under the Act of 1840 in the county clerk's office was not essential to the conclusiveness of the judgment. Such docketing is only required for the purpose of making a money judgment a lien on the real estate of the debtor, and as a preliminary to the issuing of an execution. This judgment is not sought to be enforced as a lien, but is set up as an estoppel."

Entry on Lien Docket Does Not Make Judgment. — The lien docket is not the record of judgments, but only their essential index; and the entry on the lien docket does not make the judgment, but only refers to one supposed to be already made. *Ferguson v. Staver*, 40 Pa. St. 213.

Docketing Creditor's Privilege and Not Duty. — To docket his judgment is a creditor's privilege, not his duty. If he fails to docket it, he may lose his lien on the real estate aliened to a purchaser for value without notice. *Gurnee v. Johnson*, 77 Va. 712.

3. *Citizens Nat. Bank v. Manoni*, 76 Va. 802.

4. *California.* — *Los Angeles County Bank v. Raynor*, 61 Cal. 145; *Hastings v. Cunningham*, 39 Cal. 144.

Indiana. — *Berry v. Reed*, 73 Ind. 235.

Minnesota. — *Brown v. Hathaway*, 10 Minn. 303.

New York. — *Blydenburgh v. Northrop*, (Supm. Ct. Spec. T.) 13 How. Pr. (N. Y.) 289; *Buchan v. Sumner*, 2 Barb. Ch. (N. Y.) 165; *Lynch v. Rome Gas Light Co.*, 42 Barb. (N. Y.) 591; *Whitney v. Townsend*, 67 N. Y. 40; *Sheridan v. Andrews*, 49 N. Y. 478; *Van Orman v. Phelps*, 9 Barb. (N. Y.) 500; *France v. Hamilton*, (Supm. Ct. Gen. T.) 26 How. Pr. (N. Y.) 180.

North Carolina. — *Holman v. Miller*, 103 N. Car. 118; *Sawyers v. Sawyers*, 93 N. Car. 321; *Williams v. Weaver*, 94 N. Car. 134; *McAden v. Banister*, 63 N. Car. 478; *Hoppock v. Shober*, 69 N. Car. 153; *Harris v. Ricks*, 63 N. Car. 653; *Dougherty v. Logan*, 70 N. Car. 558; *Perry v. Morris*, 65 N. Car. 221; *Bates v. Hinsdale*, 65 N. Car. 423; *Ross v. Alexander*, 65 N. Car. 576.

Pennsylvania. — *Mann's Appeal*, 1 Pa. St. 24.

Virginia. — *Purveyor v. Taylor*, 12 Gratt. (Va.) 401; *Redd v. Ramey*, 31 Gratt. (Va.) 265.

West Virginia. — *Renick v. Ludington*, 14 W. Va. 367; *Anderson v. Nagle*, 12 W. Va. 98.

Wisconsin. — *Steckmesser v. Graham*, 10 Wis. 37.

See in General as to the Lien of Judgments and the priority of different judgments, the title *Judgments*, Am. and Eng. Encyc. of Law.

Effect of Subsequent Docketing in Another County. — The fact that a judgment docketed in one county is after-

Undocketed Judgment Lien Against Those with Notice. — Although the general rule is as just stated, yet where subsequent purchasers or incumbrancers have actual notice of the judgment, they will be bound thereby, this being equivalent to the constructive notice required to be given by entry on the judgment docket.¹

(2) *Judgments Affirmed on Appeal.* — Where a judgment has been affirmed on appeal, it must be redocketed in order to make it a lien for the damages and costs in the appellate court,² although without such redocketing it remains a lien upon real estate, by virtue of the original docketing, for the amount of the original judgment and accumulated interest.³

(3) *Docketing of Justices' Judgments.* — As to the necessity and manner of docketing justices' judgments, see the article JUSTICES OF THE PEACE, vol. 12, p. 749 *et seq.*⁴

b. DOCKETING UNNECESSARY TO ISSUANCE OF EXECUTION. — Since the enforcement of a judgment does not depend upon its entry or docketing, and since the docketing is essential only to constitute a lien upon property of the debtor, it follows that the docketing of a judgment is not essential to the issuance or service of an execution upon a judgment which has been duly rendered.⁵

wards docketed in another does not deprive it of the lien it had on the defendant's land in the first county. *Perry v. Morris*, 65 N. Car. 221.

Requisite to Action on Judgment and to Set Aside Conveyance for Fraud. — In *Geery v. Geery*, 63 N. Y. 252, the court held that an action based upon a judgment requiring the payment of a specific sum of money by one of the parties, and brought to set aside conveyances of real estate, made by the party so charged, as in fraud of creditors, and to reach his real and equitable assets, could not be maintained without first docketing such judgment and issuing execution thereon.

1. *York Bank's Appeal*, 36 Pa. St. 458; *Johns v. French*, 1 Hog. 459, 461; *Tunstall v. Trappes*, 3 Sim. 286.

2. *Chapin v. Broder*, 16 Cal. 403; *Daniels v. Winslow*, 4 Minn. 318; *Alsop v. Moseley*, 104 N. Car. 60.

In *M'Clung v. Beirne*, 10 Leigh (Va.) 410, however, it was held that a judgment lien includes not only the amount of the original judgment, but also the damages and costs in the appellate court.

Costs. — Where costs on appeal to the Supreme Court are not entered on the judgment docket in the court below, they do not become a lien on property until the levy of an execution. *Chapin v. Broder*, 16 Cal. 403.

3. *Daniels v. Winslow*, 4 Minn. 318.

4. Docketing of Justice's Judgments in Superior Court. — It is provided by statute in some states that a justice's judgment shall be docketed in the Superior Court of the county, and that by such docketing it becomes a judgment of such Superior Court. *Bates v. Fayetteville Bank*, 65 N. Car. 81; *Perry v. Morris*, 65 N. Car. 221; *Kincaid v. Richardson*, (County Ct.) 9 Abb. N. Cas. (N. Y.) 315; *Blossom v. Barry*, 1 Lans. (N. Y.) 190.

If a number of justice's judgments be docketed in the Superior Court, they will, under Code Civ. Pro. N. Car., be a lien upon the land of the defendant from the time when they were docketed, and will have a priority over a judgment obtained in court by another person against the same defendant at a subsequent time; and though an execution be issued on the latter and the sheriff levies it on the land and advertises it for sale, yet if before the sale executions are issued on a part of the justice's docketed judgments and are placed in the hands of the sheriff, the proceeds of the sale of the land must be first applied to the payment of all the justice's judgments. *Perry v. Morris*, 65 N. Car. 221.

5. *Los Angeles County Bank v. Raynor*, 61 Cal. 145; *Hastings v. Cunningham*, 39 Cal. 144; *Rice v. Warren*, 91

c. **FAILURE TO DOCKET** — **Effect Of.** — As a general rule the effect of a failure to docket a judgment makes it inoperative as a lien against subsequent purchasers in good faith without notice.¹

Remedy For. — In the case of a failure of the clerk to perform his duty in the matter of entering a judgment upon the judgment docket, the only remedy of the judgment creditor would seem to be against the clerk for his loss suffered thereby.²

4. **Book of Entry.** — A judgment, in order to be docketed, must be entered in the book kept for that purpose, and usually known as the judgment docket or "docket book,"³ which is a separate

Ga. 759; *Youngs v. Morrison*, 10 Paige (N. Y.) 325; *Clark v. Dakin*, 2 Barb. Ch. (N. Y.) 36; *Galpin v. Page*, 1 Sawy. (U. S.) 309. See, however, *Kupfer v. Frank*, 30 Hun (N. Y.) 74.

In *Clark v. Dakin*, 2 Barb. Ch. (N. Y.) 36, the court said: "This court has frequently decided that it is not necessary to docket a judgment of the Supreme Court to enable the plaintiff to sell the defendant's interest in lands. The object of docketing the judgment is merely to obtain a lien upon the lands as against purchasers and subsequent mortgagees, or judgment creditors."

Execution in Another County. — In *New York* it was held that an execution issued upon a judgment of the Supreme Court, or a decree of the Court of Chancery, might be levied upon the debtor's real estate, although such judgment or decree had not been docketed in the county in which such real estate is situated; but such judgment or decree did not become a lien upon such real estate unless so docketed. But a judgment of the Court of Common Pleas, or of the Superior Court of the city of New York, was required to be so docketed to authorize them to issue their executions into another county, as their process did not, in ordinary cases, extend to other counties. *Corey v. Cornelius*, 1 Barb. Ch. (N. Y.) 571; *Clark v. Dakin*, 2 Barb. Ch. (N. Y.) 36.

"It is only necessary to docket the judgment, in order to authorize the issuing of the execution, where the judgment has been recovered in a local court and the execution is to be issued to the sheriff of a different county from that in which the judgment was recovered." *Youngs v. Morrison*, 10 Paige (N. Y.) 325.

1. *Cushing v. Edwards*, 68 Iowa 145; *Fuller v. Nelson*, 35 Minn. 213; *Buchan*

v. Sumner, 2 Barb. Ch. (N. Y.) 165, 47 Am. Dec. 305; *Holman v. Miller*, 103 N. Car. 118; *Stephens's Appeal*, 38 Pa. St. 9; *Ridgway's Appeal*, 15 Pa. St. 177; *Wood v. Reynolds*, 7 W. & S. (Pa.) 406; *Hance's Appeal*, 1 Pa. St. 408; *Gordon v. Rixey*, 76 Va. 694; *Landon v. Ferguson*, 3 Russ. 349. See in general as to lien of judgments the title *Judgments*, Am. and Eng. Encyc. of Law.

In *Virginia*, under the code, it would seem that every judgment is a lien on all the debtor's real estate, and the prior judgment has priority as between the judgments, whether docketed or undocketed, with the exception that no judgment is a lien on real estate as against purchasers for value without notice unless docketed in the manner and within the time prescribed. *Gurnee v. Johnson*, 77 Va. 712.

In *Gordon v. Rixey*, 76 Va. 694, it was held that a judgment, though undocketed, is good against subsequent creditors with or without notice. See also, in this connection, *Duncan v. Custard*, 24 W. Va. 730.

2. *Holman v. Miller*, 103 N. Car. 118; *Ridgway's Appeal*, 15 Pa. (St. 177).

A Purchaser is not bound to look beyond the judgment docket. *Ridgway's Appeal*, 15 Pa. St. 177; *Holman v. Miller*, 103 N. Car. 118. In the latter case it is held that it is the duty of a judgment creditor to see that his judgment is properly docketed. If the clerk neglects to docket the judgment, subsequent incumbrancers and claimants under the judgment debtor are not to be prejudiced thereby, and the remedy of the judgment creditor is against the clerk for loss suffered by reason of the failure to docket the judgment.

3. *Sheridan v. Linden*, 81 N. Y. 182; *Brown v. Hathaway*, 10 Minn. 303.

and distinct book from that known as the "judgment book."¹

5. By Whom Entry Made. — It is the duty of the clerk or prothonotary of the court to docket the judgment by entering it in the proper book.² It is, however, the duty of the plaintiff to see that his judgment is properly entered.³

6. Time of Docketing. — As a General Rule it may be said that the test of the right to docket a judgment is the right to issue execution upon it immediately.⁴

The Entry of a Judgment in the Judgment Book and the making up and filing of the judgment roll must precede the docketing of the judgment in order that such docketing may constitute a valid lien.⁵ The docketing without a preceding entry in the judgment

1. *Sheridan v. Linden*, 81 N. Y. 182; *Holman v. Miller*, 103 N. Car. 118.

Entry in "Judgment Book" Not Sufficient. — The "judgment book" required to be kept by every clerk of a court of record (Code Civ. Pro., § 1236) is a separate and distinct book from the "docket book," also required to be kept (Code Civ. Pro., § 1245), and an entry of such a judgment in the "judgment book" is not sufficient; unless entered in the "docket book" it is not docketed within the meaning of the statute. *Sheridan v. Linden*, 81 N. Y. 182.

2. *Brown v. Hathaway*, 10 Minn. 303; *Townshend v. Wesson*, 4 Duer (N. Y.) 342; *Risk v. Uffelman*, (C. Pl. Gen. T.) 7 Misc. (N. Y.) 133; *Holman v. Miller*, 103 N. Car. 118; *Bear v. Patterson*, 3 W. & S. (Pa.) 233; *Hance's Appeal*, 1 Pa. St. 408; *Crutcher v. Com.*, 6 Whart. (Pa.) 340; *Hesse v. Mann*, 40 Wis. 560.

3. *Wood v. Reynolds*, 7 W. & S. (Pa.) 406; *Ridgway's Appeal*, 15 Pa. St. 177; *Barry's Estate*, 3 Luz. Leg. Reg. (Pa.) 141; *Bell v. Davis*, 75 Ind. 314; *Johnson v. National Exch. Bank*, 33 Gratt. (Va.) 473.

In *Wood v. Reynolds*, 7 W. & S. (Pa.) 406, the court said: "It was the plaintiff's business to see his judgment properly entered; and he must bear the loss caused by his negligence, rather than one who is in no default whatever. Though the terretenant was apprised of the defect before he had paid the last shilling, he was bound by his engagement to pay; and actual notice came too late."

A Subsequent Purchaser or Judgment Creditor is not bound to look beyond the judgment docket. If the Christian names of defendants in a judgment are not entered on the judgment docket,

the judgment, though valid as between the parties, cannot affect subsequent purchasers or judgment creditors. It is the duty of the judgment creditor to see that his judgment is rightly entered in the judgment docket. *Ridgway's Appeal*, 15 Pa. St. 177; *Holman v. Miller*, 103 N. Car. 118.

4. *De Agreda v. Mantel*, (N. Y. Super. Ct. Spec. T.) 1 Abb. Pr. (N. Y.) 130.

Docketing Nunc pro Tunc. — A failure to docket a judgment against two persons so that it shall be a lien upon real estate as against one will not invalidate an execution issued to the sheriff where the judgment was rendered. If necessary, the court has power to order it docketed *nunc pro tunc*, against the other defendant. *Drake v. Harrison*, 69 Wis. 99.

5. *De Agreda v. Mantel*, (N. Y. Super. Ct. Spec. T.) 1 Abb. Pr. (N. Y.) 130; *Townshend v. Wesson*, 4 Duer (N. Y.) 342; *Blashfield v. Smith*, 27 Hun (N. Y.) 114; *Rockwood v. Davenport*, 37 Minn. 533.

Docket Should Be Sustained by Judgment Roll. — The judgment roll required by law should be made up, either by the clerk or by the attorney for the successful party, before a judgment is docketed, and if this is not done, and execution is issued on a docket not properly supported by the record, the court may require the defect to be supplied within a reasonable time, and may set aside the execution for failure to comply. *Blashfield v. Smith*, 27 Hun (N. Y.) 114.

Effect of Docketing When No Judgment Roll Filed. — In *Townshend v. Wesson*, 4 Duer (N. Y.) 342, it was held that a judgment roll can be constituted only by the attaching of the papers which for that purpose are described in the

book is of no avail, even though a judgment roll has been filed with what purports to be a copy of a judgment in it.¹

Docketing Out of Office Hours. — It has been held in some jurisdictions that all judgments filed and docketed by a clerk out of office hours, although some may be entered before others, must take effect and become liens equally at the next office hour after such docketing.²

7. Place of Docketing — *a.* **IN GENERAL.** — A judgment is not a lien on real estate unless docketed in the county in which the land is situated.³

code, and that to give to a paper containing neither process nor pleadings the name and effect of a judgment roll would not only be an abuse of language, but a direct violation of provisions of the code. The docketing of a judgment when no judgment roll has been made and filed is an unauthorized and illegal act, and creates no lien on the lands of the debtor.

1. *Rockwood v. Davenport*, 37 Minn. 533, the court saying: "There can be no judgment capable of being docketed or enforced in any manner till it is entered in the judgment book. Until that is done, it does not matter that the party is entitled to judgment, either by default of defendant or upon a decision or direction of the court. It has frequently been decided that an order or direction for judgment by the court, or by a referee, is not a judgment, so that an appeal can be taken from it. That to constitute a judgment it must be entered in the judgment book, as the statute directs, has always been held by this court."

Entry on Nonjuridical Day. — The entry of a judgment by the clerk on the judgment docket being a purely ministerial act, his performance of this duty on a nonjuridical day will not be void, and judgment creditors will thereby acquire a lien on the real estate of a judgment debtor just as though the entry were made on any other day. *In re Worthington*, 7 Biss. (U. S.) 455.

2. *In France v. Hamilton*, (Supm. Ct. Gen. T.) 26 How. Pr. (N. Y.) 180, the court, in stating the rule as laid down in the text, said: "It is insisted, however, by the counsel for the judgment creditors, whose judgments were docketed out of office hours, that they became a lien the moment they were docketed in the county clerk's office, according to the express provisions of the statute; * * * that the provi-

sion first cited has no bearing on the question, and though mandatory as to these hours, it does not prohibit a clerk from keeping his office open at other hours. The object of the statute was doubtless in part to compel the clerks of the counties to be at their offices during certain hours of the day for the transaction of business; but I am of the opinion that it was also designed to go a little beyond this, by prescribing rules and regulations which should regulate and control the office where the business was transacted. The record must be filed and the judgment docketed at the office; and there is certainly great propriety in making provisions as to the time within which the daily business should be done. Were it otherwise, it would to some extent vest a county clerk with power to determine the priority of liens." See also *Wardell v. Mason*, 10 Wend. (N. Y.) 573, wherein it was held that records of judgments delivered to the clerk to be filed before the hour of nine o'clock in the morning will be considered as filed at the hour of nine. No preference can be gained by taking a record to the clerk's office before that hour.

3. *Alsop v. Moseley*, 104 N. Car. 60; *De Agreda v. Mantel*, (N. Y. Super. Ct. Spec. T.) 1 Abb. Pr. (N. Y.) 130. And see the title *Judgments*, Am. and Eng. Encyc. of Law.

Transmission of Judgments of United States Courts. — In *Alsop v. Moseley*, 104 N. Car. 60, the court said: "So essential and imperative is the requirement that the judgment be docketed to create a lien that it was deemed necessary to pass the Act of 1881, c. 75, which provides for the transmission of the substantial elements of a final judgment rendered in this court to the various Superior Courts, and the docketing therein, in order to attach a lien upon the debtor's real estate. The Code, § 436. In like manner, to give

b. NECESSITY OF DOCKETING IN COUNTY WHERE RENDERED. — It would seem that a judgment rendered in one county cannot be docketed in another without having been first docketed in the county where it was rendered.¹

c. DOCKETING TRANSCRIPT. — *Necessity of.* — In order that a judgment may constitute a lien upon real estate in a county other than that in which it was rendered, a transcript thereof must be entered and recorded in the judgment docket of such county.²

Duty of Clerk to Furnish and File Transcript. — It is the duty of the clerk of the county where the judgment was rendered, upon request and payment of fees, to furnish a transcript containing all the facts necessary to make a perfect docket of the judgment,³ and the clerk of the county in which such transcript is presented must file it and docket the judgment.⁴

8. Requisites of Docket Entry. — The requisites of an entry upon the judgment docket and the manner in which such entry is to be made in order to secure the lien of the judgment are, as a rule, prescribed by the statutes of the different states. That subject is not within the scope of this article.⁵

9. Correction of Docket. — It has been held that an immaterial error in the docket as to a defendant's name may be corrected and the judgment may be declared a lien from the date of the original docketing.⁶

10. Cancellation of Docket. — The clerk is generally authorized by statute to cancel and discharge the docket of a judgment, upon the filing with him of an acknowledgment of satisfaction,

the same efficacy to judgments rendered and decrees pronounced in the Circuit and District Courts of the United States, within the state, was passed the Act of 1889, which allows such to be docketed in the several state Superior Courts for the purpose of creating liens upon the debtor's real estate in such counties, to the same extent as docketed judgments of the said Superior Courts, and requires the clerks of the last-mentioned courts to docket such transcripts when presented. This enactment was made to carry into effect an Act of Congress entitled 'An act to regulate the liens of judgments and decrees of the courts of the United States,' approved August 1, 1888.

1. *McAden v. Banister*, 63 N. Car. 478.

2. *Bell v. Davis*, 75 Ind. 314; *Blossom v. Barry*, 1 Lans. (N. Y.) 190; *De Agreda v. Mantel*, (N. Y. Super. Ct. Spec. T.) 1 Abb. Pr. (N. Y.) 130; *Hamed's Case*, (Surrogate Ct.) 4 Abb. Pr. (N. Y.) 270. *Smith v. Buck*, 22 Wis. 577.

Docketing from Original Papers. — In *McAden v. Banister*, 63 N. Car. 478, it was held that the judgment may properly be docketed from the original papers before the magistrate, instead of from a transcript of them.

3. *Sears v. Burnham*, 17 N. Y. 445. As to the sufficiency of the attestation of the clerk to the transcript see *People v. Keenan*, 31 Hun (N. Y.) 625.

4. *Sears v. Burnham*, 17 N. Y. 445; *People v. Keenan*, 31 Hun (N. Y.) 625.

5. **Sufficiency of Docket Entry to Secure Lien.** — See the title *Judgments*, Am. and Eng. Encyc. of Law.

6. *Geller v. Hoyt*, (Supm. Ct. Spec. T.) 7 How. Pr. (N. Y.) 265. In this case it was held, where a judgment was docketed correctly as to the Christian name and surname of the defendant, but incorrectly as to the initial of his middle name, and the docket was afterwards corrected on motion, that the judgment took priority as a lien from the date of the original docketing, as against a subsequent judgment obtained before the correction.

signed by the party in whose favor the judgment is obtained, and authenticated in the prescribed manner. Without such acknowledgment, however, the act of the clerk in canceling the docket is without jurisdiction, and is void as to the parties whose rights are affected by it.¹

11. *Index of Judgments.* — It is also usually expressly required that in addition to the docket of the judgments there shall be an index thereof, in order to create a lien on the property of the judgment debtor.²

1. *Booth v. Farmers', etc., Nat. Bank, 4 Lans. (N. Y.) 301*, wherein the court said: "The docket is no part of the record of the court. The entries upon it are directed to be made by the clerk, and neither in fact nor theory are submitted to the court. In making such entries the clerk acts in a ministerial capacity, and we think his erroneous or false entries cannot conclude the parties, whatever might be the effect of an entry which he was authorized by law to make. If he should make an entry that an execution had been returned satisfied, contrary to the fact, we think the plaintiff's rights would not be affected by such entry, either as to the lien of his judgment or the right to issue an execution, any more than an entry of a judgment on the docket without any record to sustain it would bind the supposed parties until it was vacated by some direct proceeding. The clerk is authorized to

cancel and discharge the docket upon the filing with him of an acknowledgment of satisfaction, signed by the party in whose favor the judgment was obtained, and authenticated in a particular manner. Unless this has been done, the act of the clerk in canceling the docket is without jurisdiction, and void as to the parties whose rights purport to be affected by it; though it is quite probable the clerk might, by entering on the docket the satisfaction of a judgment without due authority, subject himself to an action in behalf of a party who had been misled and damaged thereby." And see in general article SATISFACTION, PAYMENT, AND DISCHARGE OF JUDGMENTS.

2. As to requisites and sufficiency of the index of judgments in order to create a lien on the property of the judgment debtor, see the title *Judgments*, Am. and Eng. Encyc. of Law.

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See article *LANDLORD AND TENANT*, vol. 12, p. 842.

REPLEADER.

BY HENRY STEPHEN.

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CROSS-REFERENCE.

As to *Pleading Over after Demurrer*, see article *DEMURRERS AT COMMON LAW AND UNDER THE CODES*, vol. 6, p. 292.

I. DEFINITION. — A replader is the "making a new series of pleadings."¹ It is seldom required in modern practice, as amend-

1. Bouv. L. Dict.

Texas. — It seems that in Texas a replader is synonymous with an amended petition. *Avery v. Popper*, (Tex. Civ. App. 1895) 34 S. W. Rep. 325.

Equivalent to New Trial. — Where the defendant pleaded the general issue and special pleas, each confessing a cause of action and alleging in avoidance immaterial and insufficient matter, there was a verdict for the defendant, which was set aside, and an award of replader. In denying a mandamus to have judgment entered on the verdict, the court said that an award of replader, though it might not be technically correct, was precisely the same in effect as the granting of a new trial with leave to amend the pleadings. *Ex p. Pearce*, 80 Ala. 195.

Comparison with Judgment Non Obstante. — There is a distinction drawn

between a replader and a judgment *non obstante veredicto*, in this: that the latter is always upon the merits and never granted but in a very clear case, while a replader is upon the form and manner of pleading. If a plea be defective and the defendant succeed at the trial, the question whether the plaintiff can have judgment or whether there should be a replader is dependent upon whether the plea does or does not contain a confession of a cause of action. If a cause of action be confessed by plea, and the matter pleaded in avoidance be insufficient, the plaintiff is entitled to judgment notwithstanding the verdict. But if the plea does not confess a cause of action there must be a replader. *Pitts v. Polehampton*, 1 Ld. Raym. 390; *Lambert v. Taylor*, 4 B. & C. 138, 10 E. C. L. 293; *Macomb v. Wilber*, 16 Johns. (N. Y.) 227; 2 Tidd's Pr. 922; 2 Chitty on Pleading, 688.

ments in form or substance are liberally allowed.¹

II. AWARD OF REPLEADER — 1. Motion for. — Where a defeated party, after examination of the pleadings, considers that the issue taken is an immaterial one, he may move for a repleader.²

Revision of Court's Action. — The question whether or not there shall be an award of repleader is not discretionary; it must be granted or refused upon common-law principles, and if there be error it may be corrected by an appellate court.³

2. In What Cases Awarded. — Whenever the cause has been tried upon immaterial issues a repleader should be awarded;⁴ and in

1. Stephen's Pl. (Andrews's ed.) 188. And see generally article AMENDMENTS, vol. I, p. 458.

2. Stephen's Pl. (Andrews's ed.) 186.

At the Hearing on a Repleader the Court Will Look into the Whole Record, not merely confining its attention to the pleadings objected to, but being guided in its decision by the rights of the parties as they appear on a full consideration of the pleadings. *Eaton v. Stone*, 7 Mass. 312; *Henderson v. Foote*, 3 Call (Va.) 248; *Bonsack v. Roanoke County*, 75 Va. 585.

3. *Gerrish v. Train*, 3 Pick. (Mass.) 124; *Baird v. Mattox*, 1 Call (Va.) 257; *Ex p. Pearce*, 80 Ala. 195; 1 Chitty on Pleading 687.

Appeal from Justice. — In an action commenced before a justice of the peace and carried by appeal to the District Court, it was held competent in that court to order a repleader. *Strout v. Durham*, 23 Me. 483.

Rules for Repleaders. — It was laid down in the earliest leading case on this subject: First, that a repleader should be awarded when there is such a joinder of issue that, after trial thereof, the court cannot give judgment because of the impertinence or uncertainty of the issue as not determining the right. Second, that at common law the court might award a repleader before trial, because verdicts did not cure issues of this kind. Since the statute of jeofails, however, in cases where the issues may be aided by verdict, it may be more proper not to award a repleader until after trial. Third, on the award of a repleader the amendment should begin where the proceedings first became faulty, in the absence of a specific direction from the court as to when the repleader should begin. Fourth, if a repleader be awarded where it should not have

been, or denied when it should be awarded, it is error. Fifth, that upon the award of a repleader there should be no costs, because it is a judgment of the court upon the pleadings. *Staple v. Heydon*, 6 Mod. 1.

4. *Stafford v. Albany*, 6 Johns. (N. Y.) 1; *Masterson v. Gibson*, 56 Ala. 56; *Watson v. Brazeal*, 7 Ala. 451; *Centralia, etc., R. Co. v. Brake*, 31 Ill. App. 459; *Eaton v. Stone*, 7 Mass. 312; *Trott v. West*, Meigs (Tenn.) 163; *Saving Fund v. Broomall*, 6 Phila. (Pa.) 236, 24 Leg. Int. (Pa.) 227; *Baird v. Mattox*, 1 Call (Va.) 257; *Terrell v. Page*, 3 Hen. & M. (Va.) 118; *Dudley v. Estill*, 6 Leigh (Va.) 562; *Taylor v. Huston*, 2 Hen. & M. (Va.) 161; *Parkhurst v. Sumner*, 23 Vt. 538; *Rex v. Phillips*, 1 Burr. 302; *Plomer v. Ross*, 5 Taunt. 386, 1 E. C. L. 136; *Serjeant v. Fairfax*, 1 Lev. 32; *Masters v. Wood*, 2 Lev. 164; *Holms v. Broket*, Cro. Jac. 434; *Coxe v. Cropwell*, Cro. Jac. 5; *Tryon v. Carter*, 2 Stra. 994; *Staple v. Heydon*, 6 Mod. 1; *Witts v. Polehampton*, 3 Salk. 305; *Bac. Abr.*, Pleas, etc., M.; *Carpenter v. Starr*, 1 Rolle 86.

The Issue Is Immaterial where a material allegation in the pleadings is not traversed, but an issue is taken on some point which, though found by the verdict of the jury, will not determine the merits of the case, and would leave the court at a loss for which of the parties to give judgment. *Gould v. Ray*, 13 Wend. (N. Y.) 634.

Replication de Injuria. — Where the action was one of trespass *de bonis asportatis*, there was a plea that the property of the goods when taken was in one Stevens and not in the plaintiff; that the defendant was a deputy sheriff and took the goods under a writ of attachment against Stevens in favor of a third party. The replication traversed the property in Stevens, and on this

all cases when the pleadings are so defective that there could be no valid judgment upon them, the court, in order that the parties may be restored to their legal rights and justice be done them, will award a repleader.¹

3. In What Cases Not Awarded. — Where the verdict is a general one on all the issues, one of which is material, a repleader should not be awarded, for wherever the court can, upon an inspection of the whole record, give judgment there should be no repleader.²

traverse there was a joinder of issue and a verdict for the plaintiff. The court held that the issue should have been taken on the traverse in the defendant's plea and that the issue joined was immaterial, and awarded a repleader. *Gerrish v. Train*, 3 Pick. (Mass.) 124.

Plea of Nul Tiel Record. — In an action of assumpsit against a corporation to recover the amount assessed by a jury for ground taken to widen a street under a local act, the declaration set forth the proceedings of the court, in which the jury assessed the damages, and the court's judgment, to which the defendants pleaded *nul tiel record*, on which issue was joined. It was held that the issue was immaterial. *Stafford v. Albany*, 6 Johns. (N. Y.) 1.

Faculty Counts. — It was held good ground for a repleader in an action of covenant after a general verdict for plaintiff, that there were two counts in a declaration; one in covenant and concluding in case, and the other entirely in case, to which there was a plea that defendant "had broken the covenants." *Terrell v. Page*, 3 Hen. & M. (Va.) 118.

1. 1 Chitty on Pleading 633; Com. Dig., Pleader, R. 18; Bacon Abr., Pleas, etc., M.; *Staple v. Heydon*, 6 Mod. 1; *Gerrish v. Train*, 3 Pick. (Mass.) 124; *Magoun v. Lapham*, 19 Pick. (Mass.) 419; *Taylor v. Huston*, 2 Hen. & M. (Va.) 161; *Terrell v. Page*, 3 Hen. & M. (Va.) 118; *Dudley v. Estill*, 6 Leigh (Va.) 562; *Strout v. Durham*, 23 Me. 483.

Where Pleadings Do Not Show Facts. — Where defendant, through the misapprehension of his attorney, pleaded *puis darrein* an accounting and satisfaction by a delivery of certain bills of exchange to plaintiff, instead of pleading that the said bills would be in satisfaction of the debt when paid, a repleader was awarded on terms. *Heye v. Lieman*, 12 Fed. Cas. No. 6,445 a.

Statute of Limitations. — Where one of the grounds of motion for repleader was to take advantage of a statute of limitations after a joinder in demurrer, the court, in denying the motion, said that it might be induced to grant it if any equitable cause had been shown to support it, but with no such ground denied the motion as the proposed new plea did not go to the merits. *Perkins v. Burbank*, 2 Mass. 81.

But in *Coleson v. Blanton*, 3 Hayw. (Tenn.) 152, a repleader was allowed to enable a defendant to rely upon the statute of limitations, for the court considered this defense, though formerly discountenanced, entitled to be favored as much as any other so as to bring before it any facts not yet ascertained.

2. *Roop v. Delahaye*, 2 Colo. 307; *Payne v. Barnet*, 2 A. K. Marsh. (Ky.) 314; *Hartfield v. Patton*, Hempst. (U. S.) 271; *Pegram v. U. S.*, 1 Brock. (U. S.) 265; *Jenkins v. Stanley*, 10 Mass. 226; *Mudge v. Treat*, 57 Ala. 1.

Case Submitted on General Issue. — Where the case was also submitted to the jury upon the general issue, and there was nothing in the record to indicate that complete justice had not been done the parties on the trial under the material issue, an appellate court declined to reverse the judgment and award a repleader. *Shippey v. Eastwood*, 9 Ala. 198.

Action Against Administrators. — In an action against administrators for the recovery of purchase money for land, the defendant pleaded that the plaintiffs were not entitled to the land as heirs or in any other manner, whereby the consideration failed; and that the plaintiffs had no power to dispose of interest in warrants for the land; and also pleaded *plene administravit*. Both the first and second pleas were immaterial. A verdict was rendered for the defendants, and a motion was entered to set it aside and award a repleader. The court said that had

First Fault in Pleading. — A repleader is not grantable in favor of the party who makes the first fault in pleading, which occasions the immaterial issue.¹

After Demurrer. — It would seem that a repleader cannot be awarded after demurrer,² except it be a demurrer to a plea in abatement,³ or upon a writ of error.⁴

III. JUDGMENT. — In the absence of a direction of the court to plead anew from any particular pleading, the parties will recommence their pleading at the faulty plea.⁵

there been no other pleas than the insufficient ones, there could be no doubt that the repleader should have been awarded, but there was a general verdict for defendants, and the plea of *plene administravit* being a material issue, the motion was denied. *Wallace v. Barlow*, 3 Bibb (Ky.) 168.

1. *Kempe v. Crews*, 1 Ld. Raym. 170; *Webster v. Bannister*, 1 Dougl. 395; *Taylor v. Whitehead*, 2 Dougl. 747; *Goodburne v. Bowman*, 9 Bing. 532, 23 E. C. L. 369; *Andre v. Johnson*, 6 Blackf. (Ind.) 375; *Frank v. Godwin*, 24 Ark. 584; *Whitemore v. Stephens*, 48 Mich. 573; *Ragsdale v. Gossett*, 2 Lea (Tenn.) 729; *Sparhawk v. Hall*, 52 Vt. 624; *Hartfield v. Patton*, *Hempst.* (U. S.) 268, 11 Fed. Cas. No. 6,158a; *U. S. v. Burnham*, 1 Mason (U. S.) 66.

Application of Rule. — This rule is applicable only where the immaterial issue is found against the party first in fault; when found in his favor there may be a repleader. *Gordon v. Ellis*, 7 M. & G. 607, 49 E. C. L. 607; *Gorham v. Reeves*, 1 Ind. 421.

Rule Too Rigid. — In *Bates v. Cooper*, 5 Ohio 115, it was considered that the rule was too rigid for modern practice, and would often interpose obstacles in the way of the great ends of justice where the merits of the case were undetermined by a verdict rendered on an immaterial issue; but, inasmuch as it appeared to the court in this case that the award of a repleader would not further justice, but would, on the contrary, place technical impediments in the way of its advance, a motion for a repleader was denied.

Exception to Rule. — Where the plaintiff committed the first error by misjoining breaches of the condition of the bond on which he was declaring, for which the declaration ought to have been judged insufficient, but which appeared to pass unheeded by the defendants, who were permitted to file an

amended plea in abatement, after pleading in bar, which plea the plaintiff might have disregarded if he had not been precluded from adopting this course by the decision of the court "that while the plea in abatement was pending all other pleas should be treated as a nullity," and this, together with permission to the defendants to withdraw their pleas in bar, which were withdrawn, left in fact no valid defense, it was held proper to award a repleader commencing with the declaration where the first error appeared to have been committed. *Governor v. Evans*, 1 Ark. 349.

Untrue Plea. — Where the plea was essentially bad because it tendered an immaterial issue and was moreover found by the jury not to be true, a motion by the defendant for a repleader was denied. *Bledsoe v. Chouning*, 1 *Humph.* (Tenn.) 85.

2. *Wallace v. Bishop*, 1 *Harr.* (Del.) 87 note a; *Crosse v. Bilson*, 6 *Mod.* 102; *Staple v. Heydon*, 6 *Mod.* 1.

Contra. — *Pitts v. Polehampton*, 1 *Ld. Raym.* 390, 3 *Lev.* 20; and *Potter v. Titcomb*, 7 *Me.* 302, seem to be the only instances of repleader allowed after a demurrer.

3. *Wallace v. Bishop*, 1 *Harr.* (Del.) 87, note a.

After Plea Puis Darrein. — Where the matter pleaded in abatement was *puis darrein continuance* the court gave leave for a repleader on terms. *Augusta v. Moulton*, 75 *Me.* 551; *Field v. Capers*, 81 *Me.* 36.

4. *Holbage v. Bennet*, 2 *Keb.* 769; *Crosse v. Bilson*, 6 *Mod.* 102.

5. *Staple v. Heydon*, 6 *Mod.* 1; *Bolling v. Petersburg*, 3 *Rand.* (Va.) 563; *Green v. Bailey*, 5 *Munf.* (Va.) 246.

Declaration Faulty. — Where the declaration was too faulty to be sustained the court dismissed the suit, declining to award a repleader. *Smith v. Walker*, 1 *Wash.* (Va.) 135.

IV. COSTS. — As a general rule, costs will not be awarded to either party.¹

Replication Bad. — In an action of debt on a bond against the executor of the obligor, the plaintiff replied *precludi non* because it was not expressed in the bond that the deceased was jointly bound with a third party as alleged in the plea, and insisted that the action did not survive against a third party. The replication was held defective in not setting forth the time of the deceased's death, and there was no joinder of issue. The court directed a repleader from the plea. *Stevens v. Taliaferro*, 1 Wash. (Va.) 155.

1, *Lickbarrow v. Mason*, 6 T. R. 131 [citing *Anonymous*, 2 Vent. 196]; *Staple v. Heydon*, 6 Mod. 1; *Otis v. Hitchcock*, 6 Wend. (N. Y.) 433.

But repleaders were awarded on terms in the following cases: *Heye v. Lieman*, 12 Fed. Cas. No. 6,445 a; *Augusta v. Moulton*, 75 Me. 551; *Field v. Cappers*, 81 Me. 36.

Connecticut. — On a motion in arrest of judgment a repleader was awarded and full costs were allowed including those of the repleader. *Johnson v. Smith*, 1 Root (Conn.) 373.

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BY WILKINS B. SHIELDS.

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 - e. *Plea or Answer*, 633.
 - f. *Replication*, 635.
 - g. *Judgment*, 635.
8. *Procedure Against Officer Where Bond Is Insufficient*, 636.

XIX. REDELIVERY BOND, 637.

CROSS-REFERENCES.

As to the *Kindred Actions of Detinue and Trover and Conversion*, see articles *DETINUE*, vol. 6, p. 643; *TROVER AND CONVERSION*.

Proceedings under Statute for the Trial of the Right of Property, see article *RIGHT OF PROPERTY, TRIAL OF*, *post*.
Matters of Substantive Law and Evidence, see *AM. AND ENG. ENCYC. OF LAW*, title *REPLEVIN*.

I. DEFINITION. — Replevin is a justicial writ to the sheriff, complaining of an unjust taking and detention of goods or chattels, commanding the sheriff to deliver back the same to the owner upon security given to make out the injustice of such taking, or else to return the goods and chattels.¹

II. NATURE OF ACTION — *In General.* — While the term “replevin” is usually applied to the action, yet in some states other terms are employed; of these “claim and delivery” occurs most frequently.² Sometimes the proceeding is called an action to “recover a chattel.” But the principles governing the action are the same regardless of name. In some states the action of replevin does not exist in its usual form, or does not exist at all.³ The gist of the action is the plaintiff’s right to the immediate possession of the property at the commencement of the suit.⁴

Both Parties Actors. — The action of replevin is one of peculiar nature in that both parties are actors.⁵

Comparison with Other Actions. — Replevin differs from trover and trespass in that it is for the recovery of the specific property and not for damages, and it differs from detinue in that it restores the property to the plaintiff at the commencement of the action.⁶

Object of Replevin. — The primary object of replevin is to recover the property *in specie*; ⁷ the secondary object is to recover its value with damages for detention, where specific recovery cannot be had.⁸

1. *Williamson v. Ringgold*, 4 Cranch (C. C.) 42.

2. *Carroll v. Byers*, (Ariz. 1896) 36 Pac. Rep. 499; *Ellingboe v. Brakken*, 36 Minn. 156; *Gist v. Loring*, 60 Mo. 487.

3. In *Alabama* it has been held that the action is the same as the common-law action of detinue with statutory modifications. *Cooper v. Watson*, 73 Ala. 252; *Seals v. Edmondson*, 73 Ala. 295; *Russell v. Walker*, 73 Ala. 315; *Jones v. Anderson*, 76 Ala. 427.

4. *Brook v. Bayless*, 6 Okla. 568.

5. *Forrester v. Barret*, Col. & C. Cas. (N. Y.) 95, 1 Johns. Cas. (N. Y.) 247; *Reed v. Carpenter*, 2 Ohio 79.

6. See articles *DETINUE*, vol. 6, p. 643; *TROVER*.

7. *Nickerson v. Chatterton*, 7 Cal. 568; *Hunt v. Robinson*, 11 Cal. 262; *Thomas v. Spofford*, 46 Me. 408; *Hickey v. Hinsdale*, 12 Mich. 99; *Clark v. West*, 23 Mich. 242; *Burrage v. Melson*, 48 Miss. 237; *Buckley v. Buckley*, 12 Nev. 423.

8. *Hunt v. Robinson*, 11 Cal. 262.

Title and Right of Possession Only Questions. — In replevin the question of value is not in issue. The title and right of possession are the matters to be determined. *Thomas v. Spofford*, 46 Me. 408.

Question in Issue. — Since the question is, who was entitled to the property when the action was commenced,¹ the right of possession to no other property than that originally claimed will be considered.²

Replevin Is a Civil Action, subject to the same rules as other civil actions.³

Action Ex Delicto. — The action of replevin has been considered *ex delicto*.⁴

Of Common-law and Statutory Origin. — The action of replevin is of common-law authority, but has been greatly modified by statute; it is not an extraordinary remedy in derogation of the common law, like attachment.⁵

The Form of the Action where the detention is the material allegation is in the *detinet*; but where the wrongful taking is the leading allegation, it is in the *cepit*.⁶

1. Hoke v. Applegate, 92 Ind. 572; Kingsbury v. Buchanan, 11 Iowa 387; Cassel v. Western Stage Co., 12 Iowa 47; Campbell v. Williams, 39 Iowa 646; Marshall v. Bunker, 40 Iowa 121; Loomis v. Youle, 1 Minn. 175; Blue Valley Bank v. Bane, 20 Neb. 294.

2. Lovensohn v. Ward, 45 Cal. 8.

Trial of Title. — The right of possession being the primary object of the action, the title to the property will not be tried unless distinctly put in issue by the answer. Warner v. Matthews, 18 Ill. 83; McFadden v. Ross, 108 Ind. 512; Noble v. Epperly, 6 Ind. 414; Le Roy v. East Saginaw City R. Co., 18 Mich. 233; Dows v. Greene, 32 Barb. (N.Y.) 490.

Judgment Conclusive as to Title. — Although replevin generally tests merely the right of possession, yet where the title was put in issue and no evidence was offered by either party except that which tended to support the defendant's title, a verdict and judgment therein for the defendant may be conclusive as to the want of title in the plaintiff. Seldner v. Smith, 40 Md. 602.

A Plea of Property raises the issue of title, which is not determined by a finding of wrongful detention. Page v. Ramsdell, 59 N. H. 575.

Where Property Is Not Taken on Writ. — Title is a matter in issue, where the property is not taken on the writ, and the action proceeds as one for damages. Parmalee v. Loomis, 24 Mich. 242.

3. Leroy v. McConnell, 8 Kan. 273; Wilson v. Fuller, 9 Kan. 176; Gilchrist v. Schmidling, 12 Kan. 263; Brown v.

Holmes, 13 Kan. 482; Smith v. Woodleaf, 21 Kan. 717; Corbin v. People, 142 Ill. 58.

Action under Code. — The action for the recovery of personal property, under the code, is substantially the former action of replevin, and is governed by the same principles and rules, especially in relation to demand and refusal. Moser v. Jenkins, 5 Oregon 447.

Facts Existing at Institution of Suit. — The determination of the action is controlled, as a rule, by the state of facts existing at the institution of the suit. Belden v. Laing, 8 Mich. 500; Clark v. West, 23 Mich. 242; Cary v. Hewitt, 26 Mich. 228; Aber v. Bratton, 60 Mich. 357.

4. Wall v. De Mitkiewicz, 9 App. Cas. (D. C.) 109; Rector v. Chevalier, 1 Mo. 345.

Abatement at Death. — And it has been further held to abate on the death of the defendant, on the ground that the action is personal and the maxim *actio personalis moritur cum persona* will apply. Rector v. Chevalier, 1 Mo. 345. See also article DEATH, vol. 5, p. 783.

5. Martinez v. Martinez, 2 N. Mex. 464.

Before Justice. — The action before a justice of the peace is, however, purely statutory. Standard Foundry Co. v. Schloss, 43 Mo. App. 304.

6. Le Roy v. East Saginaw City R. Co., 18 Mich. 233; Rouge v. Dawson, 9 Wis. 246.

Not of Form Quia Timet. — The action is not in the nature of a bill *quia timet*; its purpose is not to quiet title to property in the plaintiff's possession.

Change of Nature of Action. — Where the property is retained by the defendant under bond, the case proceeds as an action of trespass.¹

III. JURISDICTION — 1. **In General.** — In most of the states the action of replevin has been more or less modified to suit present conditions, and special provisions have been made conferring jurisdiction upon particular tribunals; and these statutory provisions must be observed.²

Extends to What Property. — Only the property taken under the writ is within the jurisdiction of the court and can be affected by an order to return or by a judgment.³

2. Jurisdictional Amount — *a.* **STATUTORY PROVISIONS.** — Whether the action should be brought in a justice's court or in

Hickey *v.* Hinsdale, 12 Mich. 99; Bacon *v.* Davis, 30 Mich. 157; Morrison *v.* Lombard, 48 Mich. 548.

Possessory Action. — Replevin is a possessory action. Hickey *v.* Hinsdale, 12 Mich. 99; Hatch *v.* Fowler, 28 Mich. 205; Bacon *v.* Davis, 30 Mich. 157; Hunt *v.* Strew, 33 Mich. 85; Henry *v.* Ferguson, 55 Mich. 399; Adriance *v.* Rutherford, 57 Mich. 170; Pearl *v.* Garlock, 61 Mich. 419.

In Personam. — The action ordinarily is one *in personam*. Bower *v.* Talman, 5 W. & S. (Pa.) 556.

Right to Recover Damages. — Replevin being *in personam* as well as *in rem*, the plaintiff may recover damages to the full value of the property and for its detention. Miller *v.* Warden, 111 Pa. St. 300.

Action in Rem. — In *Minnesota* it is an action *in rem* alone in justices' courts, where there is a defect of jurisdiction and the property is not taken on the writ. St. Martin *v.* Desnoyer, 1 Minn. 41.

1. Shoemaker *v.* Shoemaker, 7 Kulp (Pa.) 528.

Failure to Claim Immediate Possession. — But since it is optional with the plaintiff whether he will claim immediate delivery, his failure to do so will not change the action to one of conversion merely. Benjamin *v.* Smith, 43 Minn. 146.

In Nature of Trover. — Where the state statute authorizes a judgment including property not returned under the writ, the action is one in the nature of trover as well as of replevin. Belknap Sav. Bank *v.* Robinson, 66 Conn. 542.

2. See the statutes of the various states.

Action Against Administrator in Justice's Court. — In *Michigan*, as a general rule, personal representatives cannot be sued in a justice's court, but the statute excepts actions of replevin. Singer Mfg. Co. *v.* Benjamin, 55 Mich. 330.

3. Gallup *v.* Wortmann, 11 Colo. App. 308.

Statutory Provisions. — It is competent for the statute to provide that the judgment may cover other property than that seized, and in such a case the additional property need not be within the jurisdiction of the court at the commencement of the suit. Belknap Sav. Bank *v.* Robinson, 66 Conn. 542.

Property Without Jurisdiction. — In *Kansas* it has been held that where an action of replevin is commenced before a justice of the peace by a resident of the county against a nonresident, and the defendant is properly served with summons in the county where the action is commenced, but the property is not obtained, and the property has never been wrongfully detained in the county where the action is commenced but has been and is wrongfully detained by the defendant in the county where the defendant resides, the court has jurisdiction to hear and determine the case as one for damages only. Huckell *v.* McCoy, 38 Kan. 53.

Removal of Property Before Service. — Where in an action of replevin before a justice of the peace, the property is removed to another county before service of the writ, this does not affect the jurisdiction of the justice before whom the action was commenced. Craft *v.* Franks, 34 Iowa 504.

a court of record of general jurisdiction depends as a general rule upon the amount in controversy as fixed by statute.¹

In Justices' Courts. — While as a general proposition jurisdiction in replevin is conferred on justices of the peace in most of the states, still there is by no means any uniform rule that can be laid down as to the limit of the jurisdictional amount. The pleader must therefore have recourse to the statute law of the particular state for precise direction on this point.²

Courts Other than Justices' Courts. — In some states, when the amount in controversy is in excess of the jurisdiction of a justice of the peace, the action should be brought in the Circuit Court,³

1. See generally article AMOUNT IN CONTROVERSY, vol. 1, p. 702.

The Superior Court in Massachusetts is without jurisdiction where the value of the replevied property does not exceed one hundred dollars, as shown either by agreement of the parties or by the evidence adduced at the trial. *Octo v. Teahan*, 133 Mass. 430; *Gray v. Dean*, 136 Mass. 128; *Leonard v. Hannon*, 105 Mass. 113; *Blake v. Darling*, 116 Mass. 300.

2. See generally articles AMOUNT IN CONTROVERSY, vol. 1, p. 702; JUSTICES OF THE PEACE, vol. 12, p. 664.

California. — In an action for the recovery of specific personal property, in a justice's court, the standard of jurisdiction is "the value of the property," and it would seem (though in this case it was held unnecessary to decide) that the justice's jurisdiction for the incidental damages for detention is unlimited; and at all events the demand for damages cannot oust the justice of jurisdiction, if the value of the property is less than three hundred dollars. *Astell v. Phillippi*, 55 Cal. 265.

Indiana. — See *Harrell v. Hammond*, 25 Ind. 104; *Dean v. Dawson*, 62 Ind. 22; *Perkins v. Smith*, 4 Blackf. (Ind.) 299; *Grubaugh v. Jones*, 78 Ind. 350; *Fawcner v. Baden*, 89 Ind. 587.

Kansas. — See *Griffiths v. Wheeler*, 31 Kan. 17.

Maryland. — See *Deitrich v. Swartz*, 41 Md. 196.

Michigan. — See *Dinnen v. Baxter*, 18 Mich. 457; *Henderson v. Desborough*, 28 Mich. 170; *Carew v. Matthews*, 41 Mich. 576; *Kittridge v. Miller*, 45 Mich. 478; *Humphrey v. Bayn*, 45 Mich. 565; *Sager v. Shutts*, 53 Mich. 116; *Chilson v. Jennison*, 60 Mich. 235.

Mississippi. — Original jurisdiction is with the justice, and not with the Circuit Court, if the property claimed

does not exceed one hundred and fifty dollars in value. That the damages allowed for the detention carry the verdict above one hundred and fifty dollars makes no difference. *Higgins v. Deloach*, 54 Miss. 498. And presumably the value is that found by the verdict. *Stephen v. Eiseman*, 54 Miss. 535.

The Constitution of 1890, § 171, which increased the jurisdiction of justices to two hundred dollars, has been held to apply also to replevin as against the legislative limitation of one hundred and fifty dollars. *Illinois Cent. R. Co. v. Brookhaven Mach. Co.*, 71 Miss. 663.

Missouri. — See *Gottschalk v. Klinger*, 33 Mo. App. 410; *Payne v. Weems*, 36 Mo. App. 54.

Nebraska. — See *Hill v. Wilkinson*, 25 Neb. 103.

South Carolina. — See *Dillard v. Samuels*, 25 S. Car. 318.

Vermont. — See *Glover v. Chase*, 27 Vt. 533; *Tripp v. Leland*, 39 Vt. 63.

Wisconsin. — See *Darling v. Conklin*, 42 Wis. 478.

3. *Eldred v. Woolaver*, 46 Mich. 241; *Merrill v. Butler*, 18 Mich. 294; *Stephen v. Eiseman*, 54 Miss. 535; *Fenn v. Harrington*, 54 Miss. 733; *Payne v. Weems*, 36 Mo. App. 54.

Illinois. — Where goods are taken under an attachment issued from the Superior Court of Cook county, Illinois, which belong to one not a party to the attachment, the owner, being entitled to their possession, may bring replevin for them in either the Superior Court or the Circuit Court of that county, as he may choose. *Samuel v. Agnew*, 80 Ill. 553.

New Jersey. — Where a vessel had been seized under an act for the protection of clams and oysters, and the proceeding was pending before the two justices, and the vessel was replevied

in the Court of Common Pleas,¹ or in the District Court.²

On Appeal from Justice's Court. — It is not proper on an appeal from a justice's court to render judgment for a sum in excess of the justice's jurisdiction.³

Value Below Jurisdictional Limit. — If by agreement the parties have indorsed on the writ a value below the jurisdictional limit of the court, it is without jurisdiction in the matter.⁴

Excess of Jurisdictional Amount. — The court is powerless to approve the bond, issue the writ, or take any step in the action, if the amount for which the writ is requested exceeds its jurisdiction;⁵ and it should, of course, dismiss the action.⁶

6. HOW AMOUNT IN CONTROVERSY ASCERTAINED. — In some states the value of the property as alleged in the plaintiff's affidavit and the writ is the test of the jurisdictional amount, and not the actual value as afterwards determined.⁷

by the owner by writ out of the Circuit Court, a plea to the jurisdiction of such Circuit Court was held proper. *Day v. Compton*, 37 N. J. L. 514.

Concurrent Jurisdiction of Justice and Circuit Court. — In *Michigan* it has been declared that while the Circuit Court may have jurisdiction, under the general replevin act, of replevin where the value of the property is clearly less than one hundred dollars, it should not and probably was not intended to have it, and such actions should be brought in a justice's court. *Kittridge v. Miller*, 45 Mich. 478.

1. *Small v. Swain*, 1 Me. 133.

2. *Miller v. Bogart*, 19 Kan. 119; *Leslie v. Reber*, 4 Kan. 315; *Hill v. Wilkinson*, 25 Neb. 103.

3. **Dismissal of Action.** — In *Thornily v. Pierce*, 10 Colo. 250, the plaintiffs recovered two hundred and sixty-five dollars in the justice's court and on appeal by the defendants to the County Court a verdict for three hundred and sixty-five dollars, which sum was sixty-five dollars in excess of the justice's jurisdiction, was rendered in favor of the same parties. It was held that on the failure of the plaintiff to remit the excess of sixty-five dollars the County Court should have dismissed the action.

Value of Property and Damages. — Both the property itself and the claim for damages may be aggregated to give jurisdiction to the County Court on appeal from a justice. *Fisk v. Wallace*, 51 Vt. 478; *Andrews v. Baker*, 59 Vt. 656.

4. *Leonard v. Hannon*, 105 Mass. 113; *King v. Dewey*, 11 Cush. (Mass.) 218.

5. *Rosen v. Fischel*, 44 Conn. 371; *Caffrey v. Dudgeon*, 38 Ind. 512, 10 Am. Rep. 126; *Darling v. Conklin*, 42 Wis. 478.

He can only render judgment for costs. *Jacobs v. Parker*, 7 Baxt. (Tenn.) 434. See also *Burdett v. Doty*, 38 Fed. Rep. 491.

A court acts without authority in ordering the return of property in a case not within its jurisdiction and where no appeal has been taken. *Elder v. Greene*, 34 S. Car. 154.

6. *Scott v. Russell*, 39 Mo. 407. And see article AMOUNT IN CONTROVERSY, vol. 1, p. 702.

7. *Griffiths v. Wheeler*, 31 Kan. 17; *Dinnen v. Baxter*, 18 Mich. 457; *Merrill v. Butler*, 18 Mich. 294; *Henderson v. Desborough*, 28 Mich. 170; *Carew v. Matthews*, 41 Mich. 576; *Eldred v. Woolaver*, 46 Mich. 241; *Chilson v. Jennison*, 60 Mich. 235; *Burt v. Addison*, 74 Mich. 730; *Scott v. Russell*, 39 Mo. 407; *Matlak v. Brown*, 2 Miles (Pa.) 15; *Darling v. Conklin*, 42 Wis. 478. And see generally article AMOUNT IN CONTROVERSY, vol. 1, p. 702.

Where the Appraised Value of the Property is within the jurisdiction of the County Court, the court does not lose its jurisdiction by reason of a value subsequently proved in excess of jurisdictional amount. *Bates v. Stanley*, 51 Neb. 252.

Rule Criticised. — Since by permitting the value stated in the plaintiff's affidavit to be the test of the jurisdiction it is entirely within the power of the plaintiff to regulate the jurisdiction, this rule is open to the criticism that where a minimum jurisdictional amount prevails it is possible for the

3. Federal Courts. — Federal courts have full jurisdiction in replevin, and when the defendant is served they have jurisdiction of both the subject-matter and the person, and their judgment cannot be collaterally impeached.¹

IV. VENUE — 1. Whether Action Is Local or Transitory — View that Action Is Local. — Upon the question as to whether replevin shall be treated as a local action, or more liberally as a transitory one, the authorities are by no means in accord. In England and a large number of jurisdictions in America the action is considered local,² so that the venue must be laid in the county where

plaintiff, by over-estimating the property, to bring his case within the jurisdiction of the court. Hence, in some jurisdictions the safer rule is that the real value of the property, and not that which the plaintiff may put upon it, is the test which is to govern. *Sanford v. Scott*, 38 Conn. 244; *Small v. Swain*, 1 Me. 133; *Hall v. Monroe*, 73 Me. 123; *King v. Dewey*, 11 Cush. (Mass.) 218; *Pomeroy v. Trimmer*, 8 Allen (Mass.) 398; *Leonard v. Hannon*, 105 Mass. 113; *Blake v. Darling*, 116 Mass. 300; *Litchman v. Potter*, 116 Mass. 371.

In Massachusetts the jurisdiction in replevin is made by statute to depend not upon the allegations or the estimate of the appraisers, but upon the actual value of the goods. *Davenport v. Burke*, 9 Allen (Mass.) 116.

Minimum Jurisdictional Amount. — The statute provides a minimum valuation of the goods as a limit of jurisdiction, and an action of replevin for goods cannot be maintained unless the value of the goods exceeds twenty dollars. *King v. Dewey*, 11 Cush. (Mass.) 218; *Sackett v. Kellogg*, 2 Cush. (Mass.) 88; *Octo v. Teahan*, 133 Mass. 430.

In Justices' Courts the question of jurisdiction, as far as value is concerned, is generally closed by the affidavit for the writ. *Henderson v. Desborough*, 28 Mich. 170.

In an action of replevin the averment in the statement filed by the plaintiff of the value of the property sued for, and of the damages for its detention, and for injuries to it, conclusively determines the jurisdiction of the justice. *Gottschalk v. Klinger*, 33 Mo. App. 410; *Malone v. Hopkins*, 40 Mo. App. 331. But see *Butler v. Ivie*, 30 Mo. 478.

On Appeal from Justice's Court. — On appeal from the judgment of a justice, the jury not having found the value of the property, the value stated in the affidavit must govern in determining whether there shall be a trial *de novo*

in the Circuit Court. *Bradley v. Morse*, 21 Wis. 680.

Estimate Less than Actual Value. — The plaintiff may fix an estimate of value upon the property at a less sum than the real value, and within the jurisdiction of a justice of the peace. But he is bound by this valuation voluntarily made, and if the property is not restored to his possession by the writ, he cannot recover, on the trial, a greater amount than the value thus fixed and laid in the warrant. *Gray v. Jones*, 1 Head (Tenn.) 542.

After Jurisdiction Has Attached the value of the property is no longer in issue except for the purpose of an assessment in the defendant's favor. *Eldred v. Woolaver*, 46 Mich. 241.

1. *Cheseldine v. Mathers*, 2 Disney (Ohio) 592.

Replevin by Assignee of Chose in Action. — Section 11 of the Judiciary Act of 1789, 1 U. S. Stat. at L. 79, provides as follows: "Nor shall any District or Circuit Court have cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange." In *Deshler v. Dodge*, 16 How. (U. S.) 622, it was held that this clause has no application to a suit by an assignee of a chose in action to recover possession of the thing *in specie*, or damages for its wrongful caption or detention. Therefore, where an assignee of a package of banknotes brought an action of replevin for the package, the action could be maintained in the Circuit Court though the assignor could not himself have sued in that court.

2. *Potter v. North*, 1 Saund. 347, note 1; 1 Chitty Pl. (16 Am. ed.), p. 281.

the property was taken, detained, or distrained, or at least in the county in which it was found in whole or in part.¹

View that Action Is Transitory. — In some jurisdictions the rule of venue is more liberal, and the action is considered purely transi-

Reason for Action Being Local. — Originally replevin was limited to the recovery of property distrained for rent, and hence it became in a measure associated with things of a fixed nature, and this is the reason why the action has been considered local by so many authorities. Even now when the action is brought for property distrained for rent, it is held to be local. *Strong v. Lawler*, 37 Conn. 177.

1. *Connecticut.* — In a declaration in replevin for cattle impounded it is sufficient to allege the town where they were taken. *Strong v. Lawler*, 37 Conn. 177.

Georgia. — A possessory warrant may be had in any county where the property to be recovered is found. It is not such a civil case as may be brought in the county of the residence of the defendant. *Jordan v. Owens*, 67 Ga. 616.

Where the affidavit of a possessory warrant alleged that the defendant was a resident in a certain county, and that he had possession of the property claimed, it was held that it would be presumed that the property was in said county. *Claton v. Ganey*, 63 Ga. 331.

Kansas. — Where an action of replevin is commenced before a justice of the peace against a nonresident by a resident of the county, if the defendant is properly served with summons in the county where the action is commenced, although the property is not obtained, and has never been wrongfully detained in the county where the action is commenced, but has been and is wrongfully detained by the defendant in the county of his residence, the court can proceed to try the case as one for damages only. *Huckell v. McCoy*, 38 Kan. 53.

Maine. — Replevin must be brought in the county where the original taking was, or where the chattel is detained. *Pease v. Simpson*, 12 Me. 261.

Massachusetts. — The action of replevin is local in its nature and must be brought in the county where the goods are taken or attached. *Robinson v. Mead*, 7 Mass. 353.

Mississippi. — Replevin before a justice of the peace may be brought in the

county where the goods are found, although the defendant is a resident freeholder and householder of another county. *Ellison v. Lewis*, 57 Miss. 588.

The action may be instituted in the circuit court of any county or in the justice's court of any district where the defendant or the goods may be found, and all proper process may issue to other counties, or districts, as the case may be. Code of Mississippi, § 2634. See *Turner v. Lilly*, 56 Miss. 576. But under the foregoing section a justice of the peace for one district cannot issue a writ of replevin for property held by defendant in another district returnable before a justice in such district. *Richardson v. Davis*, 59 Miss. 15.

Missouri. — Replevin is not a local action in those cases where the object of replevin is to try the mere rights to property, without reference to place. *Crocker v. Mann*, 3 Mo. 472.

But under the Rev. Stat. 1879, as amended in 1887, the action must be brought in the county in which the property is found, regardless of defendant's residence. *Allen v. St. Louis, etc., R. Co.*, 38 Mo. App. 294. See also *Thompson v. Bronson*, 17 Mo. App. 456.

New Hampshire. — Replevin is a local action under the statutes of this state, and must be commenced in the county where the goods were unlawfully taken. *Sleeper v. Osgood*, 50 N. H. 331.

But if the vendor is entitled to take back the goods without process, under a special contract of sale, it then makes no difference whether the sheriff, under direction of the vendor, took the goods beyond the limits of his own county, be it on a writ of replevin or not. *Proctor v. Tilton*, 65 N. H. 3.

New Jersey. — If a defendant in replevin omits to plead *non cepit*, or *non cepit in alio loco*, but pleads property in himself or another, the place of taking the goods is not material. *Emmett v. Briggs*, 21 N. J. L. 53.

New York. — Replevin is a local action and must be laid in the county where the cause of action arose. *Atkinson v. Holcomb*, 4 Cow (N. Y.) 45;

tory, and it may often not only be brought in the county where the injury occurred or where the property is withheld, but by statute in the county where either party resides.¹

Close Upon Which Distress Was Levied. — Some of the older authorities go so far as to hold that the close upon which the distress was levied must be described by name or by abutments,² but such is not the modern doctrine.³

Allegation of Venue. — Every complaint in an action of replevin should contain an allegation of venue.⁴

Williams v. Welch, 5 Wend. (N. Y.) 290. See also *Gardner v. Humphrey*, 10 Johns. (N. Y.) 53.

Pennsylvania. — In replevin for goods not distrained for rent it is sufficient if the taking is laid in the county. *Muck v. Folkroad*, 1 Browne (Pa.) 60.

1. *Delaware.* — *Truax v. Parvis*, 7 Houst. (Del.) 330, holding under Code Del., c. 106, that replevin was not local, nor need it be brought in the county where the wrong was committed.

Indiana. — Actions of replevin may be brought either in the township where the defendant resides, or where the property was taken, and process may be served throughout the county. *Jocelyn v. Barrett*, 18 Ind. 128; *Beddinger v. Jocelyn*, 18 Ind. 325; *Test v. Small*, 21 Ind. 127; *Cook v. Gibson*, 21 Ind. 303.

Under 2 Rev. Stat. 1876, p. 605, it was held that the justice's venue was confined either to the township where the taking occurred or the one where the property was detained. *Copple v. Lee*, 78 Ind. 230.

Iowa. — An action of replevin must be brought in the county where defendant resides, or some portion of the property is situated, and the Code, § 3230, does not authorize the bringing of the action in the county from which the property has been wrongfully removed, unless such county is that of the defendant's residence. *Hibbs v. Dunham*, 54 Iowa 559; *Parker v. Norris*, 56 Iowa 295; *Porter v. Dalhoff*, 59 Iowa 459.

Section 3853 of the Revision, providing that actions of replevin may be commenced in any county and township wherein any portion of the property is found, is construed to relate to the location of the property at the time the action is commenced, and not to that where the property is seized under the writ. *Craft v. Franks*, 34 Iowa 504.

North Carolina. — Replevin may under the statute "be tried in the county in which the plaintiffs, or the defendants, or any of them, shall reside at the commencement of the action." *Smithdeal v. Wilkerson*, 100 N. Car. 52.

Wisconsin. — Under Rev. Stat., c. 123, actions for the recovery of personal property by replevin are transitory, except where the property has been distrained. *Young v. Lego*, 38 Wis. 206.

2. *Potten v. Bradley*, 2 M. & P. 78, 17 E. C. L. 203.

Traversal of Place in Avowry. — Where the defendant in avowry states the precise house or place, the plaintiff may traverse the place in the avowry, though not described with certainty in his declaration; but where the plaintiff does not traverse the place, but joins issue on the tenancy, the *locus in quo* is rendered immaterial, and the plaintiff may show the taking of the goods in another place than the house demised, especially where the goods were removed from such house, leaving the rent unpaid, and were seized within thirty days thereafter. *Gardner v. Humphrey*, 10 Johns. (N. Y.) 53.

3. *Strong v. Lawler*, 37 Conn. 177; *Gibson v. Bump*, 30 Vt. 175.

The declaration in an action of replevin stated the taking of the property to be from the dwelling house of the plaintiff in Gay street. It was held that evidence of the defendant having taken the property in Gay street was sufficient without proving that he took it from the dwelling house of the plaintiff. *Faget v. Brayton*, 2 Har. & J. (Md.) 350.

No Venue Necessary in Avowry. — In an action of replevin it seems that no venue is necessary in an avowry for a distress. *Davis v. Tyler*, 18 Johns. (N. Y.) 490.

4. **Venue Is Jurisdictional** in an action to recover specific personal property, and a complaint is fatally defective which fails to allege that the property,

2. Change of Venue. — Where the action is brought in a different county from that of the residence of the defendant or in which the property is found, a change of venue should be granted on application,¹ but when brought in the county where the property is located, or, as is held in one jurisdiction, where the plaintiff resides,² the defendant is not entitled to a change of venue to the county of his residence.³

V. PARTIES — **1. In General** — **Test of Parties.** — The test as to whether a given party is the proper party plaintiff in an action of replevin turns upon the question whether he is at the time of instituting suit entitled to right of possession and not the right of property, and the proper party defendant must at the time be in possession or control of the property.⁴

or a part of it, at the time of the commencement of the action, was in the county in which the action is brought. But where the sheriff's return on file in the cause shows the property is within the court's jurisdiction, the omission in the pleading is corrected. *Stiles v. James*, 2 Wash. Ter. 194.

Marginal Statement of Venue. — Where the venue appears in the margin of the statement filed with the justice, it is sufficiently laid. *Stoker v. Crane*, 46 Mo. 264.

1. Graves v. Shoefelt, 60 Ill. 462; *Parker v. Norris*, 56 Iowa 295. And see generally article CHANGE OF VENUE, vol. 5, p. 373.

Necessity to Ask for Change of Venue. — The failure of the plaintiff to show that the property is situated in the county in which suit is brought will not defeat the action. The remedy of defendant, if the action is brought in the wrong county, is by motion to transfer it to the proper county, and in case of failure to make such application, no objection to the place of bringing the action can be interposed. *Goldsmith v. Willson*, 67 Iowa 667.

2. Smithdeal v. Wilkerson, 100 N. Car. 52.

3. Porter v. Dalhoff, 59 Iowa 459; *Laughlin v. Main*, 63 Iowa 580.

Change of Venue Refused. — If an action of replevin is properly triable in the county in which suit is instituted, the court should refuse a change of venue. *Benjamin v. Smith*, 43 Minn. 146.

New York. — Where the action is considered purely local, a change of venue is inconsistent, and, in general, will not be permitted. *Atkinson v. Holcomb*, 4 Cow. (N. Y.) 45.

4. See generally article PARTIES TO ACTIONS; and see the following cases:

Arkansas. — *Robinson v. Calloway*, 4 Ark. 94; *Britt v. Aylett*, 11 Ark. 475; *Dixon v. Thatcher*, 14 Ark. 141; *Hill v. Robinson*, 16 Ark. 90; *Bostick v. Brittain*, 25 Ark. 482; *Smith v. Graves*, 25 Ark. 458; *Thatcher v. Franklin*, 37 Ark. 64; *Titworth v. Spitzer*, 42 Ark. 310; *Edwards v. Greenwell*, Hard. (Ky.) 197.

Connecticut. — *Spencer v. Roberts*, 42 Conn. 75; *Peters v. Stewart*, 45 Conn. 103, 29 Am. Rep. 663.

Delaware. — *Ott v. Specht*, 8 Houst. (Del.) 61.

Illinois. — *Updike v. Henry*, 14 Ill. 378; *Underwood v. White*, 45 Ill. 437; *Stockton v. Lochmitt*, 31 Ill. App. 214.

Indiana. — *Bradley v. Michael*, 1 Ind. 551; *Walpole v. Smith*, 4 Blackf. (Ind.) 304; *Noble v. Epperly*, 6 Ind. 414; *Rose v. Cash*, 58 Ind. 278; *Easter v. Fleming*, 78 Ind. 116; *Adams v. Davis*, 109 Ind. 10.

Iowa. — *Marienthal v. Shafer*, 6 Iowa 223; *Alden v. Carver*, 13 Iowa 253, 81 Am. Dec. 430; *Coffin v. Gephart*, 18 Iowa 256; *Marshall v. Bunker*, 40 Iowa 121.

Kansas. — *Bates v. Wiggin*, 37 Kan. 44; *Moses v. Morris*, 20 Kan. 208; *Davis v. Van De Mark*, 45 Kan. 130.

Kentucky. — *Hooser v. Hays*, 10 B. Mon. (Ky.) 72.

Maine. — *Ingraham v. Martin*, 15 Me. 373; *Pierce v. Stevens*, 30 Me. 184; *Gillerson v. Mansur*, 45 Me. 25; *Ramsdell v. Buswell*, 54 Me. 546.

Maryland. — *Smith v. Williamson*, 1 Har. & J. (Md.) 147.

Massachusetts. — *Collins v. Evans*, 15 Pick. (Mass.) 63; *Wade v. Mason*, 12 Gray (Mass.) 335, 74 Am. Dec. 597; *Fairbank v. Phelps*, 22 Pick. (Mass.) 535; *Leonard v. Stickney*, 131 Mass. 541; *Hall v. White*, 106 Mass. 599; *Leighton v. Harwood*, 111 Mass. 67;

Property in a Third Person. — Hence, when property in a third person is shown, it is unnecessary for such person to become a party to the action.¹

Swett v. Boyce, 134 Mass. 381; *Richardson v. Reed*, 4 Gray (Mass.) 441.

Michigan. — *Belden v. Laing*, 8 Mich. 500; *Clark v. West*, 23 Mich. 242; *Hunt v. Sirew*, 33 Mich. 85; *Lindner v. Brock*, 40 Mich. 619; *Burt v. Burt*, 41 Mich. 82; *Hess v. Griggs*, 43 Mich. 397; *Morrison v. Lumbard*, 48 Mich. 548; *Nottingham v. Vincent*, 50 Mich. 461; *Gildas v. Crosby*, 61 Mich. 413; *Aber v. Bratton*, 60 Mich. 357.

Minnesota. — *Bradley v. Gamelley*, 7 Minn. 331; *Ames v. Mississippi Boom Co.*, 8 Minn. 467; *Hardin v. Palmerlee*, 28 Minn. 450; *Kellogg v. Anderson*, 40 Minn. 207.

Mississippi. — *Frize v. White*, 27 Miss. 198; *McCormick v. McCormick*, 40 Miss. 760; *Saunders v. Jordan*, 54 Miss. 428; *Krosnopolski v. Paxton*, 58 Miss. 581; *Meyer v. Mosler*, 64 Miss. 610.

Missouri. — *Melton v. M'Donald*, 2 Mo. 45, 22 Am. Dec. 437; *Davis v. Randolph*, 3 Mo. App. 454; *Haeger v. Marcus*, 5 Mo. App. 565; *Crawshaw v. Wright*, 5 Mo. App. 577; *Bayless v. Lefaire*, 37 Mo. 120; *Rogers v. Davis*, 21 Mo. App. 150; *Feder v. Abrahams*, 28 Mo. App. 454.

Nebraska. — *Flynn v. Jordan*, 17 Neb. 518; *Nunn v. Home Ins. Co.*, 31 Neb. 39.

New Hampshire. — *Mitchell v. Roberts*, 50 N. H. 486.

New Jersey. — *Hunt v. Chambers*, 21 N. J. L. 620; *Chambers v. Hunt*, 22 N. J. L. 552.

New York. — *King v. Orser*, 4 Duer (N. Y.) 431; *M'Curdy v. Brown*, 1 Duer (N. Y.) 101; *Dodworth v. Jones*, 4 Duer (N. Y.) 201; *Rockwell v. Saunders*, 19 Barb. (N. Y.) 473; *Redman v. Hendricks*, 1 Sandf. (N. Y.) 32; *Roberts v. Randel*, 3 Sandf. (N. Y.) 707; *Rogers v. Arnold*, 12 Wend. (N. Y.) 31.

North Carolina. — *Myers v. Credle*, 63 N. Car. 504; *Houghton v. Newberry*, 69 N. Car. 456.

Ohio. — *Williams v. West*, 2 Ohio St. 83.

Pennsylvania. — *Harlan v. Harlan*, 15 Pa. St. 507, 53 Am. Dec. 612; *Lester v. McDowell*, 18 Pa. St. 91.

Tennessee. — *Shaddon v. Knott*, 2 Swan (Tenn.) 358, 58 Am. Dec. 63; *Brogard v. Jones*, 9 Humph. (Tenn.) 739; *Brammell v. Hart*, 12 Heisk. (Tenn.) 366.

Vermont. — *Sprague v. Clark*, 41 Vt. 6.

Wisconsin. — *Martin v. Watson*, 8 Wis. 315; *Johnson v. Garlick*, 25 Wis. 705; *Grace v. Mitchell*, 31 Wis. 533; *Timp v. Dockham*, 32 Wis. 146; *Brewster v. Carmichael*, 39 Wis. 456; *Wheeler, etc., Mfg. Co. v. Teetzlaff*, 53 Wis. 211; *Gaynor v. Blewitt*, 69 Wis. 582.

Party Defendant. — The person in possession of the property, whether owner or bailee, is the only proper defendant. *Herzberg v. Sachse*, 60 Md. 426.

Any person having the unlawful possession of personal property belonging to another is the proper party from whom to replevy the same, whether he claims it as owner, agent, administrator, trustee, custodian, or in any other capacity. *Rose v. Cash*, 58 Ind. 278.

"Owners" Defined. — The language of the Ohio statute allowing the "owners," etc., to bring replevin, does not limit the action to the general owner. *Williams v. West*, 2 Ohio St. 83.

Party Defined. — The word "party," as used by the statute, directing the service of writs by the coroner when the usual officer is a party to the suit, means a party of record. *Douglass v. Gardner*, 63 Me. 462.

Order Against One Not a Party to Suit. — An order will be of no force and effect which commands the officer to replevy property from one who is not a party to the action, nor an agent of such party. *Lehman v. Mayer*, 8 N. Y. App. Div. 311.

1. *Thompson v. Sweetser*, 43 Ind. 312. See also *Colby v. Portman*, 115 Mich. 95.

Use of Property at Will. — One who has the right to use property at will may maintain replevin for the property. *Tandler v. Saunders*, 56 Mich. 142.

Not a Necessary Party. — A bank is not made a necessary party plaintiff where the complaint shows that the goods were purchased by the plaintiff to secure the bank's claim against the seller. *Church v. Foley*, 10 S. Dak. 74.

Effect of Plaintiff's Assignment. — Where pending the suit the plaintiff assigns his interest in the property and also his right of prosecuting in his

Both Parties Actors. — In replevin both parties are equally actors; so that a nonsuit is improper.¹

2. Enumeration of Parties Plaintiff — In the Name of a Trustee. — The trustee, having the legal title in himself, and not the beneficiary, is the proper party in an action of replevin to recover trust property.²

Action for Use of Another. — But one party cannot in his own name bring an action of replevin for the use of another without being entitled to actual possession in his own right.³

Mortgagees. — The mortgagee is the proper party in an action of replevin to recover possession of mortgaged property.⁴

Pledgee or Bailee. — The bailee or pledgee is the proper party to bring replevin to recover property withheld from his possession.⁵

Agents. — Possession by an agent is sufficient to authorize him to sue in his own name for recovery, or be sued.⁶

Personal Representatives. — In his own name an administrator may

name, this will not affect his right of recovery in his name. *Wall v. De Mitkiewicz*, 9 App. Cas. (D. C.) 109.

An Assignee should replevy the assigned property in his own name. *Lufkin v. Preston*, 52 Iowa 235.

1. *Forrester v. Barret*, Col. & C. Cas. (N. Y.) 95, 1 Johns. Cas. (N. Y.) 247; *Reed v. Carpenter*, 2 Ohio 79.

2. *Gates v. Bennett*, 33 Ark. 475; *Pearce v. Twitchell*, 41 Miss. 344; *Peck v. Ingraham*, 28 Miss. 246; *Garratt v. Carlton*, 65 Wis. 188; *Shipton v. Norris*, 1 Colo. 404; *Jackson v. Hubbard*, 36 Conn. 10; *Thompson v. Foerstel*, 10 Mo. App. 290; *Keck v. Fisher*, 58 Mo. 532.

A Trustee in Bankruptcy is the proper party to bring an action of replevin for the property of his bankrupt. *Gordon v. Farrington*, 46 Mich. 420; *Coats v. Farrington*, 46 Mich. 422.

3. *Roof v. Chattanooga Wood Split Pulley Co.*, 36 Fla. 284; *Meyer v. Mosler*, 64 Miss. 610; *Moore v. Watson*; (R. I. 1898) 40 Atl. Rep. 345.

Buyer. — A person buying property for another, but in his own name, may maintain an action of replevin in his own name for recovery. *Douglass v. Wolf*, 6 Kan. 88.

Surplusage. — But where one is entitled to recover in his own name and inserts his usee's name in the pleadings, this fact will be treated as surplusage. *Roof v. Chattanooga Wood Split Pulley Co.*, 36 Fla. 284.

4. *Kannady v. McCarron*, 18 Ark. 166; *Williams v. Miller*, 6 Kan. App. 626; *Watson v. Mead*, 98 Mich. 330;

Frisbee v. Langworthy, 11 Wis. 375; *Welch v. Sackett*, 12 Wis. 243.

Unnecessary to Join, When. — As against the mortgagor, one of several mortgagees may maintain replevin for the mortgaged property, without joining the others as plaintiffs. *Watson v. Mead*, 98 Mich. 330.

5. *Deeter v. Sellers*, 102 Ind. 458; *Wade v. Mason*, 12 Gray (Mass.) 335, 74 Am. Dec. 597; *White v. Dolliver*, 113 Mass. 400; *Ely v. Ehle*, 3 N. Y. 506.

Holder of Bill of Lading. — A party holding a bill of lading by the terms of which property is to be delivered to him, has sufficient title to sue in his own name. *Powell v. Bradlee*, 9 Gill & J. (Md.) 220.

A Factor Who Has Advanced Money on goods has a sufficient interest in them to entitle him to sue in his own name in replevin. *Williams v. Bugg*, 10 Mo. App. 586; *Wood v. Orser*, 25 N. Y. 348.

In the Name of Auctioneer. — Where the condition of a sale is not complied with, the auctioneer is the proper party to sue in replevin for the goods. *Tyler v. Freeman*, 3 Cush. (Mass.) 261.

6. *Hillyer v. Brogden*, 67 Ga. 24; *Stevenson v. Taylor*, 2 Mich. N. P. 95.

User at Will. — One who has the right to use property at will may sue in replevin for its recovery in his own name. *Tandler v. Saunders*, 56 Mich. 142.

In the Name of the Parish. — To recover the possession of parish records an action of replevin may be maintained in the name of the parish.

maintain replevin for any property to which his intestate had the right of possession.¹

Tenants in Common.— One tenant in common cannot maintain replevin for chattels without joining his cotenants;² nor can they severally bring replevin against each other until after a division of the common property.³

Joint Tenants.— Joint owners of personal property must join in an action of replevin,⁴ and hence they cannot for their respective shares maintain the action against each other before a division of the property.⁵

Partners.— If the property taken or detained is partnership property, all of the partners must join in an action of replevin for its recovery, even though it was taken from the manual possession of but one partner, and so must they be joined as defendants.⁶ Under particular circumstances in some cases a single partner may sue in his own name, especially where he is entitled

Sudbury v. Stearns, 21 Pick. (Mass.) 148.

1. *Anderson v. Wilson*, 13 Ark. 409; *Afflerbach v. McGovern*, 79 Cal. 268; *Smith v. Ferguson*, 90 Ind. 229; *Eberstein v. Camp*, 37 Mich. 176; *Bennett v. Schuster*, 24 Minn. 383.

Third Party Claimant.— Since the statute prescribes a remedy where a third party claims replevied property, the plaintiff cannot be forced to have an administrator appointed for such party when dead and make the administrator party defendant. *Read v. Brayton*, 143 N. Y. 342.

2. *Smith v. Graves*, 25 Ark. 458; *Cox v. Morrow*, 14 Ark. 603; *Titsworth v. Frauenthal*, 52 Ark. 254; *Vermont L. & T. Co. v. Cardin*, 19 Wash. 304; *Hacker v. Johnson*, 66 Me. 21; *Lawrence v. Burnham*, 4 Nev. 361; *Kindy v. Green*, 32 Mich. 310; *Spooner v. Ross*, 24 Mo. App. 599; *Phipps v. Taylor*, 15 Oregon 484; *Reinheimer v. Hemingway*, 35 Pa. St. 432. See *D'Wolf v. Harris*, 4 Mason (U. S.) 515.

Exceptions.— Plaintiff was a tenant in common of certain logs which he sold to defendant as if they were his own property; plaintiff brought the action in his own name and right without joining his cotenants. Defendant's objection to the nonjoinder was overruled on the ground that his claim was based on a sale from plaintiff alone. *Ferguson v. Rafferty*, 128 Pa. St. 337.

Tenants in Common May Sue Alone where by a special agreement between them one of them is entitled to possession. *Newton v. Gardner*, 24 Wis. 232.

3. *Ward v. Worthington*, 33 Ark.

830; *Carle v. Wall*, (Ark. 1891) 16 S. W. Rep. 293; *Reynolds v. McCormick*, 62 Ill. 412; *Frans v. Young*, 24 Iowa 375; *Wills v. Noyes*, 12 Pick. (Mass.) 324; *Barnes v. Bartlett*, 15 Pick. (Mass.) 71; *Silloway v. Brown*, 12 Allen (Mass.) 30; *Busch v. Nester*, 70 Mich. 525; *Spooner v. Ross*, 24 Mo. App. 599; *Davis v. Lottich*, 46 N. Y. 303. And see title *Tenants in Common*, Am. and Eng. Encyc. of Law.

4. *Prentice v. Ladd*, 12 Conn. 331; *Noble v. Epperly*, 6 Ind. 414; *Mills v. Malott*, 43 Ind. 248; *McArthur v. Lane*, 15 Me. 245; *Witham v. Witham*, 57 Me. 447; *McElderry v. Flannagan*, 1 Har. & G. (Md.) 308; *Hart v. Fitzgerald*, 2 Mass. 509, 3 Am. Dec. 75; *Kimball v. Thompson*, 4 Cush. (Mass.) 441; *Cross v. Hulett*, 53 Mo. 397; *Scrugham v. Carter*, 12 Wend. (N. Y.) 131; *Hunt v. Chambers*, 21 N. J. L. 620; *Hewitt v. Hatch*, 57 Vt. 16. And see title *Joint Tenants*, Am. and Eng. Encyc. of Law.

Sole Possession.— A joint owner, however, who is entitled to the sole possession of the goods, may maintain replevin in his own name for the same. *Chaffee v. Harrington*, 60 Vt. 718.

5. *Hill v. Robinson*, 16 Ark. 90; *Mills v. Malott*, 43 Ind. 248; *Deacon v. Powers*, 57 Ind. 489; *Bowen v. Roach*, 78 Ind. 361; *Cross v. Hulett*, 53 Mo. 397; *Lisenby v. Phelps*, 71 Mo. 522; *Pulliam v. Burlingame*, 81 Mo. 111. And see title *Joint Tenants*, Am. and Eng. Encyc. of Law.

6. *Hackett v. Potter*, 131 Mass. 50; *Fay v. Duggan*, 135 Mass. 242; *Deyerle v. Hunt*, 50 Mo. App. 541; *Heaton v.*

to possession himself,¹ but the action of replevin cannot be brought by one partner against another.²

3. Officers as Defendants.— Since replevin must be brought against the party in possession, the officer, and not the execution creditor, is the only necessary party in an action to recover property seized under process.³

4. Joinder of Parties— *a.* **PLAINTIFFS**— **Mortgagor and Mortgagee.**— Since the interests of a mortgagor and mortgagee are in conflict and not in common they cannot join in replevying their property from a third person,⁴ nor can the owners of separate mortgages on the same chattel join.⁵

Wilson, 123 N. Car. 398; Saul v. Kruger, (Super. Ct. Gen. T.) 9 How. Pr. (N. Y.) 569.

Suit in Individual Names.— Partners must sue in the Circuit Court in their individual names. A writ of replevin issued on behalf of partners in the name of their firm is a nullity. Smith v. Canfield, 8 Mich. 493.

Fatal Variance.— Where a partnership is alleged and it is shown in the evidence and in an amendment that there is only one plaintiff, such a variance is fatal. Stirling v. Heintzman, 42 Mich. 449; Deyerle v. Hunt, 50 Mo. App. 541.

1. Bostick v. Brittain, 25 Ark. 482; Coggeshall v. Munger, 54 Mo. App. 420.

Surviving Partner.— The plaintiff may recover property in his own name as surviving partner without ever having declared as such. Smith v. Wood, 31 Md. 293.

Partnership Property Seized for Individual Debt.— In his own name one partner may bring replevin for partnership property seized on execution for another's individual debt to the execution creditor. Hutchinson v. Dubois, 45 Mich. 143.

Against One or All Members.— The possession of one partner is, *prima facie*, the possession of the firm, therefore replevin may be maintained against one or all the members, when the article replevied is in the possession of one claiming to act for and with the concurrence of all. Howe v. Shaw, 56 Me. 291.

2. Reynolds v. McCormick, 62 Ill. 412.

3. Ide v. Gilbert, 62 Ill. App. 524; MacLachlan v. Pease, 66 Ill. App. 634; Blatchford v. Boyden, 122 Ill. 657; Bevan v. Hayden, 13 Iowa 122; Scott v. McGraw, 3 Wash. 675; France v.

Omaha First Nat. Bank, 3 Wyo. 187. See also Tripp v. Leland, 42 Vt. 487.

Deputy Constable.— The action of claim and delivery may be brought against a deputy constable who has seized it under an execution against a third party; the action need not be brought against the constable himself. Criley v. Vase, 52 Mo. 445.

Against Officer Officially or Individually.— The action may be against the officer either in his official capacity or as an individual. Irwin v. Walling, 4 Okla. 128.

Parties Interested May Be Joined.— In an action of replevin for the delivery of personal property, against the sheriff, it is proper to allow the parties interested with the sheriff to be made codefendants, that they may defend the action and protect their interests. Valle v. Cerre, 36 Mo. 575.

4. Lyons v. Geddes, 6 Cinc. L. Bul. 247, 8 Ohio Dec. (Reprint) 197. See Chambers v. Hunt, 18 N. J. L. 339.

5. Joinder of Mortgagees.— Where goods are taken from the possession of the common agent or trustee of three distinct mortgagees, who held them under lien and according to the terms of the respective mortgages, all of such mortgagees or their trustees should join in replevying such goods, and one or two of them cannot maintain the action. Upham v. Allen, 73 Mo. App. 224.

The Owners of Separate Chattel Mortgages cannot join as plaintiffs in replevin. And the effect of misjoinder must be a dismissal of the action, for the court cannot dismiss as to a part and allow the cause to continue as to one, since to dismiss a plaintiff after he has replevied goods would be equivalent to rendering judgment in his favor. Wehlen v. Macke, 15 Cinc. L. Bul. 125, 9 Ohio Dec. (Reprint) 565.

Husband and Wife. — The husband and wife may bring a joint action of replevin to recover the wife's property.¹

Parent and Child. — Where an officer seizes the property of children in an action against the father, the latter may in his own name, as the custodian for the children, sue in replevin for its recovery, without necessarily joining the children.²

b. DEFENDANTS. — **Different Persons in Possession** of separate articles of goods cannot be made defendants in a single action of replevin, but each should be sued severally.³

Master and Servant. — If a servant takes property in the course of his service, he may, in an action to recover it, be made a joint defendant with the master.⁴

5. Intervention and Substitution. — A third party claiming the ownership of replevied property has the right to be made a defendant in the suit and assert his claim; nor should his answer asserting his ownership and right of possession be stricken from the files for omission to state the evidence of his title, which is a matter to be shown at the trial.⁵

6. Amendment as to Parties. — Where parties are improperly

1. *Herzberg v. Sachse*, 60 Md. 426; *Shepard v. Cross*, 33 Mich. 96. And see article HUSBAND AND WIFE, vol. 10, p. 191.

Replevin of Exempt Property. — A wife may, in her own name, bring replevin for the household property exempt from execution; she may join her husband as plaintiff, but need not do so. *Hanselman v. Kegel*, 60 Mich. 540.

2. *Rose v. Eaton*, 77 Mich. 247.

3. *Powell v. Bradlee*, 9 Gill & J. (Md.) 220; *Woolner v. Levy*, 48 Mo. App. 469. See also *Swett v. Boyce*, 134 Mass. 381.

Misjoinder Cured by Findings. — A misjoinder of parties is cured by a finding for the plaintiff on one count and the defendant on another. *Powell v. Bradlee*, 9 Gill & J. (Md.) 220.

Failure to Prove Joint Taking — Non-suit. — Where several are joined defendants the plaintiff need not prove a joint taking; for there may be a non-suit as to one of the defendants, and a trial of the issue between the plaintiff and the others. *Woodburn v. Chamberlin*, 17 Barb. (N. Y.) 446.

Plea in Bar or Abatement. — In replevin, but not in any other action, the nonjoinder of one who should have been joined as plaintiff is pleadable in bar as well as in abatement. *Fay v. Duggan*, 135 Mass. 242.

4. *Hewitt v. Watertown Steam Engine Co.*, 65 Ill. App. 153.

5. *Hamilton v. Duty*, 36 Ark. 474; *Parrott v. Hughes*, 10 Iowa 459; *Witter v. Fisher*, 27 Iowa 9; *Tootle v. Berkley*, 57 Kan. 111; *Albright v. Brown*, 23 Neb. 136; *Welborn v. Eskey*, 25 Neb. 195.

Intervention After Default. — Where default has been entered, it is error to allow intervention by a third party, when the default has not been set aside. *Dupont v. Amos*, 97 Iowa 484.

Substitution for Plaintiff Denied. — Where one has neither made demand for the property, nor given bond, it is error to permit him to be substituted for a plaintiff who has gotten possession of the property. *Pierce v. Batten*, 3 Kan. App. 396; *Flanders v. Lyon*, 51 Neb. 102.

Substitution for Defendant Improper. — Where the property was taken on the writ and defendant did not request a return upon giving the undertaking under section 1709 of the Code, thus entitling plaintiff to possession, it is improper under section 820 to permit an order of interpleader substituting another for defendant, since the delivery of the property required by that section cannot be made by defendant. *Pelham Hod Elevating Co. v. Baggeley*, (N. Y. City Ct. Gen. T.) 12 N. Y. Supp. 218.

Intervention of Assignee. — If the defendant answers that his assignee, and not himself, is the owner of the prop-

joined in replevin the defect may on application be corrected by amendment.¹

VI. THE AFFIDAVIT — 1. Necessity and Office of Affidavit. — By the Statute of Marlbridge it was enacted that the sheriff should proceed to replevy the goods immediately upon plaint made to him.²

Office of Affidavit in Justice's Court. — The first office of an affidavit in a justice's court is to procure a delivery and confer jurisdiction. When this is accomplished, the office of the affidavit has been completed and it may thereafter be treated as a complaint.³

As a Condition Precedent. — Filing the affidavit is a condition precedent whenever the purpose of the action is to obtain immediate delivery of the goods, else the officer is not justified in seizing the property;⁴ but the affidavit is not a condition precedent

erty, the court should of its own motion compel such assignee to intervene. *Wilkins v. Lee*, 42 S. Car. 31.

Substitution of Execution Creditor. — Under the statute permitting the substitution of the execution creditor for the sheriff in an action against the latter to recover property seized, it is perfectly proper to allow such substitution on the application of the defendant sheriff and the execution creditor. *France v. Omaha First Nat. Bank*, 3 Wyo. 187.

Substitution of Purchaser from Officer. — Where property taken under an execution is replevied from the officer by one claiming title thereto, and the officer gives a cross bond for the retention of the property conditioned for the performance of the judgment, etc., the court will refuse to permit the purchaser from the officer to be substituted as defendant in the place of the officer, where such purchaser tenders only a bond for costs, for such substitution would discharge the officer and there would be no security for the return of the property or its value. *Ferguson v. Ehrenberg*, 39 Ark. 420.

1. *Herzberg v. Sachse*, 60 Md. 426. And see article PARTIES TO ACTIONS.

2. 3 Black. Com. 147.

Plaint Same as Affidavit. — The plaint mentioned in the statute of Marlbridge corresponds precisely with the affidavit of modern statutes. *Anderson v. Hapler*, 34 Ill. 436, 85 Am. Dec. 318; *Bardwell v. Stubbart*, 17 Neb. 485.

3. *Hawes v. Robinson*, 44 Ark. 308; *Elliott v. Whitmore*, 5 Mich. 532; *Bloomington v. Chittenden*, 75 Mich. 305.

Prerequisites of Jurisdiction. — The first step necessary to give a justice jurisdiction to issue a writ in replevin

is making and filing the affidavit. *Bolin v. Fines*, 51 Neb. 650.

In *Missouri* replevin may be instituted before a justice without either affidavit or bond. But the property will not be delivered to the plaintiff before trial. *Zimmerman v. Downey*, 66 Mo. App. 106, 2 Mo. App. Rep. 1315.

Affidavit No Part of Record. — The affidavit is no part of the complaint or record. *Town v. Wilson*, 8 Ark. 464; *Donnelly v. Wheeler*, 34 Ark. 111; *Crawford v. Furlong*, 21 Kan. 701; *Moser v. Jenkins*, 5 Oregon 447. But see *Newell v. Newell*, 34 Miss. 385.

Not Regarded as a Pleading. — The affidavit for an order of replevin required by section 177 of the Code (Gen. Stat. 661) is no part of the pleadings in the case; and the facts therein set forth form no part of the issues in the case, unless such facts are again set forth in the pleadings. *Hoisington v. Armstrong*, 22 Kan. 110.

An Informality not sufficient to render void the affidavit required as the foundation of a replevin suit in a justice's court will not prevent the taking of jurisdiction. *Carlson v. Small*, 32 Minn. 492.

4. *Laughlin v. Thompson*, 76 Cal. 287; *McClaghry v. Cratzenberg*, 39 Ill. 117; *Kehoe v. Rounds*, 69 Ill. 351; *Catterlin v. Mitchell*, 27 Ind. 298, 89 Am. Dec. 501; *Dowell v. Richardson*, 10 Ind. 573; *Cure v. Wilson*, 25 Iowa 205; *Bardwell v. Stubbart*, 17 Neb. 485; *Milliken v. Selye*, 6 Hill (N. Y.) 623; *Berrien v. Westervelt*, 12 Wend. (N. Y.) 194; *McCarthy v. Ockerman*, 154 N. Y. 565; *Sanderson v. Pullman*, 11 Cinc. L. Bul. 145, 9 Ohio Dec. (Report) 175; *Carlson v. Dixon*, 12 Oregon 144.

Lost Affidavit. — If an objection is

when immediate delivery of the property at the commencement of the action is not demanded.¹

Proceedings Not Void but Voidable. — On the ground that the affidavit is intended for the protection of the defendant, the proceedings, where no affidavit was filed, are not thereby made void but only voidable.²

2. Requisites and Sufficiency — *a.* **IN GENERAL** — **Entitling Affidavit.** — The plaintiff's affidavit of ownership in replevin should not be entitled, because at the time it is made there is no action pending; and some old cases have even held that if it is entitled it is a nullity.³

If the Plaintiff Joins Two Counts, one in the *cepit* and the other in the *detinet*, he must either make his affidavit embrace both counts or else file two affidavits corresponding with them.⁴

Averment of Territorial Jurisdiction. — The affidavit must show that the case is within the court's territorial jurisdiction, though it is unnecessary to prove that fact.⁵

raised against a proceeding upon the ground that the preliminary statutory affidavit is wanting, the plaintiff may show that it was properly filed but has been lost or mislaid. *Morgan v. Morgan*, 31 Miss. 546.

1. *Catterlin v. Mitchell*, 27 Ind. 298, 89 Am. Dec. 501; *Hodson v. Warner*, 60 Ind. 214; *Batchelor v. Walburn*, 23 Kan. 733; *Lamont v. Williams*, 43 Kan. 558; *Hamilton v. Clark*, 25 Mo. App. 428; *Bingham v. Morrow*, 29 Mo. App. 448; *Keene v. Munger*, 52 Mo. App. 660; *Eads v. Stephens*, 63 Mo. 90; *Jarman v. Ward*, 67 N. Car. 32.

In Michigan the writ will issue in the Circuit Court under the statute before the filing of the affidavit, but service will not be made till thereafter. *Wilbur v. Flood*, 16 Mich. 40; *Baker v. Dubois*, 32 Mich. 92.

No Affidavit from Bail. — No affidavit is required to be made by a party becoming bail for the stay of execution on a judgment in replevin. *Ensley v. McCorkle*, 74 Ind. 240.

2. *Nichols v. Standish*, 48 Conn. 321. **Abatement.** — The want of an affidavit before issuing the writ is matter of abatement merely. *Pirani v. Barden*, 5 Ark. 81.

Waiver of Defects. — By answering without objecting to defects in the writ and pleadings, the defendant gives the justice jurisdiction to try the action. *McKee v. Metraw*, 31 Minn. 429.

But in *St. Martin v. Desnoyer*, 1 Minn. 41, it was held that the proceeding in replevin suits fixed by Act of

Minn. Ter., "Concerning Justices," art. 10, shows that replevin in justices' courts is a proceeding *in rem*; and unless the property is taken on the writ, the justice acquires no jurisdiction, even though the summons was personally served, and defendant appeared and answered.

3. *Stacy v. Farnham*, (Supm. Ct. Spec. T.) 2 How. Pr. (N. Y.) 26; *Milliken v. Selye*, 3 Den. (N. Y.) 54. In the latter case it was held that the affidavit was, because it was entitled, a mere nullity; and the court cited *Rex v. Pierson*, Andr. 313; *Rex v. Jones*, 1 Stra. 704; *Hollis v. Brandon*, 1 B. & P. 36; *King v. Cole*, 6 T. R. 640; *Haight v. Turner*, 2 Johns. (N. Y.) 371; *People v. Tioga C. Pl.*, 1 Wend. (N. Y.) 291; *Whitney v. Warner*, 2 Cow. (N. Y.) 499; *Roosevelt v. Dale*, 2 Cow. (N. Y.) 581; *Nichols v. Cowles*, 3 Cow. (N. Y.) 345; *Matter of Bronson*, 12 Johns. (N. Y.) 460. And see generally article AFFIDAVITS, vol. 1, pp. 312, 313.

4. *Cox v. Grace*, 10 Ark. 86.

5. *Buck v. Young*, 1 Ind. App. 558. And see *supra*, IV. *Venue*.

It is sufficient if the affidavit shows in what county defendant is and that the property has been received and taken possession of by him. *Claton v. Ganey*, 63 Ga. 331.

Marginal Statement. — It is sufficient if the jurisdiction appears in the margin of the statement. *Stoker v. Crane*, 46 Mo. 264.

Sheriff's Return. — The omission is cured if the sheriff's return shows such

Surplusage. — When unnecessary and harmless allegations are made in the affidavit, they will be treated as surplusage, and will not be regarded.¹

b. COMPLIANCE WITH STATUTE. — Where the statute prescribes certain allegations which must be made in the affidavit they must appear affirmatively; but an affidavit in substantial compliance with the statute is sufficient.²

jurisdiction. *Stiles v. James*, 2 Wash. Ter. 194.

In What County Property Is Detained. — *Indiana Statute.* — The statute requires that the affidavit should state in what county the affiant believes the property is detained, but it is not necessary to the validity of the verdict that this statement should be sustained by any evidence. *Cox v. Albert*, 78 Ind. 241; *Buck v. Young*, 1 Ind. App. 558.

An affidavit for the possession of personal property which states that the property is "wrongfully" instead of "unlawfully" detained, as required by the statute, and does not charge that the detention is by the defendant, is bad. *Louisville, etc., R. Co. v. Payne*, 103 Ind. 183.

1. Surplusage. — In an action of replevin before a justice of the peace, there is no necessity, it seems, for the plaintiff's affidavit, as such, to state that he claims a judgment for the possession of the property, or that he claims damages for the detention thereof, though these statements will not vitiate the affidavit. *Eddy v. Beal*, 34 Ind. 159.

2. California. — *Laughlin v. Thompson*, 76 Cal. 287.

Connecticut. — An affidavit in replevin is sufficient if it follows the form given by statute and describes the goods described in the complaint, although it does not state in so many words that the goods described are those which it is desired to replevy. *Brown v. Poland*, 54 Conn. 313.

Georgia. — *Chapman v. Chatman*, 34 Ga. 393, to which case reference is made for the form of an affidavit that was held sufficient. See also *Meredith v. Knott*, 34 Ga. 222.

Illinois. — An affidavit in replevin stated that the plaintiff, "being duly sworn, says on oath that he is lawfully entitled to the possession of five hundred barrels of prime mess pork, for which he brings suit in replevin against Horace Burton, and which is about to be replevied, and which said

pork is wrongfully detained from this deponent by the said Horace Burton," etc. This was held sufficient. *Burton v. Curyea*, 40 Ill. 320, 89 Am. Dec. 350. See also *Evans v. Bouton*, 85 Ill. 579.

Nebraska. — *Bardwell v. Stubbett*, 17 Neb. 485.

New York. — As to the general requisites of an affidavit see Code Civ. Pro., §§ 1695, 1696; and also the following cases: *Paddock v. Guyder*, (Supm. Ct. Gen. T.) 8 N. Y. Supp. 905; *Vandenburgh v. Van Valkenburgh*, 8 Barb. (N. Y.) 217, Code Rep. N. S. (N. Y.) 169; *Hyde v. Patterson*, (Supm. Ct. Spec. T.) 1 Abb. Pr. (N. Y.) 248; *Burns v. Robbins*, (C. Pl.) 1 Code Rep. (N. Y.) 62; *Roberts v. Willard*, (Supm. Ct. Spec. T.) 1 Code Rep. (N. Y.) 100; *Spalding v. Spalding*, (Supm. Ct. Spec. T.) 1 Code Rep. (N. Y.) 64, 3 How. Pr. (N. Y.) 297; *O'Reilly v. Good*, (Supm. Ct. Gen. T.) 18 Abb. Pr. (N. Y.) 106, 42 Barb. (N. Y.) 521; *Sommer v. Greenberg*, (N. Y. City Ct. Gen. T.) 60 N. Y. St. Rep. 852; *Dows v. Green*, (Supm. Ct.) 3 How. Pr. (N. Y.) 377; *Stockwell v. Vietch*, (Supm. Ct. Gen. T.) 15 Abb. Pr. (N. Y.) 412, 38 Barb. (N. Y.) 650; *Depew v. Leal*, (N. Y. Super. Ct. Gen. T.) 2 Abb. Pr. (N. Y.) 131; *Norris v. Jones*, (Supm. Ct. Spec. T.) 7 Misc. (N. Y.) 198; *Donald v. Rockwell*, 19 N. Y. Wkly. Dig. 192; *Wisconsin M. & F. Ins. Co. Bank v. Hobbs*, (Supm. Ct. Gen. T.) 22 How. Pr. (N. Y.) 494; *Niagara Elevating Co. v. McNamara, Sheld.* (N. Y.) 360, 2 Hun (N. Y.) 416, 4 Thomp. & C. (N. Y.) 604.

Oregon. — The affidavit is the foundation of the court's jurisdiction, and statutory requirements must be complied with. *Carlson v. Dixon*, 12 Oregon 144.

Wisconsin. — When the affidavit for replevin contains all the averments required by § 135, c. 120 of the Wis. Rev. Stat., it is sufficient; and although it may be necessary for the plaintiff to prove that he has an interest in the property, in order to establish his right

c. AVERMENTS UPON INFORMATION AND BELIEF. — Where the affidavit is made by an agent, pursuant to statute, it would seem that it may be made on information and belief; ¹ but it has been held that an affidavit in this form made by the plaintiff is insufficient.²

d. ALLEGATION OF ACCRUAL OF ACTION. — In some jurisdictions it is provided by statute that the affidavit must contain an averment that the cause of action accrued within a specified time, and the absence of such an averment is ground for abatement.³ Of course the affidavit cannot be made before the cause of action accrues.⁴

e. DESCRIPTION OF PROPERTY. — What is a sufficient description of the property required to be replevied must in a large measure depend upon each particular case. Technical accuracy is not desired, and in general the degree of precision demanded must be such as will inform a man of fair judgment and enable him readily to identify the property with reasonable certainty.⁵

to the possession, yet he need not state in the affidavit the extent of such interest. *Hass v. Prescott*, 38 Wis. 146, *overruling Child v. Child*, 13 Wis. 17.

Objections Waived. — The jurisdiction of a justice is not lost by the plaintiff's failure to allege in his affidavit certain allegations required by statute, if the defendant appears and gives a redelivery bond, and goes to trial on the merits. *Gaiser v. Heim*, 8 Ohio Cir. Ct. 120, 4 Ohio Cir. Dec. 378.

1. *U. S. v. Bryant*, 111 U. S. 499. But see *contra*, *Frink v. Flanagan*, 6 Ill. 35. And see article AFFIDAVITS, vol. 1, p. 321.

2. *Lewis v. Connolly*, 23 Neb. 222.

3. *Duncan v. Ripley*, 7 Ark. 100.

Prerequisite to Issuance of Writ. — The statutory provision that the plaintiff shall file an affidavit that his right of action has accrued within two years, before the writ of replevin shall issue, is not an act of limitation, but is merely a prerequisite to the issuance of the writ, is in no manner connected with the merits of the cause, and its truth cannot be contested by plea. If no such affidavit or a defective one is filed, it is a cause of abatement. *Payne v. Bruton*, 10 Ark. 53.

Sufficient Affidavit. — An affidavit for replevin, under the statute, stated that the plaintiff's cause of action against W., the defendant, accrued within one year. It was objected that it was insufficient, because it did not aver that the cause of action to recover generally had accrued within one year, and the

defendant might have obtained possession from another, and as to him the cause of action might not have accrued within one year. It was held that the affidavit was sufficient, as the defendant could reply in his defense, upon the fact (if it existed) that another had had adverse possession prior to him, so that the whole adverse possession would be for a longer period than one year before the commencement of the suit. *White v. Graves*, 24 Miss. 166.

4. *Darling v. Tegler*, 30 Mich. 54.

5. *King v. Connery*, 52 Ark. 115; *Hawes v. Robinson*, 44 Ark. 308; *Simmons v. Robinson*, 101 Mich. 240; *Standard Foundry Co. v. Schloss*, 43 Mo. App. 304; *McCarthy v. Ockerman*, 154 N. Y. 565.

Subject-Matter of Jurisdiction. — The jurisdiction of the justice is limited to the articles described by the plaintiff in his affidavit, even though the constable seize other articles under the order of delivery. *Standard Foundry Co. v. Schloss*, 43 Mo. App. 304.

But the fact that the description given in the writ is an undivided interest which should not be made the subject of replevin does not deprive the court of jurisdiction to render judgment for return or for value. *Humphrey v. Bayn*, 45 Mich. 565.

Sufficient Description. — The description of the property in the affidavit and writ as "one sewing machine and one pool table" is sufficiently specific. *Proper v. Conkling*, 67 Mich. 244.

Affidavit Conforming to Writ. — If the

Variance Between Affidavit and Writ.—A variance between the description of the property in the affidavit and that in the writ is immaterial, where no room remains for doubt and where the right property was taken on the writ.¹

f. AVERMENT OF VALUE OF PROPERTY.—Wherever the jurisdiction of the court is made to depend upon the value or amount of property claimed in the affidavit an allegation of such fact is indispensable to the affidavit.²

g. GENERAL ALLEGATION OF OWNERSHIP AND DETENTION.—The affidavit must contain a positive averment of ownership or right of immediate possession of the property in the plaintiff, and must show that it is unlawfully and wrongfully withheld by the defendant.³

affidavit describes the goods in the same terms as the writ under which they are seized, it is sufficient. *Brown v. Poland*, 54 Conn. 315.

Averment that Property Is Personalty.—In replevin for a steam saw-mill and its appurtenances, the affidavit must aver that the property in question is personal estate. *Chatterton v. Saul*, 16 Ill. 149.

Indefiniteness and Uncertainty.—Where the description is so vague and indefinite that only an expert can understand what is meant, it is insufficient for uncertainty. *Van Dyke v. New York State Banking Co.*, (Supm. Ct. Spec. T.) 18 Misc. (N. Y.) 661; *Schwietering v. Rothschild*, 26 N. Y. App. Div. 144.

1. *McCourt v. Bond*, 64 Wis. 596.

2. *McClure v. Hill*, 36 Ark. 268; *Sager v. Shutts*, 53 Mich. 116; *Barruel v. Irwin*, 2 N. Mex. 223; *Roach v. Moulton*, 1 Chand. (Wis.) 187. See also *supra*, III. 2. *Jurisdictional Amount.*

Averment Jurisdictional.—If the affidavit upon which a writ of replevin issues from a justice's court fails to state the value of the property, or states it over \$200, the justice takes no jurisdiction, whatever the value may be in fact, and the proceeding is *coram non iudice*. *Darling v. Conklin*, 42 Wis. 478.

Quashal of Writ.—The statement of the value of the property, in an action in a justice's court, is under the *New Mexico* statute necessary, and the writ should be quashed for its omission. The defect cannot be cured by verdict. *Barruel v. Irwin*, 2 N. Mex. 223.

When Averment of Value Unnecessary.—Where the value as laid in the affidavit is not made the test of jurisdictional amount, it is not necessary to aver in the affidavit the value of the

property. *Blake v. Darling*, 116 Mass. 300. See also *King v. Dewey*, 11 Cush. (Mass.) 218; *Pomeroy v. Trimmer*, 8 Allen (Mass.) 398; *Davenport v. Burke*, 9 Allen (Mass.) 116; *Leonard v. Hannon*, 105 Mass. 113; *Litchman v. Potter*, 116 Mass. 371.

Kentucky Statute.—Under Act Ky. 1842, it was not necessary to file an affidavit of the value of property sued for in replevin. *Aulick v. Adams*, 12 B. Mon. (Ky.) 104.

3. *Spencer v. Bidwell*, 49 Conn. 61; *Brownell v. Twyman*, 68 Ill. App. 67; *Frink v. Flanagan*, 6 Ill. 35; *Burton v. Curyea*, 40 Ill. 320, 89 Am. Dec. 350; *Paul v. Hodges*, 26 Kan. 225; *Hunt v. Strew*, 33 Mich. 85; *Vinnedge v. Nicholai*, 28 Neb. 133; *Strahle v. Stanton First Nat. Bank*, 47 Neb. 319; *Bolin v. Fines*, 51 Neb. 650; *Hudelson v. Tobias First Nat. Bank*, 51 Neb. 557; *Burns v. Robbins*, (C. Pl.) 1 Code Rep. (N. Y.) 62; *McArthur v. Hogan*, *Hempst.* (U. S.) 286.

In Illinois the affidavit upon which the writ issues need not allege that the property was unlawfully taken or detained. *Whisler v. Roberts*, 19 Ill. 274.

Words Equivalent to "Detained."—The affidavit alleged that the defendant had the property in his possession "unlawfully from the possession" of the plaintiff. It was held that the omission of the word "detained" after "unlawfully" was not a fatal defect. *Smith v. Dodge*, 37 Mich. 354.

Alleging Special Property.—Where plaintiff claims the delivery of specific personal property by virtue of a special property therein, he must show in his affidavit the facts in respect to such special property, so that the court may know from these facts whether a special

h. **NEGATING SEIZURE UNDER PROCESS.** — In the statutes of many states there are provisions that the affidavit shall contain allegations that the property has not been taken in execution on any order or judgment against the plaintiff, or for the payment of any tax, fine, or amercement assessed against him, or by virtue of an order of delivery issued in an action of replevin, or any other mesne or final process issued against him, and under such provisions it is imperative for the plaintiff to make these averments in positive terms, not on information and belief, though it is not necessary for him to prove them.¹

i. **IN ACTIONS TO RECOVER EXEMPT PROPERTY.** — In some states, in actions to recover the possession of exempt personal property seized under execution, the affidavit must allege facts clearly showing that the property is exempt.²

property and right of possession is made out. *Williams v. Gardner*, 22 Kan. 122; *Depew v. Leal*, (N. Y. Super. Ct. Gen. T.) 2 Abb. Pr. (N. Y.) 131.

Defective Affidavit. — Where plaintiff's affidavit alleged that she was entitled to the possession by virtue of a special property as sole legatee of A., that A. died seized and possessed of the property which formerly was in the possession of his executor, and that the executor had absconded, the affidavit was held to be defective, under § 1695 of the Code of Civil Procedure, as containing no facts showing a special property, and showing no delivery by the executor. *Donald v. Rockwell*, 19 N. Y. Wkly. Dig. 192.

Affidavit as to Title of Stranger. — Where the defendant claims that a third person is entitled to the property, the affidavit under section 1704 of the Code may contain an allegation of the title of such third person, based on information and belief. *Lange v. Lewi*, 58 N. Y. Super. Ct. 265.

1. *Clow v. Gilbert*, 54 Ill. App. 134; *Campbell v. Head*, 13 Ill. 122; *McClaghry v. Cratzenberg*, 39 Ill. 117; *Bridges v. Layman*, 31 Ind. 384; *Adams v. Davis*, 109 Ind. 10. See also *Dowell v. Richardson*, 10 Ind. 573; *Deacon v. Powers*, 57 Ind. 489. *Compare* *Bringham v. Pollard*, 6 Ind. 452; *Auld v. Kimberlin*, 7 Kan. 601; *Westenberger v. Wheaton*, 8 Kan. 169; *Williams v. Gardner*, 22 Kan. 122; *Paul v. Hodges*, 26 Kan. 225; *Phenix v. Clark*, 2 Mich. 327; *Carlson v. Small*, 32 Minn. 492; *Gist v. Loring*, 60 Mo. 487; *Madkins v. Trice*, 65 Mo. 656; *Carney v. Doyle*, 14 Wis. 270.

Charging that Process Is Defective. —

Under Code Civ. Pro. N. Y., § 1695, providing that in replevin for goods taken under a tax warrant the affidavit must allege "that the taking was unlawful by reason of defects in the process, or other causes specified," the affidavit must allege facts, and it is insufficient to aver that the process was defective because the tax embraced moneys illegally chargeable, without pointing out what moneys are meant. *Norris v. Jones*, 81 Hun (N. Y.) 304, 7 Misc. (N. Y.) 198.

Questioning Validity of Judgment and Execution. — A statute requiring the plaintiff in replevin to swear that the goods were not taken in execution on any order or judgment against him is not satisfied by an affidavit that they were taken in execution against him on a void judgment. Plaintiff cannot question the validity of the judgment in that manner. *Wilson v. Macklin*, 7 Neb. 50. See *Vinnedge v. Nicholai*, 28 Neb. 133.

Motion to Set Aside Writ. — In *Ohio* when the affidavit states that the property was not seized on any process, etc., against the plaintiff, the truth of such allegations are open to investigation, and if they are not true the writ may be set aside on motion. *Xenia Twine*, etc., *Co. v. Hoover*, etc., *Co.*, 25 Cinc. L. Bul. 10, 11 Ohio Dec. (Reprint) 120.

Proof Unnecessary. — In *Wisconsin* in a suit before a justice of the peace the plaintiff need not prove the averments in his affidavit, that the property "had not been taken by virtue of any tax, etc., nor seized under any execution, etc." *Carney v. Doyle*, 14 Wis. 270.

2. *Spalding v. Spalding*, (Supm. Ct.) 3 How. Pr. (N. Y.) 297, 1 Code Rep.

j. EXECUTION OF AFFIDAVIT — By Whom Made. — Generally the affidavit is made by the plaintiff, but it may be made in his behalf by any one acquainted with the facts.¹

Before Whom Made. — The affidavit must be taken by some officer having power to administer oaths or to take affidavits.²

Signature. — It is not generally deemed absolutely necessary to the validity of the affidavit that the plaintiff or other person making it should sign it; but it is sufficient if it appears from the body of the affidavit or from the jurat that the affidavit was made by the party. Hence irregularity in the signature is usually immaterial.³

3. Objections. — Where a party wishes to avail himself of objections to the affidavit, he must do so in seasonable time, and not for the first time after trial and verdict, or on appeal.⁴

(N. Y.) 64. See also *Lange v. Lewi*, 58 N. Y. Super. Ct. 265. But see *contra*, *Roberts v. Willard*, (Supm. Ct. Spec. T.) 1 Code Rep. (N. Y.) 100.

Averment in Language of Statute. — In an action brought in a justice's court in *Minnesota*, an affidavit which states in the language of the statute that the property was not taken from the plaintiff "by any process legally and properly issued against him, or, if so taken, it was exempt from seizure on such process," is not invalid on account of the retention of the alternative clause, and substantially states that the property was exempt whether taken under lawful process or not. *Carlson v. Small*, 32 Minn. 492.

1. *Nichols v. Standish*, 48 Conn. 321; *Matthai v. Capen*, 65 Conn. 539; *Anderson v. Hapler*, 34 Ill. 436, 85 Am. Dec. 318; *Kehoe v. Rounds*, 69 Ill. 351; *Evans v. Bouton*, 85 Ill. 579; *Hall v. Durham*, 117 Ind. 429; *Hoover v. Rhoads*, 6 Iowa 505; *Cure v. Wilson*, 25 Iowa 205; *Bloomington v. Chittenden*, 75 Mich. 305; *Johnson v. Mason*, 16 Mo. App. 271; *Lewis v. Connolly*, 29 Neb. 222; *Cutler v. Rathbone*, 1 Hill (N. Y.) 204; *Berrien v. Westervelt*, 12 Wend. (N. Y.) 194; *Spencer v. Bell*, 109 N. Car. 39.

2. *Berrien v. Westervelt*, 12 Wend. (N. Y.) 194. See also article AFFIDAVITS, vol. I, p. 325.

Time of Attaching Jurat. — At any time after the affidavit in replevin is made, and before the return day of the writ, the justice may attach his jurat. *Peterson v. Fowler*, 76 Mich. 258.

3. *Bloomington v. Chittenden*, 75 Mich. 305; *Crist v. Parks*, 19 Tex. 234. See also article AFFIDAVITS, vol. I, p. 315.

Sufficient Signatures. — An affidavit to a petition in replevin, signed "G. W. and R. H.," and sworn to by both plaintiffs, is not objectionable. *Hoover v. Rhoads*, 6 Iowa 505.

An affidavit to a petition and for writ of replevin, signed "F. D. & Co., per P. B. M., Agent," but otherwise in proper form, while the names of the principals should have been omitted, is sufficient. *Hershiser v. Delone*, 24 Neb. 380.

Where the suit was brought by "J. M. S." and the affidavit signed by "J. M. S., per D. M. S.," it was held sufficient, the code providing that the affidavit may be made "by the plaintiff or some one in his behalf." *Spencer v. Bell*, 109 N. Car. 39.

In *Connecticut* it has been held under a statute that the affidavit must be signed. *Spencer v. Bidwell*, 49 Conn. 61.

Omission in Copy of Affidavit Served. — Where, in replevin, the signature of the plaintiff was wanting in the copy of the affidavit left in service, but the jurat stated that the plaintiff subscribed and swore to the affidavit, the omission was not deemed cause for abatement. *Matthai v. Capen*, 65 Conn. 539.

4. *Hawes v. Robinson*, 44 Ark. 308; *Frink v. Flanagan*, 6 Ill. 35; *Smith v. Emerson*, 16 Ind. 355; *Eddy v. Beal*, 34 Ind. 159; *Perkins v. Smith*, 4 Blackf. (Ind.) 299; *Furrow v. Chapin*, 13 Kan. 107; *Baker v. Dubois*, 32 Mich. 92; *Clark v. Dunlap*, 50 Mich. 492; *McKee v. Metraw*, 31 Minn. 429; *Carlson v. Small*, 32 Minn. 492; *Hudelson v. Tobias First Nat. Bank*, 51 Neb. 557; *Nicoll v. Pinner*, (Supm. Ct. Spec. T.) 10 How. Pr. (N. Y.) 376.

Motion to Set Aside Proceedings. — The

4. Amendments. — At any time before trial, or on the trial, an affidavit in replevin may be amended where an amendment will be in furtherance of justice, but the court may impose the payment of reasonable costs as a condition of making the amendment.¹

Discretion of Court. — An application to amend an affidavit in replevin is addressed to the discretion of the court.²

court will refuse a motion by defendant to set aside replevin proceedings because of the alleged insufficiency of plaintiff's affidavit for obtaining a delivery of the property, where defendant has made no objection to the affidavit until his time to answer has expired, and where his notice of motion does not specify accurately and closely any irregularity in the affidavit, as required by rule of court 37. *Paddock v. Guyder*, 55 Hun (N. Y.) 612, 8 N. Y. Supp. 905.

Defects Not Waived — Amendment. — If an affidavit alleges a demand, but in fact is made before such demand, the irregularity cannot be waived by appearance and pleading, but may be cured by amendment. *McAdam v. Walbrau*, (Supm. Ct. Spec. T.) 8 Civ. Pro. (N. Y.) 451.

Defect Not Cured by Verdict After Objection. — Where the affidavit in replevin omits to state the value of the property and is objected to for that reason, but the objection is overruled, trial had, and verdict rendered, such a defect in the affidavit is not cured by verdict. *Barruel v. Irwin*, 2 N. Mex. 223.

1. *Frink v. Flanagan*, 6 Ill. 35; *Campbell v. Head*, 13 Ill. 122; *McClaghry v. Cratzenberg*, 39 Ill. 117; *Kirkpatrick v. Cooper*, 77 Ill. 565; *Cassidy v. Fleak*, 20 Kan. 54; *Taylor v. Buck*, 100 Mich. 181; *Kimball v. Silvers*, 22 Mo. App. 520; *Crans v. Cunningham*, 13 Neb. 204; *Lewis v. Connolly*, 29 Neb. 222; *Cutler v. Rathbone*, 1 Hill (N. Y.) 204; *Stacy v. Farnham*, (Supm. Ct. Spec. T.) 2 How. Pr. (N. Y.) 26; *Depew v. Leal*, (N. Y. Super. Ct. Gen. T.) 2 Abb. Pr. (N. Y.) 131; *McAdam v. Walbrau*, (Supm. Ct. Spec. T.) 8 Civ. Pro. (N. Y.) 451; *Ethridge v. Orcutt*, (Supm. Ct. Spec. T.) 12 N. Y. St. Rep. 372; *Van Dyke v. New York State Banking Co.*, (Supm. Ct. Spec. T.) 18 Misc. (N. Y.) 661; *Van Halen v. Ridgeway*, 1 West. L. Month. 280, 2 Ohio Dec. (Reprint) 66; *Applewhite v. Allen*, 8 Humph. (Tenn.) 697.

Jurisdictional Defect. — Where an affidavit is made by an officer of a corporation on behalf of the corporation, and refers to the rights and claims of "affiant" in the goods, and not to those of the corporation, such a defect cannot be cured by amendment, because such defect is jurisdictional. *Commercial State Bank v. Ketcham*, 46 Neb. 568.

Mistake in Name of Defendant. — Under Rev. Stat. 1838, where defendant's Christian name was stated incorrectly (James for Joseph) in the affidavit, the court might, after service of the writ, and before the execution of the replevin bond, permit the plaintiff to file a new affidavit, and thereupon to amend the writ by inserting the true name. *Parks v. Barkham*, 1 Mich. 95.

Conditional Order. — When an affidavit for an order for the delivery of property is insufficient, it is the duty of the court, upon motion of the defendant, to set the order aside, unless the plaintiff, within a reasonable time to be fixed by the court, makes the affidavit sufficient by amendment. *Meyer v. Lane*, 40 Kan. 491.

New Affidavit by Another Agent. — Where the affidavit on which the writ issued was made by an agent of the plaintiff, an amended affidavit may be filed, in a case proper for amendment, by another agent. *Colborn v. Barton*, 14 Ill. App. 449.

2. *McClaghry v. Cratzenberg*, 39 Ill. 117.

Amendment After Quashal of Writ. — After judgment sustaining a motion to quash the writ, allowance of amendment of the affidavit is matter of discretion, the record still being under the control of the court. *Campbell v. Head*, 13 Ill. 122.

Amendment Is Retroactive. — Where an amendment is made or a new affidavit filed, the cure is complete, dating from the commencement of the action; and property illegally taken before amendment may be retained in possession. *Kimball v. Silvers*, 22 Mo.

Amendments on Appeal. — On appeal to the Circuit Court the affidavit in replevin may there be amended, if its defects are not of such a fatal nature as to make it a nullity; ¹ otherwise not.²

VII. THE WRIT — 1. In General — Date of Institution. — A replevin suit begins as soon as a writ taken out in good faith is ready for execution and the entry fee is paid; and any reasonable delay in delivering it to the officer for execution does not postpone the date of beginning suit. The plaintiff, having full power over the writ, may recall it after delivering it to the officer for execution.³

Provisional Writ. — Where there has been no tortious taking of the property, and a demand is necessary, the writ may be made provisionally to be used only in case of refusal by the defendant to deliver the property upon demand, but it is not to be considered as of any validity until after the demand and refusal to deliver the goods.⁴

Issuance — Chancery Writ Formerly. — While the writ of modern times is uniformly statutory, it was formerly in England and also in the United States issuable only from chancery.⁵

To Other Counties or Districts. — Under statutory provision the writ may issue to other counties or districts than that in which it is issued.

App. 520; *Lewis v. Connolly*, 29 Neb. 222.

1. *Hanf v. Ford*, 37 Ark. 544; *South Missouri Land Co. v. Jeffries*, 40 Mo. App. 360.

Failure to Amend on Leave Given by Justice. — The fact that leave to amend was granted before the justice and the amendment not made is not reason for refusing permission to amend on appeal. *Kirkpatrick v. Cooper*, 77 Ill. 565.

2. **The Entire Absence of an Affidavit** required to be filed before issuing process cannot be supplied on appeal to Circuit Court. *Turner v. Bondalier*, 31 Mo. App. 582.

Negating Seizure under Process. — The failure of the affidavit to allege that the property has not been seized under any process, execution, or attachment against plaintiff, is a defect too fatal for amendment in the Circuit Court. *Gist v. Loring*, 60 Mo. 487; *Madkins v. Trice*, 65 Mo. 656.

3. *McMillan v. Larned*, 41 Mich. 521.

Time of Suing Out Writ. — If the writ is sued out in time for the pleadings to be perfected at or before the next term ensuing the distress, it is within time. *Luther v. Arnold*, 7 Rich. L. (S. Car.) 397.

Date of Writ Not Conclusive. — The date of a writ of replevin is not con-

clusive evidence of the time when the action commenced; and if the cause of action had not accrued on the day of the date, but did accrue before the commencement of the service thereof, and there is no evidence of the time when the writ was given to the officer, the action may properly be considered as having been commenced before the cause of action accrued. *Federhen v. Smith*, 3 Allen (Mass.) 119.

4. *O'Neil v. Bailey*, 68 Me. 429. See also *Webber v. Read*, 65 Me. 564; *Grimes v. Briggs*, 110 Mass. 446; *Badger v. Phinney*, 15 Mass. 359; *Federhen v. Smith*, 3 Allen (Mass.) 119; *Lewis v. Smart*, 67 Me. 206; *Seaver v. Dingley*, 4 Me. 306.

Writ Not Premature. — A tenant in common of a crop of wheat brought replevin against his cotenant, who had wrongfully refused to allow him to take his share. It was held that the writ was not premature in calling for the seizure of a certain number of bushels, although the wheat at the time of the writ's issuance had been harvested but not threshed. *Wattles v. Dubois*, 67 Mich. 313.

5. 3 Black. Com. 146, 147.

In New Jersey the action of replevin has always been commenced by writ, formerly issuing from the Court of Chancery, but since 1795 from the Su-

No Fiat Necessary. — The act of the clerk in issuing the writ is purely ministerial and may hence be performed at any time, even during term time, without an order of court.¹

Runs in Whose Name. — The writ is addressed to the executive officer of the court, and runs in the name of the state, unless otherwise provided.²

Failure to Mention Court. — The failure of the writ to state in what court an action was brought is not fatal to its validity, but only an irregularity.³

Unnecessary to Aver Affidavit. — The writ need not show that the statutory affidavit was filed.⁴

Void Writ. — A writ void on its face neither gives the sheriff authority to execute it, nor has the court power to order a return of the property.⁵

2. Statutory Requirements. — Statutes prescribing what the writ shall contain must be strictly complied with;⁶ but on the other hand a writ which omits the usual averments is sufficient if such omissions are authorized by statute.⁷

3. Summons — Necessary to Summon. — As a rule the writ contains

preme Court and the Courts of Common Pleas. *Snedeker v. Quick*, 11 N. J. L. 180.

1. *Branch v. Branch*, 6 Fla. 314; *O'Brien v. Haynes*, 61 Ill. 494; *Pennington v. Streight*, 54 Ind. 376; *Easter v. Traylor*, 41 Kan. 493; *Judson v. Adams*, 8 Cush. (Mass.) 556; *Snow v. Roy*, 22 Wend. (N. Y.) 602; *Hiles v. McFarland*, 4 Chand. (Wis.) 89.

Alias Writ. — Where the writ is improperly executed the clerk can issue an alias without any order of court. *Pool v. Loomis*, 5 Ark. 110. See also *Branch v. Branch*, 6 Fla. 314.

Duty of Clerk. — The issuance of the writ is a duty which the clerk must perform and from which he cannot excuse himself. *Easter v. Traylor*, 41 Kan. 493.

Order of Delivery and Summons. — It is irregular for the clerk to issue the order of delivery several days before he issues the summons. *Kennedy v. Beck*, 15 Kan. 555.

Unauthorized Issuance — Trespass. — A party who issues a writ without authority is a trespasser. *Graves v. Shoefelt*, 60 Ill. 462.

Irregularity Cured by Change of Venue. — If the defendant takes a change of venue to some tribunal having jurisdiction, he thereby waives all objection to the manner in which the writ was issued. *Graves v. Shoefelt*, 60 Ill. 462.

Upon Changing Action to Replevin by

Amendment. — If a suit to try the right of property is changed by amendment to an action of replevin, a writ must issue, so that upon the taking of the property a bond may be executed, as provided by statute. *Douglas v. Newman*, 5 Ill. App. 518.

2. See generally article SUMMONS AND PROCESS.

In the Territories. — The writ must run in the name of the United States under territorial statutes. *Roach v. Moulton*, 1 Chand. (Wis.) 187.

3. *State v. Wilson*, 24 Kan. 50.

4. *Magee v. Siggerson*, 4 Blackf. (Ind.) 70.

5. *Castle v. Thomas*, 16 Minn. 490, in which case the writ was issued paramount to a statute that had been repealed.

6. *Dickinson v. Noland*, 7 Ark. 25; *Parker v. Palmer*, 13 R. I. 359.

Indorsement. — In *Massachusetts* it has been held that a writ of replevin is an original writ within a statute requiring all original writs to be indorsed by the plaintiff, and that failure to indorse it is a ground of abatement. *Gould v. Barnard*, 3 Mass. 199.

7. *West Pub. Co. v. Bottineau*, 34 Minn. 239, in which case the writ was drawn pursuant to a statute and a rule of court authorized by a statute, and omitted a statement of the value of the property and a command to the officer to summon the defendant.

a mandate ordering the officer executing it to summon the party or parties to appear in court and answer the cause, and the officer must perform this duty, either by reading the mandate or serving a copy.¹

Failure to Serve.—If the sheriff neglects to serve the summons and the defendant voluntarily appears in court and defends the suit, the omission by the sheriff to summon him is thereby cured.²

Alias Summons.—An alias summons or an alias writ, as such, may issue to effect personal service which was not accomplished in executing the original writ.³

Separate Summons.—In some jurisdictions it is the practice to issue a separate and distinct summons,⁴ but it is irregular to issue the summons and writ at different times.⁵

Need Not Specify Property.—A summons is a mere notice, in which it is unnecessary to specify the property to be recovered; and if it does, such specification of the property will be regarded as surplusage.⁶

4. Description of Property—Sufficient Description.—A writ of replevin will be deemed sufficiently accurate in description of the property if the officer in executing it has succeeded in taking

1. *Swann v. Shemwell*, 2 Harr. & G. (Md.) 283; *Ex p. Johnson*, 7 Cow. (N. Y.) 424.

Minnesota Statute.—The form given by the Minnesota statute includes a command to the officer to summon the defendant to appear and answer, but the statute provides that the writ may be in any other form that the court may by rule prescribe, and a writ issued in accordance with a form prescribed by a rule of court which omits the command to summon is sufficient; the summons in such case being made and served as in an ordinary action. *West Pub. Co. v. Bottineau*, 34 Minn. 239.

Summons Before Order of Delivery.—In *Nebraska* the summons must be issued before the order of delivery. *Pelham v. Edwards*, 45 Kan. 547.

Summons at Subsequent Term.—The sheriff received a plaint in replevin, on which he delivered the property; but omitted to summon the defendant, till after the next term. The common pleas set aside the summons as irregular. *Ex p. Johnson*, 7 Cow. (N. Y.) 424.

Time of Making Objection.—Objection to failure of sheriff to serve a copy of the order of delivery upon defendant must be taken before trial; afterwards

it is too late. *Baker v. Daily*, 6 Neb. 464.

Appearance and Exception to Bail.—Where the sheriff took the property in an action of replevin and delivered it to the plaintiff, without serving the defendant with summons, it was held that the defendant had a right at once to give notice of his appearance, and except to the bail. *Clinton v. King*, (Supm. Ct.) 3 How. Pr. (N. Y.) 55.

A Variance Between the Writ and Summons is immaterial, the latter being a mere notice. *Cutler v. Rathbone*, 1 Hill (N. Y.) 204.

2. *Swann v. Shemwell*, 2 Harr. & G. (Md.) 283. See also *Clinton v. King*, (Supm. Ct.) 3 How. Pr. (N. Y.) 55.

3. *Bell v. Mecosta Circuit Judge*, 26 Mich. 414; *Ex p. Johnson*, 7 Cow. (N. Y.) 424.

4. *Kennedy v. Beck*, 15 Kan. 555; *Yandle v. Kingsbury*, 17 Kan. 195; *West Pub. Co. v. Bottineau*, 34 Minn. 239; *Cutler v. Rathbone*, 1 Hill (N. Y.) 204; *Finehout v. Crain*, 4 Hill (N. Y.) 537; *Leathers v. Morris*, 101 N. Car. 184.

5. *Kennedy v. Beck*, 15 Kan. 555.

6. *Cutler v. Rathbone*, 1 Hill (N. Y.) 204; *Finehout v. Crain*, 4 Hill (N. Y.) 537.

the right property or if it describes the property clearly enough to enable the officer to identify it.¹

Insufficient Description. — If a writ fails to describe the property at all, or contains such an indefinite description that it cannot be executed with reasonable certainty, it will be quashed on objection unless amended.²

1. *Chandler v. Smith*, 34 Ark. 527; *Hook v. Fenner*, 18 Colo. 283; *Brown v. Poland*, 54 Conn. 315; *Magee v. Sigerson*, 4 Blackf. (Ind.) 70; *Wingate v. Smith*, 20 Me. 287; *Pomeroy v. Trimmer*, 8 Allen (Mass.) 308; *Gardner v. Lane*, 9 Allen (Mass.) 492; *Farwell v. Fox*, 18 Mich. 166; *Paterson v. Parsell*, 38 Mich. 607; *Kelso v. Saxton*, 40 Mich. 666; *Elliott v. Hart*, 45 Mich. 234; *Humphrey v. Bayn*, 45 Mich. 565; *Pingree v. Steere*, 68 Mich. 204; *Proper v. Conkling*, 67 Mich. 244; *Buckley v. Buckley*, 9 Nev. 373; *Snedeker v. Quick*, 11 N. J. L. 179; *Ruch v. Morris*, 28 Pa. St. 245; *State v. Welch*, 37 Wis. 196.

Sufficient Certainty. — It has been held that a description is sufficient if the officer can identify the goods with outside help. *Farwell v. Fox*, 18 Mich. 166; *Sexton v. McDowd*, 38 Mich. 148.

Description as of What Time. — The property must be described as it was at the time of the issuance of the writ. *Elliott v. Hart*, 45 Mich. 234.

The property replevied must be described as it existed at the commencement of the suit. If logs be fraudulently sawed into boards, before the suit is commenced, the writ should describe the property as boards. The owner cannot describe it as logs and recover boards. *Wingate v. Smith*, 20 Me. 287.

Where a Storehouse and the Goods Therein were in possession of the sheriff by virtue of an attachment, and where the attachment defendant instituted an action of replevin, and in the writ and petition described the property as being "a certain storehouse, warehouse, and the goods therein contained, being the store in Council Bluffs, * * * known and designated as the store of your petitioner," it was held that the description was sufficiently certain. *Ellsworth v. Henshall*, 4 Greene (Iowa) 417.

Contents of Store. — A writ of replevin commanded the officer to replevy "the goods and chattels following, viz., the contents of a grocery store," describing the store and stating the person by whom the goods were taken and held.

It was held that the description was sufficient under Mass. Gen. Stat., c. 143, § 11, and was not so vague and indefinite as to be bad on demurrer. *Litchman v. Potter*, 116 Mass. 371.

Stock of Goods and Books. — Where a writ of replevin commanded the sheriff to replevy all the "goods, stock, and fixtures in store at Johnston, at a place called Dry Brook, occupied by said L. [the defendant], of the value of eight hundred dollars, and books of account and evidence of indebtedness showing indebtedness of persons to said L., of the value of fifty dollars," it was held on demurrer that the property directed to be replevied was described with sufficient particularity. *Waldron v. Leach*, 9 R. I. 588.

Wheat. — A writ called for wheat of the "Fultz" variety, and proof showed that the wheat taken was of the "Clawson" variety. It was held that where the writ fully identified the wheat as that grown on the plaintiff's farm, and the testimony showed that no wheat of the "Fultz" variety was grown on the plaintiff's farm, the variance was immaterial. *Wattles v. Dubois*, 67 Mich. 313.

A Slight Error in the description of the property sued for does not render the writ void, if the same can still be identified. *Nolty v. State*, 17 Wis. 668.

2. *Parsell v. Genesee Circuit Judge*, 39 Mich. 542; *Humphrey v. Bayn*, 45 Mich. 565; *Simmons v. Robinson*, 101 Mich. 240; *Evans v. Parks*, (Miss. 1893) 13 So. Rep. 240; *Snedeker v. Quick*, 11 N. J. L. 179; *Hogan v. Kelum*, 13 Tex. 396.

Description of Grain. — "A quantity of corn consisting of about one hundred bushels, and a quantity of rye consisting of about two hundred bushels," is not a sufficient description of the property to maintain replevin. *Stevens v. Osman*, 1 Mich. 92.

Stacked Wheat. — A judgment in replevin for a quantity of stacked wheat, upon which plaintiff had a lien under a chattel mortgage, was reversed because the description of the land upon which it grew, as given in the writ of

Seizure of Property Not Described. — Only the property described in the writ is liable to seizure.¹

Description in Affidavit. — While the description in the writ and affidavit are usually the same, the former being taken from the latter, still in a case where a separate writ and affidavit are filed, it is insufficient to attach the affidavit to the writ with no further description.²

5. Alleging Value. — It is not necessary in some jurisdictions to allege in the writ the value of the goods sought to be replevied;³ in others it seems that it is.⁴

6. Alias and Pluries Writs. — If, in an action of replevin, the defendant is improperly served or not served at all, an alias and if need be a pluries writ must be issued.⁵

Partial Seizure. — Where only a part of the property is taken under the original writ, an alias writ, followed by a pluries if necessary, may issue to obtain possession of the residue.⁶

replevin, differed from the description as given in the chattel mortgage of record, which contained nothing showing that it was incorrect. *Coman v. Thompson*, 43 Mich. 389.

1. Quantity of Ore. — *Chandler v. Smith*, 34 Ark. 527. On a writ of replevin for about 400 tons of bog ore, the sheriff is not authorized to deliver to the plaintiff 720 tons. It seems that the sheriff would have been justifiable in refusing to execute a writ thus vaguely describing the property. *De Witt v. Morris*, 13 Wend. (N. Y.) 496.

Property in Barrels. — If a writ commanding the officer to replevy a certain number of barrels of mackerel is executed with the defendant's assent, by taking two half barrels for a barrel, he cannot afterwards object. *Gardner v. Lane*, 9 Allen (Mass.) 492.

2. Paterson v. Parsell, 38 Mich. 607.

Variance Between Writ and Affidavit. — If the right property is taken on the writ and there is no chance for uncertainty, a variance between the description of the property in the writ and that in the affidavit is not a jurisdictional defect, but such variance may be cured by amendment if necessary. *McCourt v. Bond*, 64 Wis. 596.

3. Pomeroy v. Trimper, 8 Allen (Mass.) 398; *Blake v. Darling*, 116 Mass. 300; *Litchman v. Potter*, 116 Mass. 371; *State v. Welch*, 37 Wis. 196.

Minnesota Statute. — The form required by the Minnesota statute includes a statement of the value of the property, but the statute provides that the writ may be in any form that the

court may by rule prescribe, and a writ which does not state the value of the property, but which is drawn in accordance with the form prescribed by a rule of court, is sufficient. *West Pub. Co. v. Bottineau*, 34 Minn. 239.

4. Briggs v. Wiswell, 56 N. H. 319; *Gray v. Jones*, 1 Head (Tenn.) 542.

Allegation in Summons. — In *North Carolina* it is necessary under the statute to allege in the summons the value of the property in question. *Leathers v. Morris*, 101 N. Car. 184.

5. Pool v. Loomis, 5 Ark. 110; *O'Brien v. Haynes*, 61 Ill. 494.

No Fiat Necessary. — The court may order a pluries writ in an action of replevin, under the statute, or the plaintiff may, in a proper case, cause one to issue without an order of the court. *Branch v. Branch*, 6 Fla. 314. See also *Pool v. Loomis*, 5 Ark. 110.

Alias Writ to Another County. — An alias writ may issue to the sheriff of another county. *Hiles v. McFarland*, 4 Chand. (Wis.) 89.

For Personal Service Done. — Where the property was seized on the original writ but personal service not had, the alias writ may issue by order of court for that purpose alone during the lifetime of the original writ. *Bell v. Mecosta Circuit Judge*, 26 Mich. 414.

6. Branch v. Branch, 6 Fla. 314; *Maxon v. Perrott*, 17 Mich. 332; *Snow v. Roy*, 22 Wend. (N. Y.) 602; *Hiles v. McFarland*, 4 Chand. (Wis.) 89.

Irregularity of Alias Immaterial. — Where part only of the property was taken on the first writ, and an alias

7. Objections to Writ — Must Be Made Seasonably. — Objections to the writ must be made at the earliest opportunity, whether by plea or motion to dismiss; they must be made before the trial, afterwards it is too late.¹

Objections Waived. — Where there are any defects in the writ or its service, and the defendant appears, goes to trial, or in any wise proceeds with the cause, without taking exception to such defects, they will be deemed waived.²

Abating or Quashing the Writ. — In a summary proceeding by motion to quash a writ of replevin on any ground the showing should be clear and satisfactory to authorize the court to set aside its process.³

Same Writ in Different Counties. — Where the same writ is used in

was issued for the remainder, and the plaintiff had judgment, it was held to be immaterial whether the alias was regular or not, as the judgment was the same that the plaintiff would have been entitled to under the statute had no alias issued. *Maxon v. Perrott*, 17 Mich. 332.

Capias in Withernam. — If no property is found in executing either the original, alias, or pluries writ, a capias in withernam may be had in aid of them, if not abolished by statute. But if the defendant, before the return of the withernam, appears to the writ of replevin and offers to plead *non cepit*, it will stay the withernam. *Swann v. Shemwell*, 2 Har. & G. (Md.) 283.

1. *Baker v. Daily*, 6 Neb. 464; *Wilder v. Stafford*, 30 Vt. 399.

Grounds of Motion to Quash. — Where there is no intrinsic defect or want of form in the writ, it will not be set aside on motion to quash. *Hunter v. Flagg*, 1 Brev. (S. Car.) 451.

After Issue Joined it is too late to move to quash the writ; and it would seem that the Act of Maryland, which requires two sureties in replevin bonds, is directory only, and that the writ is not void if there be only one surety. *Haller v. Beall*, 2 Cranch (C. C.) 227.

2. *Graves v. Shoefelt*, 60 Ill. 462; *Kennedy v. Beck*, 15 Kan. 555; *Carr v. Huffman*, 47 Kan. 188; *Pierce v. Reh-fuss*, 35 Mich. 53; *Swann v. Shemwell*, 2 Har. & G. (Md.) 283; *St. Martin v. Desnoyer*, 1 Minn. 43; *McKee v. Metraw*, 31 Minn. 429; *Carraway v. Wallace*, (Miss. 1895) 17 So. Rep. 930; *Vinnedge v. Nicholai*, 28 Neb. 133; *Clinton v. King*, (Supm. Ct.) 3 How. Pr. (N. Y.) 55; *Tripp v. Howe*, 45 Vt. 523; *Krueger v. Pierce*, 37 Wis. 269.

Effect of General Appearance. — If the

taking on the writ in an action of replevin is illegal, a general appearance will not operate as a waiver of such defect. *Castle v. Thomas*, 16 Minn. 490.

3. *Gordon v. Bucknell*, 38 Iowa 438.

Failure to Return Value of Property. — The failure of the sheriff to return the value of the property replevied, as required by section 3 of the Kentucky Act of 1830, is no cause for quashing the writ. *Fryer v. Fryer*, 6 Dana (Ky.) 54.

Objections to Bond. — It is no sufficient ground to quash a writ of replevin, because the officer has taken a bond in a larger sum than the writ directed. *Clap v. Guild*, 8 Mass. 153.

A writ of replevin, brought as an adversary suit under Gen. Stat. Vt., c. 35, § 13, was dismissed on motion, where the only bond given was the one prescribed for replevin of goods attached and replevied by the defendant, under Gen. Stat., c. 35, § 8. *Campbell v. Morey*, 27 Vt. 575; *Thurber v. Richmond*, 46 Vt. 395.

Quashed Before Service. — The court will not quash the writ, before service, on the ground that it was issued for goods under execution. *Shewell v. Mackinley*, 1 Miles (Pa.) 54.

Parties to Motion. — The court will not summarily quash a writ, issued for goods under execution, unless the officer be made defendant. *English v. Dalbrow*, 1 Miles (Pa.) 160. See *Weed v. Hill*, 2 Miles (Pa.) 122.

Appeal. — In *Kansas* by statute an order of the District Court vacating a writ, or order of delivery, issued in an action of replevin, is immediately reviewable in the Supreme Court, the aggrieved party not being required to await the final determination of the

different counties to reclaim the plaintiff's goods, the error, to be available, must be shown in abatement.¹

Effect of Abating the Writ.—A dismissal of a writ of replevin amounts to a judgment of nonsuit, entitling the defendant to a return of the property.²

8. Amendment of Writ.—When a writ of replevin is defective and seasonable application is made for amendment, the court should on proper terms grant permission to amend with a view to substantial justice between the parties.³

cause in the District Court. *Carr v. Huffman*, 47 Kan. 188. See also *Kennedy v. Beck*, 15 Kan. 555.

1. *Hall v. Gilmore*, 40 Me. 578.

Maine.—Where a writ is brought in a right court, but in a wrong county, and the defendant undertakes to avail himself of the objection by pleading it in abatement, and his plea fails on demurrer thereto, for want of proper form, he will not be permitted to have the benefit of the objection upon subsequent motion, or under any subsequent pleadings, although the objection might have been a defense under the general issue, as well as in abatement. *Cassidy v. Holbrook*, 81 Me. 589.

Writs Against Nonresident.—Successful writs, with no hope of service, cannot be used to force the appearance of a nonresident, and where a writ has been issued eleven months without a return, it will be quashed on motion. *Lanahan v. Kent Circuit Judge*, 106 Mich. 685.

2. *Stall v. Diamond*, 37 Mich. 429; *Humphrey v. Bayn*, 45 Mich. 565; *Blandy v. Raguett*, 14 Minn. 491; *Greely v. Currier*, 39 Me. 516; *Bettinson v. Lowery*, 86 Me. 218; *Xenia Twine, etc., Co. v. Hooven, etc., Co.*, 25 Cinc. L. Bul. 10, 11 Ohio Dec. (Reprint) 120.

In Iowa, quashing the writ should not have the effect of abating the suit. *Beard v. Smith*, 9 Iowa 50; *Minott v. Vineyard*, 11 Iowa 90.

No Prayer for a Return.—If a plea in abatement to a writ of replevin contains no prayer for a return of the property replevied, still a return may be ordered on a written suggestion, that the property was attached by the defendant, as an officer, and that he is still responsible for its safe keeping. *McArthur v. Lane*, 15 Me. 245.

Failure to Increase Security.—If an order for additional security is not complied with, the writ should be non-

prossed, not quashed. *Strouse v. McCouch*, 10 W. N. C. (Pa.) 274.

Abatement upon Death of Party.—Upon the death of the defendant the writ abates at common law. *Merritt v. Lumbert*, 8 Me. 128. See also article DEATH.

3. *Roberts v. Gee*, 39 Fla. 531; *Simcoke v. Frederick*, 1 Ind. 54; *Mansir v. Crosby*, 6 Gray (Mass.) 334; *Parks v. Barkham*, 1 Mich. 95; *Jewell v. Lamoreaux*, 30 Mich. 155; *Taylor v. Buck*, 100 Mich. 181; *Lewis v. Connolly*, 29 Neb. 222; *Briggs v. Wiswell*, 56 N. H. 319; *Leathers v. Morris*, 101 N. Car. 184; *McCourt v. Bond*, 64 Wis. 596. And see in general article AMENDMENTS, vol. 1, p. 658 *et seq.*

A writ of replevin may be amended by changing the name of the county, where the taking is alleged to have occurred; by requiring two sureties instead of one; or by inserting or charging the allegation of value. *Poyen v. McNeill*, 10 Met. (Mass.) 291; *Jaques v. Sanderson*, 8 Cush. (Mass.) 271; *Judson v. Adams*, 8 Cush. (Mass.) 556; *Litchman v. Potter*, 116 Mass. 371.

If both partners ought to have joined in the suit, and nonjoinder of one had been pleaded in abatement, the court in its discretion could have allowed the writ to be amended by joining him in the suit. *Garvin v. Paul*, 47 N. H. 158.

A writ of replevin tested at one term and returnable at the next term but one (an entire term intervening) is voidable. *Semble*, it may be amended, but not unless the defect appear to have arisen from mistake, and all suspicion be removed that the long return day was a trick to postpone the trial. *Cayward v. Doolittle*, 6 Cow. (N. Y.) 602.

An omission in a replevin writ of the words "original writ" from the statutory form, "provided the same is not taken upon original writ," etc., is fatally defective but amendable.

9. Service — a. BY WHOM MADE. — Those who are authorized by statute to serve the usual processes in actions at law are the proper parties to serve the writ of replevin.¹

Assistance in Service. — The defendant in replevin is of course not bound to take any voluntary or affirmative action towards assisting the officer in the service of the writ.² However, the plaintiff, or some one in his behalf, may accompany the officer and point out the property sought, though such persons must use care in not assuming authority.³

b. PLACE OF SERVICE — In What County Served. — Under proper circumstances and statutory authority a writ of replevin may be served beyond the borders of the district or county where it was issued.⁴

c. MANNER OF SERVICE. — Provision is made in the statutes of the various states as to the manner of executing the writ of replevin.⁵

Parker v. Palmer, 13 R. I. 359; *Goodell v. Bates*, 14 R. I. 65.

Florida Statute. — If the variance between the writ, affidavit, and bond is material, it may yet be amended under Rev. Stat., § 1723, where seasonable application is made for amendment, *Roberts v. Gee*, 39 Fla. 531.

1. See the statutes of the various states, and the article SERVICE OF PROCESS.

By Coroner. — A writ of replevin in an action in which the sheriff was party, was delivered to and executed by the coroner, although addressed to the sheriff. A motion was made to quash the writ, but the court permitted the plaintiff to amend the writ by substituting the word "coroner" for "sheriff" in the address. There was held to be no error in this. *Simcoke v. Frederick*, 1 Ind. 54.

By Constable. — It makes no difference whether the writ is served by a sheriff or constable, if it is properly served. *Smith v. Eals*, 81 Iowa 235.

Under a statute directing writs of replevin to be addressed to the sheriff or his deputy, it was held that service by a constable was void. *Ralston v. Strong*, *Brayt*. (Vt.) 216.

By Deputy Sheriff. — A replevin writ may be served by a deputy sheriff. *Douglass v. Gardner*, 63 Me. 462.

Objections Waived. — Defendant in replevin, who was under-sheriff, appeared generally to the action and went to trial on the merits, without objecting to service of process upon him by the sheriff, instead of by a constable, otherwise than by stating in

his answer by what officer it was made. It was held that the irregularity (if any) in the service was waived, and the court had jurisdiction. *Krueger v. Pierce*, 37 Wis. 269.

2. *People v. Wiltshire*, 9 Ill. App. 374, in which case it was pointed out that the writ commands the sheriff to take the property, not the defendant to deliver it to the officer; *Yott v. People*, 91 Ill. 11; *Horr v. People*, 95 Ill. 169.

3. *Simpson v. Mercer*, 144 Mass. 413; *Farwell v. Fox*, 18 Mich. 166; *Sexton v. McDowd*, 38 Mich. 148.

4. See the statutes of the various states. And see *Turner v. Lilly*, 56 Miss. 576; *Hiles v. McFarland*, 4 Chand. (Wis.) 89.

Contract Waiving Process. — It makes no difference whether a sheriff, on a writ of replevin, executed it outside the limits of his own county, if the contract of sale permits the seller to recover without process. *Proctor v. Tilton*, 65 N. H. 3.

Removal of Property Pendente Lite. — If the property is detained in a county where the writ is returnable, but removed after commencement of the suit to another county, the writ may be served in the latter county. *Crosier v. Stillson*, 67 Vt. 315.

5. *Kelly-Goodfellow Shoe Co. v. Todd*, 5 Okla. 360; *Weinberg v. Conover*, 4 Wis. 803.

Reading Writ or Delivering Copy. — The writ of replevin is executed by reading it to the defendant, or delivering him a copy, or leaving a copy at his usual place of abode. *Pool v. Loomis*, 5 Ark. 110.

Seizure under the Writ. — The writ is the officer's authority for the seizure, making it his imperative duty to take the goods described therein and only those.¹

If the Defendant Refuses to Deliver the Property he will not be in con-

Delivery of Copy to Agent. — A writ of replevin is a writ of summons, not attachment, and service upon the defendant must conform to the provisions of the statute as to the service of writs of summons. Delivery of a copy to the agent of the defendant, the latter being out of the state, is not sufficient. *Gaffield v. Avery*, 43 Vt. 668.

The statutes provide that the summons shall be served on defendant personally, or, when he cannot be found, by leaving a copy at his usual place of abode with his wife, or some person of proper age. Service on his agent or bailee is not sufficient. *Abrams v. Jones*, 4 Wis. 806.

Uncertified Copy. — The fact that the copy of the writ left in service with defendant was not certified is not fatal where no harm was done to defendant. *Anderson v. Lane*, 105 Mich. 89.

Delivery of Copy Not Jurisdictional. — It is the duty of an officer to whom an order of delivery is directed, to serve a copy of the same on defendant, and if he fails to do so he will be liable for all damages which the defendant may sustain in consequence of such neglect. But the failure to serve such a copy is not jurisdictional. *Aultman, etc., Co. v. Steinan*, 8 Neb. 109; *Baker v. Daily*, 6 Neb. 464.

Breaking and Entry. — While the officer has the right to enter defendant's house in search of goods, he has no authority to break an outer door of a dwelling to execute the writ. *Kneas v. Fitler*, 2 S. & R. (Pa.) 263; *Kelley v. Schuyler*, (R. I. 1898) 39 Atl. Rep. 893.

1. *People v. Wiltshire*, 9 Ill. App. 374; *Yott v. People*, 91 Ill. 11; *Horr v. People*, 95 Ill. 169; *Acker v. Haute-mann*, 27 Hun (N. Y.) 48; *Shaw v. Baldwin*, 33 Vt. 447; *Russell First Nat. Bank v. Knoll*, 7 Kan. App. 352.

Seizure of Property. — The prime object of an action of replevin is to put the plaintiff in possession of the property; and when a writ is sued out and proper bond given, it is the first duty of the officer to seize the property, and then read the writ to the defendant if he can be found. It is not a compliance with his duty to merely read the

writ to the defendant. Whether the defendant may feel disposed to deliver up the property or not is of no consequence to the officer; it is his imperative duty to seize the property if it can be found. *People v. Wiltshire*, 9 Ill. App. 374; *Yott v. People*, 91 Ill. 11.

Before Delivering Copy of Writ. — The officer, in executing a writ of replevin, has authority to take into his possession the property therein mentioned before delivering a copy of the order to the person charged with the unlawful detainer of the property, or leaving the copy at his usual place of abode. *State v. Wilson*, 24 Kan. 50.

Property Not Described in Writ. — An order of delivery directing the sheriff to replevy bales of cotton gives him no authority to seize seed cotton. *Chandler v. Smith*, 34 Ark. 527.

No Authority to Take Receipt. — The sheriff is not authorized to take a receipt from defendant for the property seized under the writ, and leave it in the defendant's possession. Such a transaction will not amount to a transfer of possession from defendant to plaintiff. *Davis v. Bayliss*, 51 Iowa 435.

Arrest of Defendant. — In *New York*, under 2 Rev. Stat. 439, § 64, 432, § 11, the plaintiff was not bound to accept part of the property, but could cause the defendant to be arrested. *Snow v. Roy*, 22 Wend. (N. Y.) 602; *Lowrey v. Mansfield*, (Supm. Ct. Spec. T.) 3 How. Pr. (N. Y.) 88.

But the defendant could not be arrested where a part of the property had been taken upon the writ and accepted by plaintiff; there must be an election of remedies, not both. *Lowrey v. Mansfield*, (Supm. Ct. Spec. T.) 3 How. Pr. (N. Y.) 88.

Imprisonment on an Execution in a replevin suit does not fall within the prohibition either of the Constitution (art. 6, § 33), or the non-imprisonment act of 1839 (2 Mich. Comp. Laws, c. 166). *Fuller v. Bowker*, 11 Mich. 204.

Officer's Inventory. — The officer should take an inventory of the property replevied and an invoice of its value, and a receipt from the plaintiff, which he should return with the writ. *People v. Core*, 85 Ill. 248.

tempt of court, nor has the court authority to issue an order compelling him to deliver it, where the return of the officer shows such a refusal; the officer himself has power to take the property under the writ.¹

Reasonable Retention of Property by Officer. — After the officer has taken the property into his possession he should hold it for a reasonable time, usually three days, before delivering it, so that all interested parties may have ample opportunity to take advantage of their respective statutory rights.²

Property Taken from Whom. — The officer is not empowered to take the property from the possession of any person except the one named in the writ.³

d. TIME OF SERVICE. — The time of service of the writ depends upon the statutes of the different states, which are not uniform, but the writ will be a nullity if it is served after the return day.⁴

e. APPRAISEMENT. — For the purpose of fixing the amount of the bond to be given in an action of replevin, the property seized must, in some jurisdictions, be appraised by the proper disinterested party or parties, under oath, and it is the duty of the officer executing the writ to see that this is done; but if the parties agree as to the value it is unnecessary to appoint appraisers.⁵

1. *Yott v. People*, 91 Ill. 11; *Horr v. People*, 95 Ill. 169.

Property Taken by Defendant After Seizure. — Where the property has been seized and delivered to the plaintiff, and, pending the action, the defendant with another takes the property and puts it beyond the reach of plaintiff, the court in which the action is pending has power to enter a rule requiring them to restore it to the possession of the plaintiff and to punish as for a contempt if they disobey. *Knott v. People*, 83 Ill. 532. See also *People v. Neill*, 74 Ill. 68.

2. *Graham v. Wells*, (Supm. Ct.) 18 How. Pr. (N. Y.) 376; *Welter v. Jacobson*, 7 N. Dak. 32.

3. *State v. Jennings*, 14 Ohio St. 73.

Property Detained by Stranger. — In case the property is claimed, held, and apparently owned by a third party, and hence is not detained by defendant from plaintiff, or so situated as to be subject to surrender by defendant, the process does not require the officer to seize it; and if he proceeds to take it, although it be the same property described, his writ will not protect him if such third person is the *bona fide* owner and holder. See also *Welter v. Jacobson*, 7 N. Dak. 32; *Sexton v. McDowd*, 38 Mich. 148.

Searching Property of Stranger. — An officer in serving a writ of replevin may search the property of a stranger to the writ on the latter's invitation, and for any unlawful injury will be liable only for actual damages. *Bruce v. Ulery*, 79 Mo. 322.

4. *O'Brien v. Haynes*, 61 Ill. 494.

Maine. — A writ of replevin, returnable before a justice of the peace, is to be "duly served not less than seven nor more than sixty days before the day therein appointed for trial." *Lord v. Poor*, 23 Me. 569.

Oklahoma. — Summons must be served or publication first made within sixty days from the date of filing petition. *Kelly-Goodfellow Shoe Co. v. Todd*, 5 Okla. 360.

Service After Return Day. — Where service of the writ after the return day is set aside, it operates as a discontinuance. *Forbes v. Washtenaw Circuit Judge*, 23 Mich. 497.

Service on Sunday. — A writ of replevin conveys no authority to an officer to take property on Sunday. *Bryant v. State*, 16 Neb. 651.

5. *Wolcott v. Mead*, 12 Met. (Mass.) 516; *Dempster Mill Mfg. Co. v. Holdrege First Nat. Bank*, 49 Neb. 321; *Miller v. Cushman*, 38 Vt. 593.

In *Williams v. McDonal*, 4 Chand.

Delivery of Property by Officer. — After the officer has retained possession of the property a reasonable time to enable all parties to take advantage of their respective statutory rights, he should then deliver it to the party who is entitled to hold it until the trial.¹

10. Return of Writ — *a.* BEFORE WHOM RETURNABLE. — A writ of replevin must be returned only to the court from which it issued, unless, in special cases, the statute permits a return to another court.²

b. TIME OF RETURN. — The time of the return of the writ differs in the various states according to the statutory provisions of each state.³

c. REQUISITES OF RETURN — What Property Taken. — The return on a writ of replevin should state precisely what property was taken,⁴ and where none was taken the only return that can be

(Wis.) 65, it was held under a territorial statute that property taken under a justice's writ of replevin must be appraised by one or more credible disinterested parties, and that the word "jury" in a subsequent section of the statute referred to such appraisers.

Variance Between Writ and Appraisal. — A variance between the writ and appraisal is not fatal to the suit. *Pomeroy v. Trimper*, 8 Allen (Mass.) 398, in which it was held immaterial that the writ described the property as a heifer and the appraisal described it as a cow. See also *Mansir v. Crosby*, 6 Gray (Mass.) 334.

No Appraisement — Motion to Quash Writ. — The failure of the officer to select appraisers, or their failure to discharge their duty, are not grounds for quashing the writ of replevin. *Parlin v. Austin*, 3 Colo. 337; *Robinson v. Austin*, 3 Colo. 376; *Wyatt v. Freeman*, 4 Colo. 15.

The Appraisers Must Be Sworn, and unless the officer's return shows that they were, it will not be evidence of the appraised value. *Watkins v. Page*, 2 Wis. 92.

1. *Welter v. Jacobson*, 7 N. Dak. 32.

A Symbolical Delivery is not sufficient unless acceptable to the party entitled to actual delivery. *Hayes v. Lusby*; 5 Har. & J. (Md.) 485.

2. A writ of replevin issued by a justice of the peace, returnable before a justice of another district in which the property is held by defendant, confers no jurisdiction on the magistrate before whom it is returned. Code of 1880, § 2634. *Richardson v. Davis*, 59 Miss. 15.

In Massachusetts a writ of replevin

may be issued by the clerk of the court in one county, returnable in another. *Judson v. Adams*, 8 Cush. (Mass.) 556.

3. In **Colorado** the return of a writ of replevin against a corporation in seven days does not render it void. *Duffield v. Denver, etc., R. Co.*, 5 Colo. App. 25.

In **Nebraska**, under Gen. Stat. 265, § 9, the summons, in all cases of replevin in county courts, must be returnable in not more than twenty days from its date. *Roggencamp v. Moore*, 9 Neb. 105.

In **Wisconsin**, under Rev. Stat. 1849, it was held that the writ should be returned immediately after the service thereof. *Hutchinson v. McClellan*, 2 Wis. 17.

Justices' writs of replevin must be made returnable on the third day after issuance, not counting Sunday. *Lowe v. Stringham*, 14 Wis. 222.

Sunday. — The objection in a replevin suit that the return day of the writ was Sunday is held to be waived by the defendant appearing, pleading to the merits, and going to trial without objection. *Pierce v. Rehfuß*, 35 Mich. 53.

Intervention of Term. — If a term intervene between the teste and the return of the writ, it is voidable. *Cayward v. Doolittle*, 6 Cow. (N. Y.) 602.

4. **Maine.** — Where, by a replevin writ, the officer was commanded to replevy eleven different parcels of wood, situated in various towns mentioned, along the line of a railroad, with the number of cords in each parcel distinctly stated, and the officer returned thereon that he had "replevied all the wood at the various places within mentioned," it was held that the return

made is "elogata." ¹

Service of Copy. — The return must show that a true copy of the writ was left with the defendant or with some one for him, as the statute may direct, and in the latter case it should state that the defendant was not found. ²

Proper Bond. — In his return the officer must show that the proper bond was taken, giving the names and addresses of the sureties. ³

Appointment of Appraisers. — The return must state that appraisers were appointed and sworn, giving their names, but need not state that they were "disinterested and discreet." ⁴

Inventory. — Together with the writ the officer should return an inventory and an invoice of the property and a receipt from the plaintiff, if he delivers the property to the latter. ⁵

was indefinite and uncertain as to the quantity of wood replevied. *Miller v. Moses*, 56 Me. 128.

A Variance Between the Writ and Certificate of levy is immaterial, where the identity of the property is established by parol evidence. *Elliott v. Hart*, 45 Mich. 234, in which case replevin was brought for a building that had been sold on execution. The writ described it as on lot 7 of block 6, while the certificate of levy and notice of sale referred to it on lot 8. The court held that the variance would not exclude evidence of the proceedings on execution, and that parol evidence was admissible to identify the property actually taken.

1. *Swann v. Shemwell*, 2 Har. & G. (Md.) 283.

Mississippi Statute. — The Code, § 2619, provides that "if the return of the officer on the writ shall show a failure to take the goods and chattels, but that the defendant has been summoned," plaintiff may elect to proceed to recover the goods. A sheriff's return which states that he served the writ by leaving a true copy with the defendant, is not sufficient to authorize an election to proceed with the action for recovery, since it does not show a failure to take the goods. It is only where the defendant secretes himself or refuses on demand of the officer to deliver the goods that the statute applies. *Meyer v. Mosler*, 64 Miss. 610.

2. *Meyer v. Mosler*, 64 Miss. 610; *Bent v. Bent*, 43 Vt. 42.

Reading Writ or Delivering Copy. — The return to the writ is defective if it does not show an execution of the writ by reading it to the defendant or delivering him a copy, or leaving a copy at

his usual place of abode with some white person of his family over fifteen years of age. It must also set forth with certainty the contents of the notice required to be delivered to or left for him, and state that it was signed by himself. But no defect in the return will be ground for dismissing the suit on motion. *Pool v. Loomis*, 5 Ark. 110.

A return of service upon defendant "by delivering a certified copy of said writ to his wife personally," it not appearing that defendant could not be found, or that the service was at his dwelling, is bad. *Wheeler v. Wilkins*, 19 Mich. 78.

3. *Pool v. Loomis*, 5 Ark. 110; *Pirani v. Barden*, 5 Ark. 81.

Sufficient Showing as to Bond. — A return stating that the officer "replevied" the property, had it appraised, took a proper bond, and delivered the property to the plaintiff, sufficiently shows that the bond was taken between the taking and the delivery of the property — the word "replevied" not being used in its strict technical sense. *Miller v. Cushman*, 38 Vt. 593.

4. *Miller v. Cushman*, 38 Vt. 593; *Bent v. Bent*, 43 Vt. 42; *Watkins v. Page*, 2 Wis. 92.

Appointment of Appraisers. — It is unnecessary for the return to show that the defendant was requested or had notice to appoint an appraiser, or that the parties did not agree as to the value; but if the parties do agree as to the value of the property, it is unnecessary to appoint appraisers, and the officer should state that fact in his return. *Wolcott v. Mead*, 12 Met. (Mass.) 516.

5. *People v. Core*, 85 Ill. 248.

Amendment of Return. — The return to a writ of replevin may be amended on due notice and proper showing, but if not amended is conclusive as made.¹

VIII. DECLARATION OR COMPLAINT — 1. In General. — In some of the states the declaration is called the complaint or petition, but this makes no difference in the principles of law governing the action.²

Complaints under the Code. — In an action in the nature of replevin under the code, the complaint may be in the form of the old declaration in replevin in the *detinet*.³

Commencement of the Action. — In courts other than justices' courts an action of replevin is not commenced merely by filing the statutory affidavit for delivery, but a proper and sufficient declaration or complaint must also be filed, else the action will be dismissed.⁴

Noncompliance with Statute — Quashing Writ. — The failure of the sheriff to return the value of the property replevied, as required by section 3 of the Kentucky Act of 1830, is no cause for quashing the writ. *Fryer v. Fryer*, 6 Dana (Ky.) 54.

Clerk's Duty. — It is the duty of the clerk to enter the defendant's appearance on the writ being returned "summoned." *Kesler v. Haynes*, 6 Wend. (N. Y.) 547.

1. *Green v. Kindy*, 43 Mich. 279; *Bent v. Bent*, 43 Vt. 42.

Correction of Appraiser's Certificate. — A return to a writ of replevin may be amended by correcting the sum named in the appraiser's certificate. *Hammond v. Eaton*, 15 Gray (Mass.) 186.

Refusal to Amend Return. — If a writ of replevin be not properly executed the clerk can issue an alias without any order of court. Nor can the court dismiss plaintiff's case on account of a defect in the return, because plaintiff "refuses or omits" to amend the return. *Pool v. Loomis*, 5 Ark. 110.

Withdrawal of Return — Additional Seizure. — If an officer succeeds in taking only a portion of the property described in the writ, and then makes a premature return without giving his reasons for failure to seize the balance, it is perfectly proper to permit a withdrawal of the return for the purpose of further service and seizure. *National Bank of Commerce v. Feeney*, 9 S. Dak. 550.

2. *Stickney v. Smith*, 5 Minn. 486; *Adams v. Corrison*, 7 Minn. 456.

3. *Hunter v. Hudson River Iron, etc., Co.*, 20 Barb. (N. Y.) 493.

In Michigan the forms prescribed by statute for actions of replevin are applicable alike to justices' courts and courts of record. *Elliott v. Whitmore*, 5 Mich. 532.

In Justices' Courts. — Before a justice of the peace the pleadings in an action of replevin may be oral. *Smith v. Dodge*, 37 Mich. 354. See also article JUSTICES OF THE PEACE, vol. 12, p. 664.

4. *Hoisington v. Armstrong*, 22 Kan. 110; *F. G. Oxley Stave Co. v. Whitson*, 34 Mo. App. 624.

Manner of Commencing Replevin. — In *Amos v. Sinnott*, 5 Ill. 447, *Young, J.*, said: "The mode of instituting a writ in replevin, under our statute, is, first, for the plaintiff to make oath, usually in the form of an affidavit, of the nature of his complaint against the defendant; secondly, for the clerk to issue a writ of replevin, directed to the sheriff of the county, which is made up of the plaint and summons mentioned in the second section of the replevin Act of 1827, by setting out the substance of the affidavit, by way of plaint or complaint, in the commencement of the writ, and then by concluding with a summons to the defendant, etc.; and thirdly, by the filing of the declaration."

Lack of Declaration at First Term Not Fatal. — The want of a declaration at the first term is not ground, under the statute, for dismissing the action; it may properly be continued at the plaintiff's costs. *Amos v. Sinnott*, 5 Ill. 447.

Declaration Is Divisible. — A declaration in replevin for the recovery of a chattel and for damages for the wrongful detention and taking is divisible;

Affidavit No Part of Pleadings. — In courts other than justices' courts the affidavit is considered no part of the pleadings, nor will the facts contained therein become issues in the cause unless they are again set forth in the pleadings.¹

Amended Affidavit. — Where it is necessary to file a petition, as well as an affidavit, the latter, in the absence of the former, cannot be so amended as to take its place.²

Incorporating Affidavit in Complaint. — While a complaint in replevin must be sufficient in itself without referring to the affidavit, yet it is proper to incorporate the affidavit in the complaint.³

Correspondence Between Complaint and Affidavit. — There must be a substantial though not technical correspondence between the complaint and affidavit in replevin.⁴

and hence a demurrer to the whole will be overruled, if it is sufficient, so far as it relates to the recovery of the chattel, although defective in reference to damages claimed. *Newell v. Newell*, 34 Miss. 385.

Time of Filing Declaration. — In *Wilson v. Williams*, 18 Wend. (N. Y.) 581, it was held that before the plaintiff can regularly file his declaration the writ must be returned with the names of the sureties annexed.

Lapse of a Year Without Declaring. — Where a year elapsed after the return of a writ of replevin, under which three-fourths of the property was delivered, and nothing else was done by the plaintiff except to sue out alias and pluries writs, which were not enforced, it was held that third persons standing in the relation of assignees to the defendants might rule the plaintiff to declare and proceed to judgment of *non prosequitur*, although special bail had not been filed. *Snow v. Roy*, 22 Wend. (N. Y.) 602.

After the Return of the Writ — Illinois. — Failure to file the declaration at the first term is not fatal to the cause, since it may be continued at plaintiff's costs. *Amos v. Sinnott*, 5 Ill. 440.

Wisconsin. — The declaration must, under Rev. Stat. 1849, be filed within ten days after return of the writ, and a copy be served on the defendant, his agent or attorney, and the record should show these facts. *Hutchinson v. McClellan*, 2 Wis. 17; *Elmore v. Garvey*, 4 Wis. 152.

The irregularity of not filing and serving the declaration within ten days after the return of the writ is not waived by pleading and going to trial, after a motion to dismiss for that cause

has been overruled. *Elmore v. Garvey*, 4 Wis. 152.

Time of Filing Disclaimer. — It is discretionary with the court when a disclaimer may be filed. *Sander v. Goldsmith*, 41 Conn. 580.

1. *Crawford v. Furlong*, 21 Kan. 698; *Hoisington v. Armstrong*, 22 Kan. 110.

Repeating Allegations of the Affidavit. — The petition need not contain all the allegations of fact which the statute requires to be set out in the affidavit. *Bosse v. Thomas*, 3 Mo. App. 472.

In a Justice's Court the affidavit in replevin may serve the double function of an affidavit and complaint. *Hawes v. Robinson*, 44 Ark. 308; *Hanner v. Bailey*, 30 Ark. 681; *Eddy v. Beal*, 34 Ind. 159; *Garland v. Bartels*, 2 N. Mex. 1.

2. *F. G. Oxley Stave Co. v. Whitson*, 34 Mo. App. 624.

3. *Loomis v. Youle*, 1 Minn. 775; *Hudelson v. Tobias First Nat. Bank*, 51 Neb. 557; *Turpie v. Fagg*, 124 Ind. 476.

Amendment of Affidavit. — Where a petition is wanting it is not proper to amend the affidavit with a view to supplying such defect. *F. G. Oxley Stave Co. v. Whitson*, 34 Mo. App. 624.

Complaint Without Formal Affidavit. — A verified complaint possessing all the statutory requisites of an affidavit dispenses with the necessity of a separate affidavit. *Hanner v. Bailey*, 30 Ark. 681; *Minchrod v. Windoes*, 29 Ind. 288; *Cox v. Albert*, 78 Ind. 241; *Louisville, etc., R. Co. v. Payne*, 103 Ind. 183; *Turpie v. Fagg*, 124 Ind. 476.

4. *Waters v. Reuber*, 16 Neb. 99.

Improper Variance. — If the affidavit set out a wrongful detention, it will be

Correspondence Between Declaration and Writ.—The declaration must conform to the writ, so that the plaintiff cannot declare for a wrongful detention alone where the writ is for both the taking and unjust detention.¹

Negating Exceptions.—The plaintiff need not allege that the action is not within the exceptions prohibited by statute.²

Presumption in Favor of Declaration.—If a declaration presents a good cause of action, though imperfectly, every reasonable presumption will be made in its favor and it will not be demurrable.³

Bill of Particulars.—The necessity for filing a bill of particulars in an action of replevin is generally regulated by the statutes of the different states, but in some states no such bill need be filed before a justice of the peace, nor in replevin commenced in the county court when the value of the property is within the jurisdiction of a justice of the peace.⁴

Surplusage.—An allegation by the plaintiff of matter not material to the cause will be rejected as surplusage.⁵

improper to allege in the declaration both a wrongful taking and a wrongful detention, for the damages which might be recovered are liable to be increased by circumstances of aggravation attending a wrongful taking. *Newell v. Newell*, 34 Miss. 385.

No Departure.—In the affidavit for replevin and original petition the property was described as "seven head of horses," marked by certain brands set out. In the amended petition, with other descriptive terms, three were described as "three mares," setting out the brand as in the original; three others as "three horses," setting out the brands as in the original; and one as "one colt," also setting out the brand thereon. This was held to be no departure. *Nollkamper v. Wyatt*, 27 Neb. 565.

In New York it is not necessary that the complaint should correspond with the affidavit furnished to the sheriff, as to the number and value of the articles. *Kerrigan v. Ray*, (Supm. Ct. Spec. T.) 10 How. Pr. (N. Y.) 213.

1. *Nichols v. Nichols*, 10 Wend. (N. Y.) 629.

Objection Waived.—Objection to a variance between the description of property as made in the complaint and writ is offered too late after plea. *Reeder v. Moore*, 95 Mich. 594.

2. *Hoffman v. Markham*, 88 Hun (N. Y.) 18.

Alleging Disappearance Without Plaintiff's Consent.—In one jurisdiction it is made necessary by statute to allege that the property did not disappear

from the plaintiff with his consent. *Odom v. Trantham*, 81 Ga. 713.

3. *Wadley v. Harris*, 25 Ark. 36; *Ladson v. Mostowitz*, 45 S. Car. 388; *Brookman v. State Ins. Co.*, 15 Wash. 29; *Johnston v. Holmes*, 32 S. Car. 434.

Cross-Replevin.—A second suit in replevin, brought by the defendant in the first, jointly with his partner, against the bailors of the plaintiff in the first, is held to be a cross-replevin. *Beers v. Wuerpul*, 24 Ark. 272.

4. *Coombs v. Brenklander*, 29 Neb. 586; *Hill v. Wilkinson*, 25 Neb. 103; *Sanderson v. Pullman*, 11 Cinc. L. Bul. 145, 9 Ohio Dec. (Reprint) 175.

Affidavit as a Bill of Particulars.—In *Starr v. Hinshaw*, 23 Kan. 532, *Valentine, J.*, said: "The affidavit contains everything that is necessary to be stated in a bill of particulars; and while a plaintiff in a replevin suit in a justice's court might very properly file an additional paper as a bill of particulars, yet if he chooses to use his affidavit as such, and the court permits him to do so, we do not think that any material error is committed. The statutes do not require that any additional paper be filed as a bill of particulars in a justice's court."

But in *Casterline v. Day*, 26 Kan. 306 it was held that an affidavit was insufficient as a bill of particulars, if duly challenged. In his case the court cited *Starr v. Hinshaw*, 23 Kan. 532, but the court must have depended upon an incorrect syllabus.

5. *Conner v. Blutworth*, 54 Cal. 635; *Watson v. Watson*, 9 Conn. 146.

2. Joinder of Counts and Causes — Propriety of Joinder. — In replevin two counts cannot properly be joined.¹ However, it has been held that a demand for possession of the property and for a judgment for the debt secured may be joined in an action of claim and delivery under a chattel mortgage.²

Adding a Count in Trover. — Where only a portion of the property claimed in replevin is found and personal service has been attained, the plaintiff may add a count in trover.³

3. Essential Allegations — a. DESCRIPTION OF PROPERTY — Declaration May Include What Property. — The plaintiff in replevin may include in his declaration articles omitted in his summons, but not such property as was not taken under the writ.⁴

Requisites and Sufficiency of Description. — What will constitute a sufficient description of the property in a complaint in replevin

Alleging Place of Taking. — An allegation in the complaint of the place where the property was taken, in an action to recover possession of personal property, is surplusage. *Lay v. Neville*, 25 Cal. 545.

Averment of Date of Judgment. — An averment of the date of the judgment is not necessary and may be rejected as surplusage, where there are averments equivalent to an averment that the execution was in full force at the time of the levy. *Lammers v. Meyer*, 59 Ill. 214.

1. Keller v. Boatman, 49 Ind. 104; *Hart v. Fitzgerald*, 2 Mass. 509, note; *Corbin v. Bouve*, 1 Cinc. Super. Ct. 259; *Wegner v. Second Ward Sav. Bank*, 76 Wis. 242.

Separate Suits for Separate Property. — Where separate articles of goods are in possession of different persons, a separate suit should be brought against each person for the articles in his possession, and not one action against all the persons. *Woolner v. Levy*, 48 Mo. App. 469.

Fatal Joinder. — Two junior trust deeds were executed to different beneficiaries. Each trustee took possession of part of the property conveyed. The trustee in the senior and superior trust deed brought replevin for the property, making but one affidavit, etc. But one writ was issued, which was levied upon all the property in the hands of both trustees. Each trustee executed a separate bond and retained possession of the property. But one declaration was filed against both trustees jointly, who jointly filed the plea of general issue. In this form the case was presented to the court for trial, which ren-

dered two separate judgments against both trustees for different amounts. It was held that these double verdicts being rendered upon but one declaration, with but one plea, were void; that there should have been either two declarations or but one judgment, and that this error was not cured after verdict by the statutes of jeofails. *Williams v. Devine*, 52 Miss. 139.

2. Kiger v. Harmon, 113 N. Car. 406.

Joinder of Counts in Cepit and Detinet. — If counts in the *cepit* and *detinet* are joined, the plaintiff must file two affidavits corresponding with the counts, or one embracing both. *Cox v. Grace*, 10 Ark. 86.

Election. — Where a party has his choice to bring the common-law action in the *cepit* or the statutory action in the *detinet*, and elects the former, he must be held to the proof necessary to support that form of action, and must prove possession in plaintiff and an actual wrongful taking by defendant. *Town v. Evans*, 6 Ark. 260.

3. Baals v. Stewart, 109 Ind. 371; *Dart v. Horn*, 20 Ill. 212; *Karr v. Barstow*, 24 Ill. 580; *Nashville Ins., etc., Co. v. Alexander*, 10 Humph. (Tenn.) 378.

In Virginia, under the Act of 1792, the plaintiff in replevin and the defendant in all other actions may plead as many several matters, whether of law or fact, as he shall think necessary for his defense, notwithstanding such several matters be inconsistent with each other. *Waller v. Ellis*, 2 Munf. (Va.) 88.

4. Finehout v. Crain, 4 Hill (N. Y.) 537; *Sanderson v. Marks*, 1 Har. & G. (Md.) 252.

must in a great measure depend upon the particular facts of each case, but generally speaking, it must be described with a reasonable degree of certainty, sufficiently definite to enable the property to be positively identified.¹

1. *Arkansas*. — Hill *v.* Robinson, 16 Ark. 90.

Georgia. — Wolf *v.* Kennedy, 93 Ga. 219; McElhannon *v.* Farmers Alliance Warehouse, etc., Co., 95 Ga. 670; Farmers Alliance Warehouse, etc., Co. *v.* McElhannon, 98 Ga. 394.

Idaho. — Pierce *v.* Langdon, 2 Idaho 878.

Indiana. — Buck *v.* Young, 1 Ind. App. 558; Minchrod *v.* Windoes, 29 Ind. 288; Onstatt *v.* Ream, 30 Ind. 259; Smith *v.* Stanford, 62 Ind. 392; Malone *v.* Stickney, 88 Ind. 594; James *v.* Fowler, 90 Ind. 563; Hall *v.* Durham, 117 Ind. 429.

Iowa. — Ellsworth *v.* Henshall, 4 Greene (Iowa) 417; Ft. Dodge *v.* Moore, 37 Iowa 388; Stephens *v.* Williams, 46 Iowa 540.

Kentucky. — Sawyer *v.* Middlesborough Town Co., (Ky. 1891) 17 S. W. Rep. 444.

Minnesota. — Ellingboe *v.* Brakken, 36 Minn. 156.

Missouri. — Standard Foundry Co. *v.* Schloss, 43 Mo. App. 304.

Nebraska. — Bilby *v.* Townsend, 29 Neb. 220.

New York. — Root *v.* Woodruff, 6 Hill (N. Y.) 418.

North Dakota. — Russell *v.* Amundson, 4 N. Dak. 112.

Oregon. — Foredice *v.* Rinehart, 11 Oregon 208; Prescott *v.* Heilner, 13 Oregon 202; Guille *v.* Wong Fook, 13 Oregon 577; Krause *v.* Herbert, 16 Oregon 429; Gardner *v.* Gillihan, 20 Oregon 603; Riley *v.* Pearson, 21 Oregon 15.

Pennsylvania. — Wilson *v.* Gray, 8 Watts (Pa.) 25; Ruch *v.* Morris, 28 Pa. St. 245.

South Carolina. — Lockhart *v.* Little, 30 S. Car. 326; Burr *v.* Brantley, 40 S. Car. 538.

Washington. — Casey *v.* Malidore, 19 Wash. 279.

Instances of Sufficient Descriptions — *Seed Cotton*. — In replevin "fifteen hundred pounds of seed cotton" is sufficiently descriptive of the article and the quantity. Hill *v.* Robinson, 16 Ark. 90.

A Horse may be described as "one gray horse, six years old this spring, about 16½ hands high, with a small

knot about halfway between the right nostril and right eye, near the front of face or nose, with collar mark on top of neck, dark mane and tail, with tip end of tail light in color." Wood *v.* Darnell, 1 Ind. App. 215.

A Pistol may be described as "a six-barreled pistol, called a six-shooter or revolver." Wright *v.* Ross, 2 Greene (Iowa) 266.

Oxen. — In an action of replevin for six oxen the writ and declaration describing them merely as "six oxen" were held to be sufficient. Farwell *v.* Fox, 18 Mich. 166.

Hogs. — A description of "nine head of fat hogs, mostly black," was held sufficient to enable the officer to identify them. Crum *v.* Elliston, 33 Mo. App. 591.

Excuse for General Description. — If a sufficient excuse is shown for not giving a specific description of the property, a general description will suffice. Hoke *v.* Applegate, 92 Ind. 570.

A Different Description in Amended Petition. — Property was described in the affidavit and original petition in replevin as "seven head of horses," marked by certain brands set out. In an amended petition the property was described as "three mares," "three horses," and "one colt," the brands being set out as in the original petition. It was held that there was no departure. Nollkamper *v.* Wyatt, 27 Neb. 565.

Instances of Insufficient Description — *Cattle*. — A description of "six head of one-year-old heifers, twelve head of one-year-old steers, twenty-one head of mixed cows," is insufficient and uncertain. Smith *v.* McCoolle, 5 Kan. App. 713.

Where in a replevin case for a band of sheep the description of which was vague, though some were described, and all stated to be of the value of three dollars per head, the court charged that there was nothing in the description to distinguish one sheep or class of sheep from another, and that plaintiff must recover all or none, this was held erroneous, both as involving a question of fact and as not clearly stating the law. Buckley *v.* Buckley, 9 Nev. 373.

Farm Products. — Property was de-

b. RIGHT TO POSSESSION. — Since the gist of the action of replevin is the right to possession, the declaration or complaint must contain an averment that the plaintiff is the owner of the property, or that the title is in him, or that the right of possession is in him, at the commencement of the suit.¹

scribed in a complaint in replevin as "one lot of seed cotton, about 6,000 pounds, twelve stacks of fodder, one load of corn, about fifteen bushels, of the total value of \$250." It was held that this was insufficient, and that a demurrer to it should be sustained; it was not aided by a verdict for the plaintiff which followed the description contained in the petition, with the exception of the value. *Lockhart v. Little*, 30 S. Car. 326.

Objections Not Available to Plaintiff. — After trial in replevin and a verdict for defendant, the plaintiff will not be permitted to avail himself of any uncertainty in his declaration. *Wilson v. Gray*, 8 Watts (Pa.) 25.

Reference in One Paragraph to Another. — It is not sufficient for one paragraph of a complaint to refer to another paragraph for a description of the property. *Entsminger v. Jackson*, 73 Ind. 144.

Schedule Annexed Insufficient. — Goods cannot in replevin be properly described as in a schedule annexed. *Kinder v. Shaw*, 2 Mass. 398.

Exhibits Must Be Attached to Complaint. — An exhibit containing a description of the property must be attached to the complaint in order to become part thereof. It is not sufficient to file the same as a separate paper, although it is referred to in the complaint as part thereof. *Riley v. Pearson*, 21 Oregon 15.

Objections Waived. — In replevin a defective description of the property must be taken advantage of by special demurrer, as it would be held sufficient after verdict, avowry, or plea of property in defendant. *Stevens v. Osman*, 1 Mich. 92.

1. *California.* — *Lafontaine v. Greene*, 17 Cal. 294; *Pico v. Pico*, 56 Cal. 453; *Carman v. Ross*, 64, Cal. 249; *Watrous v. Cunningham*, 65 Cal. 410; *Byrnes v. Hatch*, 77 Cal. 241; *Affierbach v. McGovern*, 79 Cal. 268; *Visher v. Smith*, 91 Cal. 260; *Fredericks v. Tracy*, 98 Cal. 658; *Masterson v. Clark*, (Cal. 1895) 41 Pac. Rep. 796; *Williams v. Ashe*, 111 Cal. 180; *Holly v. Heiskell*, 112 Cal.

174; *Garcia v. Gunn*, 119 Cal. 315; *Truman v. Young*, 121 Cal. 490.

Colorado. — *Baker v. Cordwell*, 6 Colo. 199; *Benesch v. Wagner*, 12 Colo. 534; *Benesch v. Mitchelson*, 12 Colo. 539; *Debord v. Johnson*, 11 Colo. App. 402; *Stevenson v. Lord*, 15 Colo. 131.

Connecticut. — *Curnane v. Scheidel*, 70 Conn. 13.

Idaho. — *Pierce v. Langdon*, 2 Idaho 878.

Illinois. — *Reynolds v. McCormick*, 62 Ill. 412.

Indiana. — *Gentry v. Bargis*, 6 Blackf. (Ind.) 261; *Bailey v. Troxell*, 43 Ind. 432; *Schenck v. Long*, 67 Ind. 579; *Entsminger v. Jackson*, 73 Ind. 144; *Johnson v. Simpson*, 77 Ind. 412; *Louisville, etc., R. Co. v. Payne*, 103 Ind. 183; *Keillar v. Carr*, 119 Ind. 127; *Turpie v. Fagg*, 124 Ind. 476; *Ross v. Menefee*, 125 Ind. 432; *Combs v. Bays*, 19 Ind. App. 263; *McAfee v. Montgomery*, 21 Ind. App. 196.

Iowa. — *Sturman v. Stone*, 31 Iowa 115; *Reisner v. Currier*, 58 Iowa 213; *Darnall v. Bennett*, 98 Iowa 410; *Creamery Package Mfg. Co. v. Union Bank*, 100 Iowa 370.

Kansas. — *State Bank v. Norduft*, 2 Kan. App. 55; *Burgwald v. Donelson*, 2 Kan. App. 301; *Hursh v. Starr*, 6 Kan. App. 8.

Massachusetts. — *Johnson v. Neale*, 6 Allen (Mass.) 227.

Michigan. — *Hasceig v. Tripp*, 20 Mich. 216; *McKinnon v. Weston*, 104 Mich. 642.

Minnesota. — *Loomis v. Youle*, 1 Minn. 175; *Adams v. Corriston*, 7 Minn. 450; *Carlson v. Small*, 32 Minn. 492; *Tancre v. Reynolds*, 35 Minn. 476; *Miller v. Adamson*, 45 Minn. 99.

Missouri. — *Bosse v. Thomas*, 3 Mo. App. 472; *Rosentreter v. Brady*, 63 Mo. App. 398; *Benedict, etc., Mfg. Co. v. Jones*, 60 Mo. App. 219, 1 Mo. App. Rep. 77; *Stoker v. Crane*, 46 Mo. 264; *Martin v. Block*, 24 Mo. App. 60; *Stone v. Barrett*, 34 Mo. App. 15; *Keen v. Munger*, 52 Mo. App. 660; *Randol v. Buchanan*, 61 Mo. App. 445; *National Brewery Co. v. Lindsay*, 72

c. SPECIAL OWNERSHIP.—Where the plaintiff in replevin is entitled to possession by virtue of a special ownership in prop-

Mo. App. 591; *Cross v. Hulett*, 53 Mo. 397.

Montana.—*Vantilburgh v. Hamilton*, 2 Mont. 413.

Nebraska.—*Haggard v. Wallen*, 6 Neb. 271; *Daniels v. Cole*, 21 Neb. 156; *Musser v. King*, 40 Neb. 892; *McKinney v. Chadron First Nat. Bank*, 36 Neb. 629; *Randall v. Persons*, 42 Neb. 607; *Sharp v. Johnson*, 44 Neb. 165; *Camp v. Pollock*, 45 Neb. 771; *Phenix Iron Works Co. v. McEvony*, 47 Neb. 228; *Paxton v. Learn*, 55 Neb. 459.

New York.—*Gardner v. Scovill*, (Supm. Ct. Spec. T.) 1 How. Pr. N. S. (N. Y.) 272; *Pattison v. Adams*, 7 Hill (N. Y.) 126; *Chapin v. Merchants' Nat. Bank*, 31 Hun (N. Y.) 529; *Davenport Glucose Mfg. Co. v. Taussig*, 31 Hun (N. Y.) 563; *Simmons v. Lyons*, 55 N. Y. 671; *Van Der Minden v. Elsas*, 36 N. Y. Super. Ct. 66; *Banfield v. Haeger*, 45 N. Y. Super. Ct. 428; *Scofield v. Whitelegge*, 49 N. Y. 259; *Bond v. Mitchell*, 3 Barb. (N. Y.) 304; *Vandenburg v. Van Valkenburgh*, 8 Barb. (N. Y.) 217; *Tuthill v. Skidmore*, (Supm. Ct. Gen. T.) 1 N. Y. Supp. 445; *Sommer v. Greenberg*, (N. Y. City Ct. Gen. T.) 29 N. Y. Supp. 602; *Hoffman v. Markham*, 88 Hun (N. Y.) 18.

North Carolina.—*Heath v. Morgan*, 117 N. Car. 504.

Ohio.—*Taylor v. Grever*, 6 Ohio Cir. Ct. 269, 3 Ohio Cir. Dec. 448; *Wilmot v. Lyon*, 11 Ohio Cir. Ct. 238, 7 Ohio Cir. Dec. 394; *Robinson v. Fitch*, 26 Ohio St. 659.

Oregon.—*Moorhouse v. Donaca*, 14 Oregon 430; *W. W. Kimball Co. v. Redfield*, (Oregon 1898) 54 Pac. Rep. 216.

South Carolina.—*Luther v. Arnold*, 8 Rich. L. (S. Car.) 24; *Peeples v. Warren*, 51 S. Car. 560.

South Dakota.—*Everett v. Buchanan*, 2 Dak. 249; *Willis v. DeWitt*, 3 S. Dak. 281; *Hormann v. Sherin*, 6 S. Dak. 82.

Tennessee.—*Parham v. Riley*, 4 Coldw. (Tenn.) 5.

Texas.—*Hill v. M'Dermot*, Dall. (Tex.) 419; *Hastings v. Kellogg*, (Tex. Civ. App. 1894) 24 S. W. Rep. 846; *Gillies v. Wofford*, 26 Tex. 76.

Utah.—*Munns v. Loveland*, 15 Utah 250.

Virginia.—*Vaiden v. Bell*, 3 Rand. (Va.) 448.

Washington.—*Laurendeau v. Fugelli*, 1 Wash. 559; *Harris v. Hayfield*, 5 Wash. 230; *Brookman v. State Ins. Co.*, 15 Wash. 29.

Wisconsin.—*Child v. Child*, 13 Wis. 17; *Oleson v. Merrill*, 20 Wis. 462; *Gage v. Wayland*, 67 Wis. 566; *Stahl v. Chicago, etc., R. Co.*, 94 Wis. 315.

Right of Possession.—An allegation in a complaint, that the plaintiffs were possessed of personal property "as of their own proper goods," is equivalent to an allegation of ownership and possession. *Stickney v. Smith*, 5 Minn. 486.

Goods "of Plaintiffs."—Where it is alleged that defendants wrongfully detain from plaintiffs the goods "of plaintiffs," it is a sufficient allegation of ownership. *Wilmot v. Lyon*, 11 Ohio Cir. Ct. 238, 7 Ohio Cir. Dec. 394.

Action by Mortgagee.—It is not necessary for a mortgagee in replevin to show in his complaint the source of his title. It is sufficient to allege his ownership, general or special; and if he alleges the mortgage, he need not allege the nonpayment of the debt for which it was given. *Person v. Wright*, 35 Ark. 169; *Nudd v. Thompson*, 34 Cal. 39.

Ambiguity and Uncertainty.—A complaint which alleges that the plaintiff is the owner of certain goods and chattels on a certain ranch; that the defendant wrongfully and fraudulently took them; that the defendant promised and agreed to buy them at what they were reasonably worth; that he afterwards refused to negotiate; and that the defendant, by force and threats, prevented the plaintiff from removing the goods from the ranch, is ambiguous and uncertain. *Buell v. Cory*, 50 Cal. 639.

Allegation of Specific Facts.—Where a complaint contains the usual allegations under the statute, and adds specific facts exhibiting the nature of the plaintiff's title, the specific facts will be looked to in determining the plaintiff's right to recover. *Reynolds v. Copeland*, 71 Ind. 422.

Sufficiency Without General Allegation.—A complaint in an action of claim and delivery, which states the particular facts entitling the plaintiff to the immediate and exclusive possession of the property claimed, suffi-

erty, he must in his declaration aver the facts creating such ownership.¹

d. TAKING.—The allegation of a wrongful taking of the property by the defendant is fictitious and need not be proved in most cases. The materiality of this allegation seems to turn on the question whether the taking was actually wrongful or not, it being plainly unnecessary in the latter case to aver an unlawful taking.² It seems that originally replevin was brought exclusively for an unlawful taking, while detinue was the action for wrongful detention; but this distinction has in a large measure been lost in confusion of cases and extension of the scope of replevin. The action has been further regulated in some jurisdictions by statutory provisions.³

ciently pleads his title thereto, although it contains no general allegation that he is the owner and entitled to the possession of the property. *Visher v. Smith*, 91 Cal. 260; *Gage v. Wayland*, 67 Wis. 566.

Evidentiary Matters.—Ownership or right to possession must be alleged as a fact in itself, it being insufficient to allege mere evidence of it. *Bond v. Mitchell*, 3 Barb. (N. Y.) 304; *Vandenburg v. Van Valkenburgh*, 8 Barb. (N. Y.) 217.

Allegation of Sale and Delivery.—The ownership of personal property will be implied from an allegation of sale and delivery. In an action to recover its possession no further allegation of ownership is necessary. *Morrison v. Lewis*, 49 N. Y. Super. Ct. 178.

Rights of Officer under Attachment.—In replevin by a sheriff for goods attached by him and taken from his possession by defendant, the complaint must state facts showing that such chattels were liable to seizure by virtue of the attachment, or it is bad on demurrer. *Tronson v. Union Lumbering Co.*, 38 Wis. 202.

Title of Mortgagee.—When the state requires plaintiff to state the extent of his interest in the property (section 3225 of the Iowa Code), and he states that he is the absolute owner, he cannot show that he is a mortgagee. *Kern v. Wilson*, 73 Iowa 490.

Wife's Interest.—A declaration in replevin by husband and wife should show specially the wife's interest in the goods. *Gentry v. Bargis*, 6 Blackf. (Ind.) 261.

Alleging Both Absolute and Special Interest.—A plaintiff in replevin, by alleging and asserting on the trial an

absolute ownership, and also a special interest or lien, was held not to waive the latter, as the inconsistency related wholly to the legal conclusions to be drawn from conceded facts. *Tuthill v. Skidmore*, 124 N. Y. 148.

Omissions Cured by Answer.—Where a petition in replevin fails to allege plaintiff's interest in the property, the defect is cured by an answer wherein the nature of plaintiff's right is asserted. *Dillard v. McClure*, 64 Mo. App. 488, 2 Mo. App. Rep. 1042.

1. *Hazard v. Hall*, 5 Mo. App. 584; *Deyerle v. Hunt*, 50 Mo. App. 541; *Griffing v. Curtis*, 50 Neb. 334; *Norcross v. Baldwin*, 50 Neb. 885; *Hudelson v. Tobias First Nat. Bank*, 51 Neb. 557; *J. Thompson & Sons Mfg. Co. v. Nicholls*, 52 Neb. 312; *Paxton v. Learn*, 55 Neb. 459; *Tuthill v. Skidmore*, 124 N. Y. 148.

General Averments Insufficient.—The general averments in a petition in replevin that the plaintiff "has a special property in the goods and chattels, and that he is entitled to the immediate possession thereof, and that they are wrongfully and unjustly detained from him," are mere propositions of law, and such petition is defective. Objection to the introduction of evidence under such a petition should have been sustained. *Curtis v. Cutler*, 7 Neb. 315.

2. *Horsey v. Knowles*, 74 Md. 602; *Randall v. Cook*, 17 Wend. (N. Y.) 53.

Taking Imports a Tortious Taking.—In a declaration in the *cepi* it is sufficient to aver that the defendant took the property of the plaintiff, and unjustly detains the same; this imports a tortious taking. *Childs v. Hart*, 7 Barb. (N. Y.) 370.

3. *Indiana.*—It is unnecessary to

Place of Taking. — It is necessary to allege the place from which the property was taken, otherwise the pleading is defective.¹

e. DETENTION. — A declaration or complaint in an action of replevin must allege that the defendant unlawfully detains the property sought to be recovered.²

allege in the declaration that the defendant unlawfully obtained possession of the property described therein. *Ross v. Menefee*, 125 Ind. 432.

Minnesota. — Under the statute in force at the time of the creation of the territory of Minnesota, the complaint in replevin was required to aver that the property was wrongfully taken, but a defect in this respect could be cured by verdict. *Coit v. Waples*, 1 Minn. 134.

Wisconsin. — The complaint under the code need not aver a wrongful or unlawful taking, or a demand and refusal, but it will be sufficient if it avers property in the plaintiff and possession and wrongful detention by the defendant at the commencement of the action. *Oleson v. Merrill*, 20 Wis. 462.

1. *Haget v. Brayton*, 2 Har. & J. (Md.) 350; *Potter v. Bradley*, 2 M. & P. 78, 17 E. C. L. 203; *Gardner v. Humphrey*, 10 Johns. (N. Y.) 53.

In **Connecticut** it has been declared that in a declaration in replevin for cattle it is sufficient to allege the town where they were taken. *Strong v. Lawler*, 37 Conn. 177.

Defect Cured by Verdict. — If, in an action for the recovery of personal property, the plaintiff fails to allege the place from which the property was taken, the defect is cured by verdict. *Kirk v. Matlock*, 12 Oregon 319.

Objections Waived. — A complaint in an action of replevin which only alleges a wrongful taking within the county in which the action is brought is bad on demurrer; but in the absence of such objection is sufficient to support evidence of the situs of the property at the time when the action was commenced. *Moorhouse v. Donaca*, 14 Oregon 430.

2. **Arkansas.** — *Pirami v. Barden*, 5 Ark. 81; *Phelan v. Bonham*, 9 Ark. 389; *Jetton v. Smead*, 29 Ark. 372.

California. — *Lazard v. Wheeler*, 22 Cal. 139.

Colorado. — *Denver Onyx, etc., Mfg. Co. v. Reynold*, 72 Fed. Rep. 464, 36 U. S. App. 538.

Indiana. — *Gould v. O'Neal*, 1 Ind. App. 144; *Schenck v. Long*, 67 Ind.

579; *Entsminger v. Jackson*, 73 Ind. 144; *Johnson v. Simpson*, 77 Ind. 412; *Roberts v. Porter*, 78 Ind. 130; *Turpie v. Fagg*, 124 Ind. 476; *Louisville, etc., R. Co. v. Payne*, 103 Ind. 183; *Ross v. Menefee*, 125 Ind. 432; *Combs v. Bays*, 19 Ind. App. 263; *McAfee v. Montgomery*, 21 Ind. App. 196.

Iowa. — *Nolan v. Jones*, 53 Iowa 387; *Houghtaling v. Hills*, 59 Iowa 287.

Kansas. — *Jordan v. Johnson*, 1 Kan. App. 656; *Burgwald v. Donelson*, 2 Kan. App. 301; *Wilhite v. Williams*, 41 Kan. 288.

Maryland. — *Benesch v. Weil*, 69 Md. 276.

Minnesota. — *Adams v. Corriston*, 7 Minn. 456; *Tozier v. Merriam*, 12 Minn. 87.

Missouri. — *Davis v. Randolph*, 3 Mo. App. 454; *Reigert v. Voelker*, 6 Mo. App. 53; *Singer Mfg. Co. v. Senn*, 7 Mo. App. 584; *Staley House Furnishing Co. v. Wallace*, 21 Mo. App. 128; *Martin v. Block*, 24 Mo. App. 60; *Keen v. Munger*, 52 Mo. App. 660; *Gist v. Loring*, 60 Mo. 487.

Nebraska. — *Haggard v. Wallen*, 6 Neb. 271; *Daniels v. Cole*, 21 Neb. 156.

New Hampshire. — *Carter v. Piper*, 57 N. H. 217.

New York. — *Childs v. Hart*, 7 Barb. (N. Y.) 370; *Randall v. Cook*, 17 Wend. (N. Y.) 53; *Seifret v. Kraft*, (Supm. Ct. Spec. T.) 13 Civ. Pro. (N. Y.) 321; *Scofield v. Valentine*, (C. Pl. Gen. T.) 19 N. Y. Supp. 225; *Sommer v. Greenberg*, (N. Y. City Ct. Gen. T.) 29 N. Y. Supp. 602; *Hoffman v. Markham*, 88 Hun (N. Y.) 18; *Appleby v. Hollands*, 8 N. Y. App. Div. 375; *Banfield v. Haeger*, 45 N. Y. Super. Ct. 428; *Chapin v. Merchants' Nat. Bank*, 31 Hun (N. Y.) 529; *Davenport Glucose Mfg. Co. v. Taussig*, 31 Hun (N. Y.) 563; *Fitch v. McMahon*, 103 N. Y. 690, 9 N. E. Rep. 497.

North Carolina. — *Heath v. Morgan*, 117 N. Car. 504.

Ohio. — *Taylor v. Grever*, 6 Ohio Cir. Ct. 269, 3 Ohio Cir. Dec. 448.

Oregon. — *Krause v. Herbert*, 16 Oregon 429; *Moorhouse v. Donaca*, 14 Oregon 430.

Venue, or Place of Detention. — Unless the statute directs otherwise a complaint in an action of replevin to recover specific personal property is fatally defective which fails to allege that the property

South Carolina. — *Ladson v. Mostowitz*, 45 S. Car. 388.

South Dakota. — *Everett v. Buchanan*, 2 Dak. 249; *Willis v. De Witt*, 3 S. Dak. 281; *Hormann v. Sherin*, 6 S. Dak. 82.

Washington. — *Brookman v. State Ins. Co.*, 15 Wash. 29.

Wisconsin. — *Dawes v. Glasgow*, 1 Pin. (Wis.) 171; *Oleson v. Merrill*, 20 Wis. 462; *Stahl v. Chicago, etc., R. Co.*, 94 Wis. 315.

Receipt of Property — Legal Fiction. — The averment in a declaration in the *detinet* that defendant received the property from plaintiff or some other person, to be redeemed on request, is a mere legal fiction, and need not be proved, nor is it necessary in such case that plaintiff should once have had actual possession of the property and bailed it, etc.; the right of immediate possession on part of plaintiff, and an unlawful withholding by defendant, are sufficient. *Beebe v. De Baun*, 8 Ark. 510.

Did or Does Detain. — The declaration may be either in the *detinet* or in the *detinuit*; that is, the plaintiff may allege that the defendant still detains the property, in which case damages may be recovered for the value of the goods, as well as for the unlawful caption or detention; or he may allege that defendant did detain them until levy was made, when he can recover damages for the unlawful caption and detention. *Clark v. Adair*, 3 Harr. (Del.) 113.

Defendant's Possession. — A complaint alleging that the property is on the premises of the defendant corporation, that it is there held under a written acknowledgment given by an officer of the corporation, and that the corporation refuses to deliver, presents a sufficient change of possession by defendant to sustain an action for the property. *Kellar v. Victoria Lumber Co.*, 45 La. Ann. 476.

Theory of Case — Variance. — The plaintiff cannot, in his complaint, for the purpose of enabling him to sue in replevin, aver that the defendant is in possession of the property, and then on the trial recover judgment against him on the ground that he was not in possession. *Hawkins v. Roberts*, 45 Cal. 38.

The declaration should correspond with the writ in alleging the caption, or detention, or the latter alone. *Dawes v. Glasgow*, 1 Pin. (Wis.) 171.

Substantial Defect. — A failure to allege in the petition the wrongful detention of the property is a substantial defect which may be taken advantage of by demurrer or by motion in arrest of judgment or upon appeal. *Draper v. Ellis*, 12 Iowa 316.

Defect Not Cured by Affidavit. — A petition which fails to state that the property sought to be recovered is wrongfully detained from the plaintiff by the defendant is fatally defective, and should be so held upon an objection made at the beginning of the trial to the introduction of any evidence; and the fact that the affidavit filed in the case to obtain an order of delivery contained an allegation will not cure the defect. *Wilhite v. Williams*, 41 Kan. 288.

Statutory Form — Missouri. — The form given in the act concerning the claim and delivery of personal property is merely a general guide, but must be intelligently followed; and in an action before a justice of the peace, where the petition omits to state the jurisdictional fact that the property was detained "by the defendant," the proceeding is properly dismissed. *Reigert v. Voelker*, 6 Mo. App. 53.

Levy of Execution Subject to Mortgage. — Where an officer levies, by virtue of an execution, upon personal property which has been mortgaged, but which remains in the possession of the mortgagor, the money not being due, and replevin is brought against him for asserting his claim under the levy and refusing to surrender the property after the mortgage money has become due, the plaintiff must declare for the detention, and not for the taking of the property. *Randall v. Cook*, 17 Wend. (N. Y.) 53.

Wrongfulness of Detention. — In a complaint based on a wrongful detention, where no wrongful taking is alleged, the facts showing the detention to be wrongful must be set forth, and a mere allegation that the defendant wrongfully detains the property is not sufficient. *Seifert v. Kraft*, (Supm. Ct. Spec. T.) 13 Civ. Pro. (N. Y.) 321.

or a part of it, at the time of the commencement of the action, is in the county where the action is brought.¹

f. VALUE OF PROPERTY. — Since the value of the property is alleged in the affidavit, and when alleged in the declaration or complaint is not regarded as the criterion of value, it does not seem necessary to allege it in the declaration or complaint.² In some jurisdictions, however, it is held that the value of the property must be alleged in the complaint.³

g. DEMAND — When Possession Was Originally Rightful. — If the defendant came rightfully into the possession of the property, it is not necessary to allege in the declaration or complaint a demand and refusal, and such demand must be specific and direct in itself.⁴

1. *Stoker v. Crane*, 46 Mo. 264; *Stiles v. James*, 2 Wash. Ter. 194.

Indiana Statute. — Under Rev. Stat. Ind. 1881, § 1547, it is not necessary to allege that the property is detained in the county in which the suit is brought. *Gould v. O'Neal*, 1 Ind. App. 144.

Omission Cured by Return. — Where the sheriff's return shows the property to be within the jurisdiction, the omission in the pleading is cured. *Stiles v. James*, 2 Wash. Ter. 194.

Marginal Statement. — A statement sufficiently lays the venue before a justice of the peace by a marginal note. *Stoker v. Crane*, 46 Mo. 264.

2. *Branch v. Branch*, 6 Fla. 314; *People v. Core*, 85 Ill. 248; *Schaffer v. Faldwesch*, 16 Mo. 337.

Defendant Not Concluded by Allegation of Value. — The allegations in the petition as to the value of the property or defendant's interest therein do not limit the amount of defendant's recovery in case he is successful, even though such allegations of the petition are not denied by him. *Chicago, etc., R. Co. v. Northwestern Union Packet Co.*, 38 Iowa 377.

Allegation of Value a Mere Form. — An allegation in the declaration in replevin of the value of the property is a matter of form in pleading, and not an admission in an inquiry by the jury as to its value. *Bailey v. Ellis*, 21 Ark. 488; *Hawkins v. Johnson*, 3 Blackf. (Ind.) 46.

3. *Lomme v. Sweeney*, 1 Mont. 584; *State v. Welch*, 37 Wis. 196.

Not Necessary to Allege Value of Each Article. — Where replevin is brought for various articles, the declaration need not state the value of each, but only the value of the whole. *Wall v. De Mitkiewicz*, 9 App. Cas. (D. C.) 109; *Root v. Woodruff*, 6 Hill (N. Y.) 418.

Alleging No Value, Except to Plaintiff Specially. — It is perfectly proper in an action of replevin to allege that "the note is of no value, excepting as a matter of evidence to the plaintiff, and for that purpose, and that only, is of the value of \$500." *Kennedy v. Roberts*, 105 Iowa 521.

Failure to Allege Value Cured by Verdict. — The objection that the complaint in replevin does not allege the value of the property is cured by a verdict assessing damages to the plaintiff for the value thereof. *Bales v. Scott*, 26 Ind. 202.

4. *Campbell v. Jones*, 38 Cal. 507; *Brenot v. Robinson*, 108 Cal. 143; *Combs v. Bays*, 19 Ind. App. 263; *Stratton v. Allen*, 7 Minn. 502; *Scofield v. Whitelegge*, 49 N. Y. 259.

California Statute. — Where the allegation of demand was made in the complaint, but it was not averred that such demand was in the form prescribed in the Code of Civ. Proc., § 689, it was held good on demurrer. *Brenot v. Robinson*, 108 Cal. 143.

The allegation that the defendant "has failed, refused, and neglected so to return" the property sued for, is not an averment of the special and formal demand and refusal to deliver required in actions of this kind. *Campbell v. Jones*, 38 Cal. 507.

Iowa Statute. — In Iowa a written notice to the officer is made a necessary prerequisite to replevying property seized under execution. *Danforth v. Harlow*, 76 Iowa 236.

Wisconsin Statute. — The complaint under the code need not aver a wrongful or unlawful taking, nor a demand and refusal, but it is sufficient to aver property in the plaintiff and possession and wrongful detention by defendant

When There Was a Wrongful Taking. — When the taking as well as the detention is alleged to have been wrongful, it is not necessary to allege a demand and refusal.¹

Failure to Allege Demand Cured. — The failure of the plaintiff to allege a demand and refusal is immaterial if the defendant appears and pleads and attempts to show property in himself.²

½. IN ACTIONS TO RECOVER EXEMPT PROPERTY. — Where property has been seized under legal process, and replevin is brought for its recovery on the ground that it is exempt, it is not ordinarily necessary to allege facts showing that the property was exempt, and general averments that the property was not subject to seizure are sufficient.³

at the commencement of the action. *Oleson v. Merrill*, 20 Wis. 462.

1. *Kennedy v. Roberts*, 105 Iowa 521; *Simmons v. Lyons*, 35 N. Y. Super. Ct. 554, 55 N. Y. 671; *Van Der Minden v. Elsas*, 36 N. Y. Super. Ct. 66; *Siedenbach v. Riley*, 36 Hun (N. Y.) 211, 2 How. Pr. N. S. (N. Y.) 143.

Possession Obtained by Fraud. — One induced to sell goods by the fraud of the buyer need not allege a demand for their return before suing for them in replevin. *Wilmot v. Lyon*, 7 Ohio Cir. Dec. 394.

Where Defendant Secretes Himself. — Actual demand upon a party in possession of chattels under a lease, by the terms of which title is reserved in the lessor until full payment of the rent, with the right in the lessor to retake possession on default of payment, need not be alleged as a condition for bringing suit, where the lessee secretes himself or leaves the jurisdiction, or asserts an adverse title to the property. *Wall v. De Mitkiewicz*, 9 App. Cas. (D. C.) 109.

2. *Raper v. Harrison*, 37 Kan. 243; *Bogle v. Gordon*, 39 Kan. 31; *Farmers', etc., Bank v. Glen Elder Bank*, 46 Kan. 376; *Hurd v. Simonton*, 10 Minn. 423.

Defects Cured by Findings and Judgment. — A complaint in an action of replevin which states facts sufficient to show that in law the defendant's holding of the property is unlawful may be sustained after judgment notwithstanding the complaint omits to allege a demand for the property before suit brought. That defect is cured by proof of the fact, by the report of the referee finding the fact of a demand, and by the judgment. *Fullerton v. Dalton*, 58 Barb. (N. Y.) 236.

3. *Newcomer v. Alexander*, 96 Ind. 453; *Newell v. Hayden*, 8 Iowa 140;

Armell v. Lendrum, 47 Iowa 535; *Glover v. Narey*, 92 Iowa 286; *Elliott v. Whitmore*, 5 Mich. 532; *O'Donnell v. Segar*, 25 Mich. 368; *Furman v. Tenny*, 28 Minn. 77; *Carlson v. Small*, 32 Minn. 492; *Krause v. Herbert*, 16 Oregon 429.

Need Not Aver Residence. — Although such exemptions are allowed only to residents, yet in a petition to recover such property seized on execution, the fact of residence in the state need not be averred, but nonresidence may be set up as a defense. *Newell v. Hayden*, 8 Iowa 140.

Property Taken under Different Writs. — Where property has been seized by a sheriff under attachment writs in several separate suits, it is not necessary in a complaint to recover the property by replevin to show what part of the property was taken under each writ. *Glover v. Narey*, 92 Iowa 286.

Allegations as to Schedule. — A complaint in replevin against a sheriff by an execution debtor, alleging a taking by levy of the writ, "though the plaintiff filed a schedule," and the property was of less value than \$600, and failing to show that the judgment on which the execution was issued was founded on contract, and that the schedule was such as the law requires, is bad. *Newcomer v. Alexander*, 96 Ind. 453.

A Sufficient Complaint. — It was held that under the *Nebraska* law a petition which was brought against a sheriff to recover property seized by the officer, but claimed as exempt by plaintiff, was sufficient, where it alleged the official character of defendant, plaintiff's ownership of certain goods and their wrongful detention by defendant under an execution, the

i. **NEGATIVING SEIZURE UNDER PROCESS.** — It has been held that the plaintiff need not allege that the property was not taken in execution on any order or judgment against the plaintiff, or for any tax, fine, or amercement, or by virtue of any order of delivery in replevin, or on any mesne or final process against him, these allegations being necessary in the affidavit alone.¹

Alleging Nonpayment of Mortgage Debt. — In replevin by a mortgagee to recover the mortgaged property it is not necessary for him to allege in his complaint the maturity and nonpayment of the note secured.²

j. **FRAUD.** — The rule which requires fraud to be specially pleaded does not apply to the action of replevin. The plaintiff may declare generally and give the special facts in evidence to establish the fraud.³

k. **DAMAGES.** — It has been held that the plaintiff, without alleging special damages, may recover for the detention of the property such damages as the jury, upon all the evidence, are satisfied that the property was worth to him during the detention, considering its nature and character.⁴

fact that such goods were exempt from levy, the residence of plaintiff in the state of Nebraska, and the fact that he was the head of a family, was engaged in agriculture, and had neither lands, town-lots, nor houses subject to execution as a homestead. *Johnson v. Neal*, 32 Neb. 14.

1. *Hoisington v. Armstrong*, 22 Kan. 110; *Daniels v. Cole*, 21 Neb. 156. See also *Batchelor v. Walburn*, 23 Kan. 733.

In *Indiana* it was held that in an action before a justice of the peace the complaint must allege that the property has not been taken by virtue of an execution or other writ, as required by statute, and must be sworn to; and a bond must be filed before the writ issues, otherwise the court has no jurisdiction. *Dowell v. Richardson*, 10 Ind. 573; *McCoy v. Reck*, 50 Ind. 283. But this view seems to be reversed by *Turpie v. Fagg*, 124 Ind. 476.

In *Wisconsin* in an action before a justice of the peace, when the affidavit takes the place of a complaint it is not necessary for the plaintiff to prove an averment therein, that the property 'had not been taken by virtue of any tax,' etc., 'nor seized under any execution,' etc. *Carney v. Doyle*, 14 Wis. 270.

Wrongful Levy upon Mortgaged Chattels. — Where the plaintiff alleges that he, by virtue of a certain chattel mortgage, is entitled to the immediate pos-

session of certain chattels, which the defendant, at the instance of certain creditors of the mortgagor, wrongfully levied upon and seized, it is unnecessary for the complaint to contain an allegation that the mortgage is still unpaid, where the complaint does show that the mortgaged debt was not due when it was filed. *Marcum v. Coleman*, 8 Mont. 196.

2. *Person v. Wright*, 35 Ark. 169; *Stevenson v. Lord*, 15 Colo. 131; *Tufts v. Johnson*, 29 Ill. App. 112; *Rodgers v. Graham*, 36 Neb. 730; *Swope v. Burnham*, 6 Okla. 736.

Alleging Illegality of Tax. — If a complaint is filed against a town for property seized by an officer in satisfaction of an assessed tax, it must allege that the tax is illegal. *Andrews v. Sellers*, 11 Ind. App. 301.

3. *Sopris v. Truax*, 1 Colo. 91; *Bliss v. Cottle*, 32 Barb. (N. Y.) 322.

Fraud Sufficiently Alleged. — Where the complaint alleged that the goods were obtained on credit by means of the false representations made to a commercial agency, with intent "to obtain credit and to induce merchants and others to sell goods to them," the intent to deceive and defraud the plaintiff was held to be sufficiently alleged. *Morrison v. Lewis*, 49 N. Y. Super. Ct. 178, 4 Civ. Pro. (N. Y.) 437.

4. *Clark v. Martin*, 120 Mass. 543; *Riley v. Littlefield*, 84 Mich. 22.

An **Ad Damnum Allegation** is not

Alleging Special Damages. — Where it is desired to recover such damages as are not the usual or natural consequences of the detention, or what are otherwise known as special damages, they must be specially pleaded.¹

4. Prayer for Relief. — The declaration or complaint should contain a prayer for the relief sought.²

5. Verification. — It is made necessary by statute in some jurisdictions for the complaint to be verified either by the plaintiff, his agent or attorney,³ and it has been held that when it is so verified it may perform the double function of a complaint and affidavit, dispensing with the necessity of a separate affidavit.⁴

6. Objections. — Objections to the form or sufficiency of the declaration or complaint must be made at the first available opportunity, for if the party desiring to make them should go to trial or proceed with the cause without raising his question at the proper time, it will be considered waived.⁵

7. Amendment. — The declaration or complaint may be amended in the discretion of the court, and an amendment is liberally granted with a view to substantial justice between the parties,

essential in a complaint in an action of claim and delivery, where the plaintiff sets forth that he was the owner and in possession of certain goods of the value of four thousand dollars and asked for a return of the property or its value. *Woods v. Berry*, 7 Mont. 195.

In *Maryland* if the declaration does not allege that damages have been sustained it is bad. *Faget v. Brayton*, 2 Har. & J. (Md.) 350.

1. *Burke v. Koch*, 75 Cal. 356; *Tucker v. Parks*, 7 Colo. 62; *Burrage v. Nelson*, 48 Miss. 237; *Burkeholder v. Rudrow*, 19 Mo. App. 60; *Cooke v. Clary*, 48 Mo. App. 166; *Rosecrans v. Asay*, 49 Neb. 512; *Armagost v. Rising*, 54 Neb. 763; *Striker v. Beattie*, 4 Cinc. L. Bul. 956, 7 Ohio Dec. (Reprint) 683.

Injury to Property. — Special damages for injury to lumber cannot in an action of replevin be recovered under a general allegation of damages, that "defendant wrongfully detains said goods and chattels from the possession of the plaintiff, and has so wrongfully detained the same for seventeen days, to plaintiff's damage." *Whitney v. Levon*, 34 Neb. 443.

Special Damages for Trespass. — If it is intended to charge the avowant in replevin with such tortious proceeding under the distress as makes him a trespasser *ab initio*, it is necessary that such a matter be pleaded specially, as

in the action of trespass. *Lander v. Ware*, 1 Strobb. L. (S. Car.) 15.

2. *Rice v. Powell*, Dall. (Tex.) 413.

Objection Waived. — Although the petition in replevin may be defective in failing to ask a judgment for the possession of the property, yet if the plaintiff is found to be entitled to such possession and no objection to the petition is made in the court below, that objection cannot be raised on appeal. *Williams v. Wilcox*, 66 Iowa 65.

3. *Cure v. Wilson*, 25 Iowa 205; *Duffy v. Dale*, 42 Iowa 215; *Dowell v. Richardson*, 10 Ind. 573; *McCoy v. Reck*, 50 Ind. 283; *Hall v. Durham*, 117 Ind. 429; *Bingham v. Hill*, 38 Ohio St. 657, 1 Clev. L. Rep. 74, 4 Ohio Dec. (Reprint) 144.

4. *Stephens v. Scott*, 13 Ind. 515; *Minchrod v. Windoes*, 29 Ind. 288; *Cox v. Albert*, 78 Ind. 241; *Louisville, etc., R. Co. v. Payne*, 103 Ind. 183.

5. *Farmers Alliance Warehouse, etc., Co. v. McElhannon*, 98 Ga. 394; *Crum v. Elliston*, 33 Mo. App. 591; *Wilmot v. Lyon*, 7 Ohio Cir. Dec. 394; *Pistorius v. Swarthout*, 67 Mich. 186; *Kraemer v. Kraemer Drug Co.*, 59 N. J. L. 9; *Kennedy v. Roberts*, 105 Iowa 521; *Williams v. Wilcox*, 66 Iowa 65.

Motion to Make More Definite and Certain. — A petition to replevy money is not demurrable, because the money is not described as being marked or in a parcel. Motion to make more definite is the proper mode of objecting.

where the purpose is to make the allegations more definite and specific or to supply omissions.¹

Amendment Refused.—Where the plaintiff's allegations are so defective that they do not authorize the issuance of process, or where the court deems an amendment unnecessary or unjustifiable, an amendment will be refused.²

Knapp v. Springmeier, 3 Cinc. L. Bul. 1122, 7 Ohio Dec. (Reprint) 570.

1. *Howell v. Foster*, 65 Cal. 169; *Henderson v. Hart*, 122 Cal. 332; *Autrey v. Bowen*, 7 Colo. App. 408; *Jefferson v. Chase*, 1 Houst. (Del.) 219; *Douglas v. Newman*, 5 Ill. App. 518; *McCarthy v. Hetzner*, 70 Ill. App. 480; *Leek v. Chesley*, 98 Iowa 593; *Swan v. Savage*, 55 Neb. 687; *Weich v. Milliken*, (Neb. 1898) 77 N. W. Rep. 363; *Lothrop v. Locke*, 59 N. H. 532; *Swope v. Burnham*, 6 Okla. 736; *Willis v. De Witt*, 3 S. Dak. 281; *McKesson v. Sherman*, 51 Wis. 303; *Wadleigh v. Buckingham*, 80 Wis. 230.

To Correspond to Finding as to Value.—If the value of the property as found in the verdict is greater than the value stated in the complaint, the complaint will be regarded as amended to correspond with the verdict. *Singer Mfg. Co. v. Doxey*, 65 Ind. 65.

Amendment in Appellate Court.—In an action brought before a justice of the peace and appealed to the district court, if the ends of justice require it, as where by an increase in the value of the property pending the appeal it exceeds the jurisdiction of the lower court, the appellate court, by amendment, may permit an increase of the alleged value, and a recovery may be had accordingly. *Deck v. Smith*, 12 Neb. 389.

Amendments Liberally Accorded.—The action of replevin is not an extraordinary remedy in derogation of the common law, like the proceeding by attachment. On principle the owner of personal property ought to have the same right to recover the possession of it *in specie* when wrongfully detained, as he has to recover a debt, and in either proceeding the law should be equally liberal in allowing amendments in furtherance of justice. *Martinez v. Martinez*, 2 N. Mex. 464.

Amendment After Failure of Suit on Bond.—The complaint and judgment in replevin may be amended after the failure of a suit against the sureties in the defendant's undertaking for want

of a proper judgment. *Jaggar v. Cunningham*, 8 Daly (N. Y.) 511.

New Bond Required.—Upon an amendment of the description of the property replevied the plaintiff will be required to file a new bond unless he agrees to strike out the articles not covered by the old bond. *Abeles v. Loag*, 12 W. N. C. (Pa.) 407.

2. *Selking v. Hebel*, 1 Mo. App. 340; *Gist v. Loring*, 60 Mo. 487; *Pugh v. Calloway*, 10 Ohio St. 488.

Omission of Jurisdictional Fact.—The omission to allege a jurisdictional fact in an action of replevin commenced before a justice of the peace cannot be rectified by amendment under Rev. Stat. 1879, § 3060, in the Circuit Court on appeal of the cause, but necessitates a dismissal of the suit. It was accordingly held that the plaintiff's omission to allege, in the statement of his cause of action in such a suit, that the property sued for was detained by the defendant, could not be cured by amendment under said section. *Dowdy v. Womble*, 41 Mo. App. 573.

Amendment as to a Party Not Charged.—Where A brought an action against B to recover certain chattels, filed the proper affidavit, and obtained an order of delivery under which he recovered possession of the property, he cannot afterwards, before the trial, amend his petition by making C a joint defendant with B to recover the property, unless, in an affidavit filed before he obtained the chattels in controversy, he had charged C with the wrongful detention of the same. *Bardwell v. Stubbart*, 17 Neb. 485.

Effect of Amendment.—When an amended declaration or complaint is filed the original ceases to remain a part of the record, and the amendment has relation back to the commencement of the suit. *Andrews v. Sellers*, 11 Ind. App. 301; *Swain v. Savage*, 55 Neb. 687; *Weich v. Milliken*, (Neb. 1898) 77 N. W. Rep. 363.

Amendment After Demurrer Sustained.—Where, on sustaining a demurrer to a petition, no assessment of

IX. PLEA OR ANSWER — 1. In General — Application of General Rules. — In replevin, as a general rule, as will be seen from the illustrations given in the notes, there is the same necessity for a plea or answer as in other actions, and in framing the plea or answer the general rules of pleading are applied.¹

the value or of damages has been made, and the court grants leave to amend the petition, the leave to amend impliedly sets aside the judgment for costs against the plaintiff, and reinstates the cause; hence it would be premature for the defendant to institute suit on the bond. *Hansard v. Reed*, 29 Mo. 472.

1. Necessity of Plea or Answer. — If the defendant has failed to file a plea he cannot have a trial of the issues, even if plaintiff does not appear. *Elsberg v. Fietze*, (N. Mex. 1867) 43 Pac. Rep. 690.

In Justices' Courts. — No written defense is required in an action of replevin before a justice of the peace. *Texas, etc., R. Co. v. Hall*, 44 Ark. 375.

Leave to File Answer After Default. — If the defendant has allowed his time for answering to pass, but files a motion to set aside the proceedings for irregularity and prays in his motion for such other and further relief as may be just, it is proper to allow him to serve his answer on the usual terms. *Paddock v. Guyder*, (Supm. Ct. Gen. T.) 8 N. Y. Supp. 905.

Denial on Information and Belief. — If the complaint alleges that the plaintiff "forwarded and delivered unto the bank of Port Angeles, into the hands of one B. F. Schwartz, the then manager of said bank, the said warrant, with the following indorsement thereon, to wit, 'For collection and credit, account of Seattle National Bank, Seattle, Wash. Signed: Robert G. Hooker, cashier,'" a denial of such allegations on information and belief is sufficient, although defendant is in possession of the warrant, and could have had actual knowledge of the indorsement, as the material allegation of the complaint goes to the fact of the forwarding and delivery of the warrant, and not to that of its indorsement. *Seattle Nat. Bank v. Meerwaldt*, 8 Wash. 630.

Immaterial Issues as to Value and Possession. — Where the complaint averred that on a certain day the plaintiff was the owner and in possession of the property, and that its value was

one thousand dollars, and the answer denied that on the day specified the "plaintiff was the owner and lawfully in possession," and, as to its value, averred that the defendant has no knowledge, etc., and therefore denies that it is worth one thousand dollars, the answer was held insufficient, because it raised an immaterial issue as to time, and as to the possession of property it amounted merely to a conclusion of law. *Kuhland v. Sedgwick*, 17 Cal. 123.

Plea Puis Darrein Continuance. — If an animal sought to be replevied dies pending the action, the defense must be made by plea *puis darrein continuance*. *Gentry v. Barnett*, 6 T. B. Mon. (Ky.) 115.

Plea of Former Recovery. — A plea of former recovery, in replevin for two articles, can be supported neither by a judgment of *non prosequi* against the plaintiff in a former suit of replevin for one of the articles alone, nor by a judgment against him on the replevin bond. *Poor v. Darrah*, 5 Houst. (Del.) 394.

Alleging Negative Pregnant. — An averment in an answer which implies the affirmative of an allegation intended to be denied is faulty as a negative pregnant and hence insufficient. *Bach v. Montana Lumber, etc., Co.*, 15 Mont. 345.

Illustration. — In an action of replevin to recover possession of a city warrant which plaintiff alleges came into its hands by indorsement, an answer alleging "that whether said warrant came into the hands of plaintiff as alleged, * * * this defendant has no knowledge or information sufficient whereof to form a belief, and he therefore denies the same," is an insufficient denial for the reason that it constitutes a negative pregnant. *Seattle Nat. Bank v. Meerwaldt*, 8 Wash. 630.

Surplusage. — The presence of statements in the answer which are harmless and immaterial will be disregarded and stricken out as surplusage. *Ainsworth v. Love*, 12 Pa. Co. Ct. 273.

Illustration. — A plea which avers that the goods were the property of a

Averment of Legal Conclusions. — A plea or answer must not state merely a conclusion of law.¹

Answers under the Code. — An answer which denies and puts in issue the essential averments of the complaint is sufficient to require the plaintiff to maintain the cause of action set up. No such technical effect should be given an answer under the code as was given some of the common-law pleas in replevin.²

Affirmative Relief. — When the defendant seeks affirmative relief he must allege in his answer the facts entitling him thereto, and when these facts are properly denied in the plaintiff's reply, the defendant is further required to prove them affirmatively at the trial.³

Pleading Set-off. — In an action of replevin to recover possession of personal property, a set-off cannot be pleaded.⁴

2. General Issue — Non Cepit. — At common law the general issue is *non cepit*, which admits the property and right of possession to be in the plaintiff and puts in issue only the taking, and does not authorize a judgment for the return of the property to the defendant;⁵ nor does such a plea authorize a judgment in

third person, and not the property of the plaintiff, presents a good defense, and it makes no difference that the plea sets up defectively a levy of the defendant upon the goods as the goods of such third person, as that averment may be rejected as surplusage; nor does it make any difference whether defendant had or had not, as between himself and such third person, a right to take the goods. *Lamping v. Payne*, 83 Ill. 463.

1. *Spahr v. Tarrt*, 23 Ill. App. 420; *Talbott v. Padgett*, 30 S. Car. 167. And see generally article LEGAL CONCLUSIONS.

2. *Bolander v. Gentry*, 36 Cal. 105; *Fleming v. Hawley*, 65 Cal. 492; *Acock v. Halsey*, 90 Cal. 215; *Noble v. Worthy*, (Indian Ter. 1898) 45 S. W. Rep. 137; *Jansen v. Effey*, 10 Iowa 227; *Bailey v. Bayne*, 20 Kan. 657; *Roberts v. White*, 146 Mass. 256; *School Dist. No. 2 v. Shoemaker*, 5 Neb. 36; *Creighton v. Newton*, 5 Neb. 100; *Russell v. Amundson*, 4 N. Dak. 112; *Capital Lumbering Co. v. Hall*, 10 Oregon 202; *Wright v. Card*, 16 R. I. 719. And see article ANSWERS IN CODE PLEADING, vol. I, p. 777.

3. *Roberts v. White*, 146 Mass. 256; *Capital Lumbering Co. v. Hall*, 10 Oregon 202.

Dismissal After Answer. — Where the property has been delivered to the plaintiff, an answer praying for the return of the property, or the value

thereof in case a return cannot be had, and for damages and costs, seeks affirmative relief, and a judgment of dismissal by the plaintiff, entered by the clerk after such answer is filed, is void, although an order of dismissal had been entered upon the register of actions before the filing of the answer. *Acock v. Halsey*, 90 Cal. 215.

4. *Boil v. Simms*, 60 Ind. 162; *Sterner v. Abbott*, 13 W. N. C. (Pa.) 209. And see generally article SET-OFF AND COUNTERCLAIM.

Property Taken by Plaintiff. — The subject matter of litigation in replevin is the property mentioned in the complaint, and the defendant cannot in his answer allege that the plaintiff has taken from him other property than that mentioned in the complaint, and ask or obtain judgment for its return. *Lovensohn v. Ward*, 45 Cal. 8.

Plea in Cross-replevin. — In a cross-replevin the defendant may plead in abatement or in bar the pendency of the first suit, and on a determination of the plea in his favor is entitled to a judgment of return. *Beers v. Wuerpul*, 24 Ark. 272.

5. *Arkansas*. — *Wilson v. Royston*, 2 Ark. 315; *Ringo v. Field*, 6 Ark. 43; *Carroll v. Harris*, 19 Ark. 237.

Connecticut. — *Watson v. Watson*, 10 Conn. 76.

Delaware. — *Eaves v. King*, 1 Harr. (Del.) 141.

Florida. — *Hopkins v. Burney*, 2

favor of the defendant for damages.¹

The Plea of *Cepit in Alio Loco* does not admit the taking as laid in the declaration, nor is the *locus in quo* traversable.²

Fla. 42; *Holliday v. McKinne*, 22 Fla. 153.

Illinois. — *Galusha v. Butterfield*, 3 Ill. 227; *Mattson v. Hanisch*, 5 Ill. App. 102; *Anderson v. Talcott*, 6 Ill. 365; *Vose v. Hart*, 12 Ill. 378; *Ingalls v. Bulkley*, 15 Ill. 224; *Miller v. Gable*, 30 Ill. App. 578; *Bourk v. Riggs*, 38 Ill. 321; *Chandler v. Lincoln*, 52 Ill. 74; *Lammers v. Meyer*, 59 Ill. 214; *Van Namee v. Bradley*, 69 Ill. 299.

Indiana. — *Trotter v. Taylor*, 5 Blackf. (Ind.) 431.

Kentucky. — *Harper v. Baker*, 3 T. B. Mon. (Ky.) 421; *Bonner v. Coleman*, 3 B. Mon. (Ky.) 464.

Maine. — *Seaver v. Dingley*, 4 Me. 306; *Vickery v. Sherburne*, 20 Me. 34; *Sawyer v. Huff*, 25 Me. 464; *Dillingham v. Smith*, 30 Me. 370; *Moulton v. Bird*, 31 Me. 206; *Cooper v. Bakeman*, 32 Me. 192; *Strang v. Hirst*, 61 Me. 9; *Page v. McGlinch*, 63 Me. 472; *Pope v. Jackson*, 65 Me. 162; *Lewis v. Smart*, 67 Me. 206.

Massachusetts. — *M'Farland v. Barker*, 1 Mass. 153; *Holmes v. Wood*, 6 Mass. 1; *Simpson v. M'Farland*, 18 Pick. (Mass.) 427; *Whitwell v. Wells*, 24 Pick. (Mass.) 25.

Minnesota. — *Coit v. Waples*, 1 Minn. 134.

Missouri. — *Gray v. Parker*, 38 Mo. 160.

New Hampshire. — *Mitchell v. Roberts*, 50 N. H. 486; *Carter v. Piper*, 57 N. H. 217.

New York. — *Shuter v. Page*, 11 Johns. (N. Y.) 196; *Bemus v. Beekman*, 3 Wend. (N. Y.) 667; *Skidmore v. Devoy*, 1 N. Y. Leg. Obs. 123; *Ely v. Ehle*, 3 N. Y. 506; *People v. Niagara C. Pl.*, 4 Wend. (N. Y.) 217.

North Carolina. — *Rowland v. Mann*, 6 Ired. L. (N. Car.) 38.

Ohio. — *Thornton v. Sprague*, Wright (Ohio) 645.

Pennsylvania. — *Mackinley v. McGregor*, 3 Whart. (Pa.) 369; *Buckley v. Handy*, 2 Miles (Pa.) 449; *Woodward v. Carl*, 3 Luz. L. Reg. (Pa.) 227.

Wisconsin. — *Emmons v. Dowe*, 2 Wis. 322; *Dimond v. Downing*, 2 Wis. 498; *Douglass v. Garrett*, 5 Wis. 85; *Swain v. Roys*, 4 Wis. 150; *Rouge v. Dawson*, 9 Wis. 246.

Other Defenses Must Be Pleaded Specially. — If the defendant would

avail himself of any other defense it should be by special plea or brief statement denying property in plaintiff. *Seaver v. Dingley*, 4 Me. 306; *Vickery v. Sherburne*, 20 Me. 34; *Dillingham v. Smith*, 30 Me. 370; *Moulton v. Bird*, 31 Me. 206; *Cooper v. Bakeman*, 32 Me. 192. See *Shuter v. Page*, 11 Johns. (N. Y.) 196.

Raises No Issue as to Title. — The plea of *non cepit* in replevin admits the property of the thing taken to be in the plaintiff, and if the defendant desires to dispute the question of property he must plead it specially. *Hopkins v. Burney*, 2 Fla. 42; *Shuter v. Page*, 11 Johns. (N. Y.) 196.

Under the *Wisconsin* statute, giving the action of replevin in two distinct classes of cases — for the unlawful taking and for the wrongful detention, — in an action of replevin in the *cepit*, a plea of the general issue, *non cepit*, admits the title, and simply puts in issue the wrongful taking, and, when they are material, the time and place. *Coit v. Waples*, 1 Minn. 134.

Insufficiency of Bond. — Objection to the maintenance of replevin by all of several plaintiffs, because only one of them has given the bond required by Rev. Stat. Me., c. 69, §§ 1, 2, cannot be taken under the plea of *non cepit*. The plea of *non cepit* admits the capacity of all to sue. *Pope v. Jackson*, 65 Me. 162. See also *Page v. McGlinch*, 63 Me. 472; *Strang v. Hirst*, 61 Me. 9.

1. *Hopkins v. Burney*, 2 Fla. 42; *Mitchell v. Roberts*, 50 N. H. 486.

Plaintiff's Right to Damages. — The plea of *non cepit* controverts the plaintiff's right to recover damages. *Buckley v. Handy*, 2 Miles (Pa.) 449.

2. *Williams v. Welch*, 5 Wend. (N. Y.) 290.

Kentucky Statute. — Under the Act of 1811 a distress warrant may be levied anywhere within the county; consequently the common-law doctrine that made the *locus in quo* traversable is inapplicable here, and a plea of *cepit in alio loco* is immaterial. *Lougee v. Colton*, 9 Dana (Ky.) 123.

Issue as to Right of Property — Place of Taking Immaterial. — If a defendant omits to plead *non cepit*, or *cepit in alio loco*, but pleads property in him-

Appropriateness of Non Detinet. — If the action is in the *cepit*, the plea of *non detinet* is inappropriate;¹ but if the action is for unlawful detainer, *non detinet* or its equivalent under the code is the proper plea or answer.²

Effect of Non Detinet. — The plea of *non detinet* puts in issue not only the wrongful taking and detention, but also plaintiff's right of property,³ and, like the plea of *non cepit*, does not authorize a judgment for the return of the property to the defendant.⁴

Not Guilty or General Denial. — In some jurisdictions the plea of "not guilty," and in others in which the code system of pleading prevails the general denial, puts in issue every fact stated in the declaration or complaint necessary to sustain plaintiff's cause of action, and under such general issue or general denial great latitude of defenses may be allowed and anything may be shown that aids in establishing the fact that plaintiff had no right to possession from the beginning.⁵

self or another, and issue be taken on the right of property, the place of taking the goods is not material. *Emmett v. Briggs*, 21 N. J. L. 53.

1. *Davis v. Calvert*, 17 Ark. 85.

2. *Walpole v. Smith*, 4 Blackf. (Ind.) 304. See *Guille v. Wong Fook*, 13 Oregon 577.

Form of Answer. — An answer denying "that at the time stated in the complaint, or at any other time, the property described in the complaint came into the possession of the defendant, or that the same was or remained in his possession at the time of the commencement of this action, as alleged in said complaint," is a sufficient denial of possession. *Roberts v. Johannas*, 41 Wis. 616. See also *Martin v. Porter*, 84 Cal. 476.

3. *Patterson v. Fowler*, 22 Ark. 396; *Neis v. Gillen*, 27 Ark. 184; *Kelley v. Blakeley*, 2 West. L. Month. 151, 2 Ohio Dec. (Reprint) 251; *Emmons v. Dowe*, 2 Wis. 322; *Dimond v. Downing*, 2 Wis. 498; *Douglass v. Garrett*, 5 Wis. 85; *Swain v. Roys*, 4 Wis. 150; *Ronge v. Dawson*, 9 Wis. 246.

In Illinois the plea of *non detinet* does not put in issue the title to the property. *Ingalls v. Bulkley*, 15 Ill. 224; *Bourk v. Riggs*, 38 Ill. 321; *Chandler v. Lincoln*, 52 Ill. 74; *Van Namee v. Bradley*, 69 Ill. 299; *Mattson v. Hanisch*, 5 Ill. App. 102; *Miller v. Gable*, 30 Ill. App. 578; *Dyer v. Brown*, 71 Ill. App. 317.

Admission of Taking. — Where the declaration alleges an unlawful taking, such allegation is admitted by denying

the wrongful detention only. *Simmons v. Jenkins*, 76 Ill. 479.

In Ohio the answer of *non detinet*, or that defendant does not detain the chattel, puts in issue not only the fact of detention, but also the plaintiff's title to the chattel, and is the only proper answer. *Kelley v. Blakeley*, 2 West. L. Month. 151, 2 Ohio Dec. (Reprint) 251; *Ferrell v. Humphrey*, 12 Ohio 113. See *Oaks v. Wyatt*, 10 Ohio 344.

4. *Johnson v. Howe*, 7 Ill. 342; *Bourk v. Riggs*, 38 Ill. 321; *Chandler v. Lincoln*, 52 Ill. 74; *Mattson v. Hanisch*, 5 Ill. App. 102; *Hinchman v. Doak*, 48 Mich. 168; *Gallagher v. Bishop*, 15 Wis. 276.

No Writ of Retorno Habendo. — It is error, under a plea of *non detinet*, to find the title to the property in the defendant and to award a writ of *retorno habendo*. *Dyer v. Brown*, 71 Ill. App. 317.

Under the Code. — In *Arkansas* an answer that the defendant "does not unlawfully and wrongfully withhold plaintiff's property as described" is bad, because the answer should either deny the fact of the detention or allege the special matter showing that the detention is lawful. *Tyner v. Hays*, 37 Ark. 599.

Several Pleas of Defendants. — In replevin against two, each may plead *non detinet* separately; and a plea of property in one is good upon general demurrer. *Boyd v. McAdams*, 16 Ill. 146.

5. *California.* — *Eaton v. Metz*, (Cal. 1895) 40 Pac. Rep. 947.

3. Denying Property in Plaintiff. — While all of the allegations of the complaint in replevin may be put in issue by a general denial, yet if the defendant elects to file a specific answer denying the plaintiff's title or right of possession, he must observe the general rules of pleading, and the denials must be sufficient to present the defenses distinctly.¹

Colorado. — *Machette v. Wanless*, 1 Colo. 225.

Connecticut. — *McNamara v. Lyon*, 69 Conn. 447; *Smith v. Brockett*, 69 Conn. 492.

Florida. — *Holliday v. McKinne*, 22 Fla. 153.

Kansas. — *Deford v. Hutchison*, 45 Kan. 318; *White v. Gemeny*, 47 Kan. 741.

Michigan. — *Loomis v. Foster*, 1 Mich. 165; *Snook v. Davis*, 6 Mich. 156; *Craig v. Grant*, 6 Mich. 447; *Belden v. Laing*, 8 Mich. 500; *Singer Mfg. Co. v. Benjamin*, 55 Mich. 330.

Minnesota. — *Aultman v. O'Dowd*, (Minn. 1898) 75 N. W. Rep. 756.

Mississippi. — *George v. Hewlett*, 70 Miss. 1.

Missouri. — *Eidson v. Hedger*, 38 Mo. App. 52; *Pulliam v. Burlingame*, 81 Mo. 111; *Oester v. Sitlington*, 115 Mo. 247.

Nebraska. — *Aultman v. Stichler*, 21 Neb. 72; *Merrill v. Wedgwood*, 25 Neb. 283; *Horkey v. Kendall*, 53 Neb. 522.

Nevada. — *Westover v. Vandoran*, 29 Nev. 652.

New Hampshire. — *Carter v. Piper*, 57 N. H. 217.

New York. — *Haas v. Altieri*, (C. Pl. Gen. T.) 2 Misc. (N. Y.) 252.

North Dakota. — *Russell v. Amundson*, 4 N. Dak. 112; *Plano Mfg. Co. v. Daley*, 6 N. Dak. 330.

Ohio. — *Bailey v. Swain*, 45 Ohio St. 657.

South Carolina. — *Burckhalter v. Mitchell*, 27 S. Car. 240.

Vermont. — *Campbell v. Camp*, 69 Vt. 97.

Washington. — *Chamberlin v. Winn*, 1 Wash. 501; *Kerron v. North Pac. Lumbering, etc., Co.*, 1 Wash. 241.

Wisconsin. — *Heeron v. Beckwith*, 1 Wis. 17; *Ford v. Ford*, 3 Wis. 399; *Martin v. Watson*, 8 Wis. 315; *Frisbie v. Langworthy*, 11 Wis. 375; *Child v. Child*, 13 Wis. 17.

If Detention Alone Is Charged in the declaration and defendants enter a plea of "not guilty" of the grievance charged, this is equivalent to a plea of

non detinet. *Dyer v. Brown*, 71 Ill. App. 317.

Defendant May Plead Title Specially. — The defendant may in his answer deny generally the allegations of the petition, and under such answer prove that he is the owner of the property in dispute, and entitled to the immediate possession thereof. This mode of pleading, however, is not compulsory. He may, if he so elect, plead specifically the facts constituting his defense, and, if he does so, the ordinary rules of pleading will apply; and, if the new matter so pleaded constitutes an affirmative defense, the plaintiff must file a reply thereto, or such new matter will be taken as true. *Westover v. Vandoran*, 29 Neb. 652.

Special Property in Defendant. — Under the plea of the general issue, without notice or special allegation, the defendant may show his official character as special administrator, and that as such he claims to hold the property replevied. *Singer Mfg. Co. v. Benjamin*, 55 Mich. 330.

Fraud Need Not Be Specially Pleaded. — The defendant under the general issue may assail the plaintiff's title for fraud, and show such facts as would under the law render such title void and ineffective against the defendant, and in this case the defendant need not plead the statutes of fraud to avail himself of their benefits. *Eidson v. Hedger*, 38 Mo. App. 52.

1. *California.* — *Kuhland v. Sedgwick*, 17 Cal. 123; *Woodworth v. Knowlton*, 22 Cal. 164; *Richardson v. Smith*, 29 Cal. 529; *Pico v. Pico*, 56 Cal. 453; *Carman v. Ross*, 64 Cal. 249; *Cunningham v. Skinner*, 65 Cal. 385; *Laughlin v. Thompson*, 76 Cal. 287.

Indiana. — *Riddle v. Parke*, 12 Ind. 89; *Landers v. George*, 40 Ind. 160; *Darter v. Brown*, 48 Ind. 395; *Martz v. Putnam*, 117 Ind. 392.

Illinois. — *Chandler v. Lincoln*, 52 Ill. 74; *Reynolds v. McCormick*, 62 Ill. 412; *Constantine v. Foster*, 57 Ill. 36; *Van Namee v. Bradley*, 69 Ill. 299; *Atkins v. Byrnes*, 71 Ill. 326.

4. Alleging Property or Right of Possession in Defendant. — Since the defendant must recover on his own title or right of possession, and not on the lack of such in the plaintiff, a plea denying property in the plaintiff, without more, is bad.¹ The defendant, therefore, should show affirmatively in his answer that he is entitled to the right of possession, either for himself or another in his own name.²

Iowa. — McIntire v. Eastman, 76 Iowa 455.

Maine. — Pope v. Jackson, 65 Me. 162.

Massachusetts. — Chase v. Allen, 5 Allen (Mass.) 599.

Minnesota. — Williams v. Mathews, 30 Minn. 131.

Missouri. — Barley v. Cannon, 17 Mo. 595.

Montana. — Driscoll v. Dunwoody, 7 Mont. 394.

Nebraska. — Moore v. Kepner, 7 Neb. 291; Gandy v. Pool, 14 Neb. 98; Burlington, etc., R. Co. v. Bear, 17 Neb. 668, 18 Neb. 494.

New York. — Ingraham v. Hammond, 1 Hill (N. Y.) 353; Pringle v. Phillips, 1 Sandf. (N. Y.) 292; Anstice v. Holmes, 3 Den. (N. Y.) 244; Rogers v. Arnold, 12 Wend. (N. Y.) 31.

North Carolina. — Rowland v. Mann, 6 Ired. L. (N. Car.) 38.

North Dakota. — Hill v. Walsh, 6 S. Dak. 421.

Wyoming. — Dobson v. Owens, (Wyo. 1895) 40 Pac. Rep. 442.

Denial of Information and Belief. — In an action to recover possession of personal property, a denial in the answer that the plaintiff is the owner, and the further allegation that the defendant "has not sufficient information or belief to enable him to answer," the allegation of plaintiff that he is entitled to the possession of the property, "and on that ground he denies the same," is sufficient to put in issue the ownership and right of possession of plaintiff. Cunningham v. Skinner, 65 Cal. 385.

Denial of Unlawful Detainer. — In an action of replevin the defendant answered "that he does not unlawfully detain the said goods and chattels of the said plaintiff," etc. It was held that the answer put in issue the plaintiff's right of property and right of possession. Moore v. Kepner, 7 Neb. 291.

Insufficient Answer. — In replevin for property claimed by plaintiff as vendee, an answer averring that defendant had taken possession of the property as as-

signee of the vendor, and objecting to the jurisdiction of the court in an action brought against him as such assignee, but which does not deny plaintiff's ownership or right of possession of the property sued for, or that defendant's detention of the property is wrongful, is insufficient. Martz v. Putnam, 117 Ind. 392.

1. Anstice v. Holmes, 3 Den. (N. Y.) 244; Dermott v. Wallach, 1 Black (U. S.) 96.

Traverse of Plaintiff's Right. — A plea of property in the defendant or a stranger must traverse the right of the plaintiff; and if issue be taken, affirming the property to be in the plaintiff, he must fail, unless he establish an exclusive right. Rogers v. Arnold, 12 Wend. (N. Y.) 31; Anderson v. Talcott, 6 Ill. 365.

If the complaint, in an action to recover the possession of personal property, avers that the "plaintiff was the owner and in possession of the property," this averment is not traversed by an answer which denies that the "plaintiff was the owner and entitled to the possession of the property." Richardson v. Smith, 29 Cal. 529.

Necessity for Special Plea. — In an action of replevin, if the claim of the defendant to a right of possession is based on a special property, such fact should be specially pleaded, as it cannot be shown under a general denial. Guille v. Wong Fook, 13 Oregon 577.

Ownership general or special in defendant or a third person must be specially pleaded. An answer in replevin denying the plaintiff's ownership will not admit evidence of defendant's title, which, being new matter, must be specially pleaded. Shur v. Statler, 1 West. L. Month. 317, 2 Ohio Dec. (Reprint) 70.

2. *Arkansas.* — Anderson v. Dunn, 19 Ark. 650; Hill v. Fellows, 25 Ark. 11.

California. — Gould v. Scannell, 13 Cal. 430; Woodworth v. Knowlton, 22 Cal. 164; Pico v. Pico, 56 Cal. 453; Swasey v. Adair, 88 Cal. 179; Banning v. Marleau, 101 Cal. 238.

Implied Denial of Plaintiff's Right. — It has been held that a single plea of property in the defendant will raise the issue of right to possession, the reason apparently being that an averment of

Delaware. — *McIlvaine v. Holland*, 5 Harr. (Del.) 226.

Illinois. — *Amos v. Sinnott*, 5 Ill. 440; *Jackson v. Hobson*, 5 Ill. 411; *Anderson v. Talcott*, 6 Ill. 365; *Edwards v. McCurdy*, 13 Ill. 496; *Schermerhorn v. Mitchell*, 15 Ill. App. 418; *Boyd v. McAdams*, 16 Ill. 146; *Dobbins v. Hanchett*, 20 Ill. App. 396; *O'Connor v. Union Line Transp. Co.*, 31 Ill. 230; *Chandler v. Lincoln*, 52 Ill. 74; *Constantine v. Foster*, 57 Ill. 36; *Reynolds v. McCormick*, 62 Ill. 412; *Van Namee v. Bradley*, 69 Ill. 299; *Kern v. Potter*, 71 Ill. 19; *Atkins v. Byrnes*, 71 Ill. 326; *Lamping v. Payne*, 83 Ill. 463.

Indiana. — *Martin v. Ray*, 1 Blackf. (Ind.) 291; *Mikesill v. Chaney*, 6 Ind. 52; *Hall v. Henline*, 9 Ind. 256; *Riddle v. Parke*, 12 Ind. 89; *Landers v. George*, 40 Ind. 160; *Thompson v. Sweetser*, 43 Ind. 312; *Darter v. Brown*, 48 Ind. 395.

Iowa. — *Jansen v. Effey*, 10 Iowa 227; *McIntire v. Eastman*, 76 Iowa 455.

Kentucky. — *Whitesides v. Collier*, 7 Dana (Ky.) 285; *Tuley v. Mauzey*, 4 B. Mon. (Ky.) 6; *Scott v. Hughes*, 9 B. Mon. (Ky.) 105.

Maine. — *Sayward v. Warren*, 27 Me. 453; *Pope v. Jackson*, 65 Me. 162.

Maryland. — *Lamotte v. Wisner*, 51 Md. 543.

Massachusetts. — *Chase v. Allen*, 5 Allen (Mass.) 599.

Michigan. — *Peterson v. Fowler*, 76 Mich. 258.

Minnesota. — *Loomis v. Youle*, 1 Minn. 175; *Williams v. Mathews*, 30 Minn. 131.

Missouri. — *Clinton v. Stovall*, 45 Mo. App. 642; *Wm. S. Merrill Chemical Co. v. Nickells*, 66 Mo. App. 678; *Young v. Glascock*, 79 Mo. 574.

New Hampshire. — *Page v. Ramsdell*, 59 N. H. 575.

New Jersey. — *Chambers v. Hunt*, 18 N. J. L. 339.

New York. — *Ingraham v. Hammond*, 1 Hill (N. Y.) 353; *Pattison v. Adams*, Hill & D. Supp. (N. Y.) 426; *Harrison v. McIntosh*, 1 Johns. (N. Y.) 380.

North Carolina. — *Rowland v. Mann*, 6 Ired. L. (N. Car.) 38.

Oregon. — *Spores v. Boggs*, 6 Oregon 122.

Pennsylvania. — *Seibert v. McHenry*, 6 Watts (Pa.) 301; *Wilson v. Gray*, 8 Watts (Pa.) 25; *Johnston v. Gray*, 19 Pittsb. Leg. J. (Pa.) 123; *Buckley v. Handy*, 2 Miles (Pa.) 449; *Erb v. Sadler*, 8 W. N. C. (Pa.) 13; *Hellings v. Wright*, 14 Pa. St. 373; *Mathias v. Sellers*, 86 Pa. St. 486; *North v. Firth*, 2 Del. Co. Rep. (Pa.) 467; *McDowell v. Windle*, 2 Chest. Co. Rep. (Pa.) 477, 2 Del. Co. Rep. (Pa.) 356.

Utah. — *Jones v. McQueen*, 13 Utah 178.

United States. — *Dermott v. Wallach*, 1 Black (U. S.) 96; *Semmes v. Oneale*, 1 Cranch (C. C.) 246.

Property in Storage. — In an action of replevin, where the defendant pleads property in a stranger, or where the evidence shows property in a stranger, it is not necessary that such person should be made defendant in the action. *Thompson v. Sweetser*, 43 Ind. 312.

After Pleading Property in Defendant.

— After plea of "property in the defendant," the court will permit the defendant to plead "property in a stranger," on payment of all antecedent costs and a continuance if requested. *Semmes v. Oneale*, 1 Cranch (C. C.) 246.

Name of Stranger. — A plea of property in a stranger is fatally defective unless the name of the claimant is given. *North v. Firth*, 2 Del. Co. Rep. (Pa.) 467.

A plea in replevin that the property in dispute is in the succession of A., and not the property of plaintiff, without naming the person in succession of A., is good on demurrer. *Anderson v. Dunn*, 19 Ark. 650.

Allegation as Inducement to Traverse. — In an action of replevin, especially in the *cepit*, defendant may, as inducement to the traverse of the plaintiff's title, set up title in a third person, and, if successful upon such issue, is entitled to judgment without connecting himself with such outstanding title. *Loomis v. Youle*, 1 Minn. 175.

Form of Traverse. — A defendant in replevin may plead property in himself or in himself and the plaintiffs, or in himself and others, or in the plaintiff and others, or in other persons; and in either case he must specially traverse, by *et non* or *absque hoc*, that the prop-

property in the defendant implies a denial of it in the plaintiff also.¹

Must Set Out Grounds of Defendant's Right. — Unless a plea shows the grounds of defendant's right of possession, it will be considered defective.²

5. Justification by Officer. — Where replevin is brought against an officer for goods seized by him, he must, in justifying the taking under the process, allege that the goods were the property of the party whom he represents under the process, deny plaintiff's title, and state that the property was subject to the process,³

erty belongs to the plaintiff in manner and form, etc. *Chambers v. Hunt*, 18 N. J. L. 339.

Averment of Defendant's Possession. — In replevin by a boarder, for goods distrained for rent due by the keeper of the boarding house, the plea must aver possession of the goods as a boarder, at the time of the distress. *Erb v. Sadler*, 8 W. N. C. (Pa.) 13.

Sufficient Answer. — An answer in an action of replevin, which avers that the defendant was and is the owner of the property replevied, and denies the plaintiff's right to maintain the action, puts in issue plaintiff's title to the property. *Chase v. Allen*, 5 Allen (Mass.) 599.

Defendant in his answer denied the alleged ownership and right of possession of plaintiff, admitted that defendant owned the property, and alleged that defendant was unlawfully deprived of it by plaintiff, and that he had sustained damage by reason thereof. This was held a sufficient allegation of ownership, although not expressly averring it in terms. *McIntire v. Eastman*, 76 Iowa 455.

1. *McIlvaine v. Holland*, 5 Harr. (Del.) 226.

Construction of Answer. — In an action for the recovery of personal property, a claim in the answer that the defendant is the owner of the property is merely a mode of denying the plaintiff's title, and presents only a legal issue as to the title of the property. *Swasey v. Adair*, 88 Cal. 179.

2. *McTaggart v. Rose*, 14 Ind. 230. See *Carew v. Matthews*, 41 Mich. 576.

Sufficient Plea. — The defendant in an action of replevin pleaded generally property in himself, and specially that the goods were delivered by the plaintiff to the defendant as a pledge, to be retained until the plaintiff should pay, etc., which he had not done. Upon

demurrer the plea was held good. *Amos v. Sinnott*, 5 Ill. 440.

3. *California*. — *Stringer v. Davis*, 35 Cal. 25.

Colorado. — *Johnson v. Bailey*, 17 Colo. 59; *McCraw v. Welch*, 2 Colo. 284; *Williams v. Mellor*, 12 Colo. 1.

Connecticut. — *Ladd v. Prentice*, 14 Conn. 116.

Delaware. — *Maclary v. Turner*, 9 Houst. (Del.) 281.

Illinois. — *Wheeler v. McCorristen*, 24 Ill. 42; *Lammers v. Meyer*, 59 Ill. 214; *Mt. Carbon Coal, etc., Co. v. Andrews*, 53 Ill. 176.

Indiana. — *Simcoke v. Frederick*, 1 Ind. 54.

Kansas. — *Bailey v. Bayne*, 20 Kan. 657; *Hursh v. Starr*, 6 Kan. App. 8.

Kentucky. — *Philips v. Harriss*, 3 J. J. Marsh. (Ky.) 132; *Whittington v. Deering*, 3 J. J. Marsh. (Ky.) 684; *Dillon v. Wright*, 4 J. J. Marsh. (Ky.) 254; *Philips v. Morris*, 7 J. J. Marsh. (Ky.) 279; *Scott v. Hughes*, 9 B. Mon. (Ky.) 105.

Maine. — *Daggett v. Adams*, 1 Me. 198.

Michigan. — *Weber v. Henry*, 16 Mich. 399; *Heyman v. Covell*, 36 Mich. 157; *Dubois v. Hutchinson*, 40 Mich. 262; *Carew v. Matthews*, 41 Mich. 576.

Nebraska. — *Williams v. Eikenberry*, 22 Neb. 210.

New Hampshire. — *Garvin v. Paul*, 47 N. H. 158; *Mitchell v. Roberts*, 50 N. H. 486.

New Jersey. — *Bruen v. Ogden*, 11 N. J. L. 370; *Brown v. Bissett*, 21 N. J. L. 46, 267.

Oregon. — *Buchtel v. Evans*, 21 Oregon 309; *Coos Bay R. Co. v. Siglin*, 26 Oregon 387.

Pennsylvania. — *Cassidy v. Elias*, 90 Pa. St. 434.

Utah. — *Jones v. McQueen*, 13 Utah 178.

Wisconsin. — *McCarty v. Gage*, 3

and also the facts which caused it to be so subject.¹

6. Avowry for Property Distrained — Considered as Declaration. — An avowry in replevin is in the nature of a declaration, and its suffi-

Wis. 404; *Smith v. Phelps*, 7 Wis. 211; *Frisbee v. Langworthy*, 11 Wis. 375; *Everit v. Walworth County Bank*, 13 Wis. 419; *Densmore Commission Co. v. Shong*, 98 Wis. 380.

Confession and Avoidance — Reply Implied. — A pleading by a defendant in an action of replevin which admits the taking complained of, but justifies under legal process, and prays judgment for a restitution of the property replevied, or for its value, contains only matter of confession and avoidance, and under the fifty-sixth section of the Practice Act is deemed controverted by plaintiff. *Stringer v. Davis*, 35 Cal. 25.

Description of Process. — A plea in an action of replevin averred that the defendant, as city collector, seized the property "by virtue of a certain warrant, duly issued and directed by the proper authority of said city to the said defendant, as such collector, directing and commanding him, the said defendant, to collect certain taxes theretofore duly assessed" against the said plaintiff, etc. It was held that this was a sufficient averment respecting the process, without setting out the warrant in full. *Mt. Carbon Coal, etc., Co. v. Andrews*, 53 Ill. 176.

Not an Avowry. — In replevin against a sheriff, a plea that defendant took the goods by virtue of an execution against one A. in favor of a third party, with an averment that the goods were the property of said A., is no more than a plea of property in a stranger, and does not amount to an avowry. *Simcoke v. Frederick*, 1 Ind. 54.

Avowry as Cognizance — Harmless Error. — In replevin the defendant (using the form of a cognizance) avowed the taking of the goods and chattels, etc., by virtue of an attachment out of the county circuit court against certain nonresident debtors, averred that the said goods were the goods of the said debtors and not of the plaintiffs, and prayed a return. On special demurrer, it was held that the form should have been that the defendant avowed, and not that he made cognizance, but that the mistake was immaterial. *Brown v. Bissett*, 21 N. J. L. 46.

Answer Sufficient After Verdict. — In an action of replevin the defendant answered, denying that the plaintiff was entitled to the property replevied, denying that the defendant unjustly or wrongfully detained the same or any part thereof, denying that the plaintiff had sustained any damage, and then setting up that defendant was a constable, that an order of attachment against the goods and chattels of the plaintiff was issued by a justice of the peace and placed in his hands in a certain case then pending before said justice, and that in pursuance of said order and in obedience thereto he levied the same on said property, and that he lawfully held the same under and by virtue of said attachment until the same was taken from him in said replevin case, and then alleging that the defendant was entitled to the possession of the property, and demanded a return of the same. It was held that the answer was sufficient, and particularly so after verdict, as no question as to its sufficiency was at any time raised before verdict. *Bailey v. Bayne*, 20 Kan. 657.

1. *Johnson v. Bailey*, 17 Colo. 59; *McCraw v. Welch*, 2 Colo. 284; *Williams v. Mellor*, 12 Colo. 1; *Wheeler v. McCristen*, 24 Ill. 40; *James v. Dunlap*, 3 Ill. 481; *Kingsbury v. Buchanan*, 11 Iowa 387; *Bailey v. Bayne*, 20 Kan. 657; *Heyman v. Covell*, 36 Mich. 157; *Dubois v. Hutchinson*, 40 Mich. 262; *Jones v. McQueen*, 13 Utah 178; *McCarty v. Gage*, 3 Wis. 404; *Densmore Commission Co. v. Shong*, 98 Wis. 380.

Return of Process. — In replevin against an officer he need not plead or prove that the writ was returned, or there was cause for attachment. *McCraw v. Welch*, 2 Colo. 284.

Issue as to Defendant's Office. — In an action of replevin for taking mules and horses, being the property of the plaintiff, out of his possession, the defendant avowed the taking by virtue of a writ of attachment, which was delivered to him as sheriff of the county of Morgan. To the avowry the plaintiff pleaded that the defendant was not sheriff on the day of the issuing of the attachment and at the time of the levy

ciency is to be tested by the rules which are applicable to declarations.¹

An Avowry for Rent in Arrear must show all the essential facts giving the right to distrain, and should set forth the title and allege the estate of which the avowant is seized.²

thereof. The defendant demurred to the plea. It was held that the plea was bad, because it attempted to put in issue the fact whether the defendant was sheriff on the day of the issuing of the writ, which was wholly immaterial. If the defendant was sheriff at the day of levy, it was sufficient. *James v. Dunlap*, 3 Ill. 481.

Facts as to Execution.—A plea in abatement that defendant took the goods as deputy United States marshal on an execution issued out of the federal circuit court against a third person named is bad on demurrer if it fails to allege that the execution was issued on any judgment, or that any judgment had been obtained against either the plaintiff in replevin or the defendant in the execution, or that the property had been levied upon as belonging to the defendant in execution. *Heyman v. Covell*, 36 Mich. 157.

Copies of Process.—The defendant's answer in replevin set forth fully the process of law whereby he held the property, stating the date of the writ, in whose favor the amount claimed by attaching creditors, the nature of the claim, and the return thereof. It was held that this setting forth was sufficient, without appending copies of the attachment. *Kingsbury v. Buchanan*, 11 Iowa 387.

General Requisites of Plea—*Wisconsin Statute*.—A plea by an officer justifying the taking by virtue of an attachment should aver his official character, that the writ was duly issued by a court having jurisdiction, and that the affidavit required by Rev. Stat. 1849 was annexed to the writ. *McCarty v. Gage*, 3 Wis. 404.

Aided by Proof.—Where an answer is defective in stating the justification under legal process in an action of replevin, this defect may be aided by the proof. *Johnson v. Bailey*, 17 Colo. 59.

1. *Whitesides v. Collier*, 7 Dana (Ky.) 285; *Brckett v. Whidden*, 3 N. H. 17; *Pike v. Gandall*, 9 Wend. (N. Y.) 149; *Waring v. Slingluff*, 63 Md. 53.

Defect Not Waived.—It has been held that where an avowry was defect-

ive in not alleging title and the estate of which avowant was seized, the defect could not be cured by plaintiff's pleading over. *Bain v. Clark*, 10 Johns. (N. Y.) 424.

2. *Delaware*.—*Taylor v. Moore*, 3 Harr. (Del.) 6; *Robelen v. National Bank*, 1 Marv. (Del.) 346; *King v. Lambden*, 4 Harr. (Del.) 283.

Kentucky.—*Whitney v. Carle*, 8 B. Mon. (Ky.) 172.

Maryland.—*Chappellear v. Harrison*, 1 Gill & J. (Md.) 477; *Neale v. Clautice*, 7 Har. & J. (Md.) 372; *Dorsey v. Hays*, 7 Har. & J. (Md.) 370; *Giles v. Ebsworth*, 10 Md. 333; *Waring v. Slingluff*, 63 Md. 53; *Swearingen v. Magruder*, 4 Har. & M. (Md.) 347.

New Hampshire.—*Brckett v. Whidden*, 3 N. H. 17; *Great Falls Co. v. Worster*, 15 N. H. 412.

New Jersey.—*Brown v. Brissett*, 21 N. J. L. 267; *Hawk v. Lepple*, 51 N. J. L. 209.

New York.—*Harrison v. M'Intosh*, 1 Johns. (N. Y.) 380; *Shepherd v. Boyce*, 2 Johns. (N. Y.) 446; *Hopkins v. Hopkins*, 10 Johns. (N. Y.) 369; *Bain v. Clark*, 10 Johns. (N. Y.) 424; *Nichols v. Dusenbury*, 2 N. Y. 283; *Hill v. Stocking*, 6 Hill (N. Y.) 277; *Burr v. Van Buskirk*, 3 Cow. (N. Y.) 263; *Wright v. Williams*, 5 Cow. (N. Y.) 338; *Wright v. Williams*, 5 Cow. (N. Y.) 501; *Pemberton v. Van Rensselaer*, 1 Wend. (N. Y.) 307; *Wright v. Williams*, 2 Wend. (N. Y.) 632; *Tice v. Norton*, 4 Wend. (N. Y.) 663; *Bloomer v. Juhel*, 8 Wend. (N. Y.) 448; *Pike v. Gandall*, 9 Wend. (N. Y.) 149; *Jenkins v. Pell*, 17 Wend. (N. Y.) 417, 20 Wend. (N. Y.) 450.

Pennsylvania.—*Thomas v. Pierce*, 1 Chest. Co. Rep. (Pa.) 403; *Franciscus v. Reigart*, 4 Watts (Pa.) 98, 477; *Smith v. Aurand*, 10 S. & R. (Pa.) 92; *Manuel v. Reath*, 5 Phila. (Pa.) 11, 19 Leg. Int. (Pa.) 38; *Kensil v. Chambers*, 5 Phila. (Pa.) 64, 19 Leg. Int. (Pa.) 292; *Hellings v. Wright*, 14 Pa. St. 373; *Baird v. Porter*, 67 Pa. St. 105.

Vermont.—*Gibson v. Bump*, 30 Vt. 175; *Keith v. Bradford*, 39 Vt. 34.

Virginia.—*Southall v. Garner*, 2 Leigh (Va.) 372; *Bargamin v. Poitiaux*,

General Avowry. — In replevin a general avowry for rent in arrear will be good; but if a party undertakes to set out a special contract in his avowry, he must set it out truly as to its terms and specially as to the amount of rent.¹

Taking Cattle Damage-feasant. — An avowry justifying the taking of cattle damage-feasant is sufficient without justifying the detention.²

4 Leigh (Va.) 412; *Turberville v. Self*, 4 Call (Va.) 580.

An Avowry by an Executor must show affirmatively that the rent fell due before the testator's death. *Wright v. Williams*, 5 Cow. (N. Y.) 338.

Remedy by Action on Replevin Bond. — In *Pennsylvania*, to a declaration in the *detinet*, the defendant cannot be admitted to avow that he took the goods as a distress for rent; a landlord has no right to give a claim-property bond, and retain the goods; he must deliver them under the replevin, and look to the replevin bond. *Baird v. Porter*, 67 Pa. St. 105.

Alleging Title of Lessor. — In an avowry or cognizance, upon a distress for ground rent, it is not necessary to set out the title of the lessor. *M'Curdy v. Randolph*, 2 Clark (Pa.) 323, 4 Pa. L. J. 110; *Franciscus v. Reigart*, 4 Watts (Pa.) 98, 477.

Alleging Particulars as to Distress. — An avowry for rent due need not show that a warrant, founded on oath, had been taken out before making the distress; nor that the goods distrained belonged to the tenant; nor need it set out the particulars of the landlord's title. *Wright v. Mathews*, 2 Blackf. (Ind.) 187.

Validity of Distress Warrant. — An avowry need not state that the warrant to distrain was under seal; though it were so in fact. *Jenkins v. Pell*, 17 Wend. (N. Y.) 417, 20 Wend. (N. Y.) 450.

Prayer for Assessment of Value. — In replevin, where the defendant avows the taking for rent, the jury who try the cause may assess and value the goods distrained without the avowant's praying that they should do so. *Dorsey v. Hays*, 7 Har. & J. (Md.) 370.

Two Avowries. — In replevin, where the defendant put in two avowries to one count in a declaration, one of which was held good and the other bad on demurrer, the one held good establishing his right to distrain, he was considered to prevail upon the whole record, and to be entitled to his dam-

ages and costs. The plaintiff was held to be entitled to recover his costs of the demurrer to the avowry adjudged bad, and the costs of the issues of fact found in his favor. *Wright v. Williams*, 2 Wend. (N. Y.) 632.

1. *Taylor v. Moore*, 3 Harr. (Del.) 6; *Turberville v. Self*, 4 Call (Va.) 580.

Amount of Rent in Arrear. — The amount unpaid is not descriptive of the identity of the obligation, out of which arises the right to a redelivery of the goods distrained, and hence an avowry need not state the exact amount of rent in arrear. *Barr v. Hughes*, 44 Pa. St. 516; *Phipps v. Boyd*, 54 Pa. St. 342.

Rent Due and Unpaid. — In replevin for a slave distrained for rent, the landlord must avow and prove that the rent distrained for was due and in arrear, the amount being given. *Lavigne v. Russ*, 36 Miss. 326.

Avowry for Part of Rent. — An avowry for part of a year's rent must show that the residue has been paid. *Shepherd v. Boyce*, 2 Johns. (N. Y.) 446.

2. *McIntire v. Marden*, 9 N. H. 288; *Osgood v. Green*, 30 N. H. 210.

Allegation of Legal Conclusions. — A plea which alleges that the animals in controversy were wrongfully on the defendant's premises and taken damage-feasant and detained under the statute must state facts showing how and in what manner they were wrongfully on the defendant's premises. A general averment that they were wrongfully, etc., is an averment of a mere conclusion of law. *Spahr v. Tarrt*, 23 Ill. App. 420.

Notification to Owner. — In replevin for taking and impounding cattle, where the defendant avows the taking of the cattle damage-feasant, and the notification to the owner describes only a part of the cattle, the avowry is good as to those described, although it is bad as to those not described. *Brown v. Smith*, 1 N. H. 36.

An avowry in replevin set forth the impounding of the cattle and averred that "within twenty-four hours thereafter the defendant gave legal notice

7. Alleging Special Defenses. — Although great latitude is given the pleader in making defenses under a general denial, yet it has been held that special matter of justification cannot be shown under the plea of *non cepit*.¹

Alleging Lien. — In some jurisdictions, if the defendant wishes to avail himself of a lien on the property for advances, he must set it up in his answer.²

8. Alleging Special Damages. — Where the defendant considers himself entitled to special damages, he cannot recover them under

of the said impounding to, etc.,” — without further stating the manner in which the notice was given. This was held sufficient on general demurrer. *Keith v. Bradford*, 39 Vt. 34.

Title to Close — Name of Poundkeeper. — An avowry in replevin that the beasts were taken damage-feasant and impounded in a public pound need not give the name of the poundkeeper, nor set forth the avowant's title to the close, further than to state that he was “seized and possessed as of his own close;” nor need he give the bounds, or description. *Gibson v. Bump*, 30 Vt. 175.

Avowry in Several Counts. — Where an avowry in replevin contains one good count going to the entire action, it will be held sufficient, even though the other counts are bad. *Nichols v. Dusenbury*, 2 N. Y. 283.

1. *Hopkins v. Burney*, 2 Fla. 42; *M'Farland v. Barker*, 1 Mass. 153; *Susquehanna Boom Co. v. Finney*, 58 Pa. St. 200.

Not Guilty — Florida Statute. — In an action of replevin under McClell. Dig., p. 862, § 12, the plea of not guilty puts in issue not only the right of the plaintiff to the possession of the property replevied, but also the wrongful taking and detention thereof. Under such a plea the defendant can give any evidence of special matter which amounts to a defense to the plaintiff's cause of action, to show that the plaintiff is not entitled to the possession of the property replevied. *Holliday v. McKinne*, 22 Fla. 153.

In Missouri where the defendant relies upon the warrant of a judge of the Circuit Court ordering certain property to be turned over to him, as a defense to an action of replevin for such property, he must set out such warrant in his answer to avail as a defense and not raise the question by motion. *Flentge v. Priest*, 57 Mo. 515.

Alleging Fraud. — To be available, in

an action of replevin, the defense that property was transferred to hinder, delay, or defraud creditors, must be specially pleaded. *Sanford v. Gates*, 18 Mont. 398; *Coos Bay R. Co. v. Siglin*, 26 Oregon 387; *Wright v. Card*, 16 R. I. 719.

Justification of Officer. — On the issue of whether the plaintiff was entitled to the possession, the defendant, a constable, who had levied on the goods, need not aver that the plaintiff had bought the goods to aid the seller to defraud his creditors. Such plea is not necessary in order to submit such question to the jury, for the plaintiff must prove title not only against his vendor, but also against the defendant, who represents the creditors of the vendor. *Nenbrand v. Myres*, 2 Cinc. L. Bul. 97, 7 Ohio Dec. (Reprint) 315.

Alleging Want of Demand and Notice. — It is not necessary that defendant should plead specially a want of demand and notice, in order to show such a defense. *Killey v. Scannell*, 12 Cal. 73; *Barton v. Mulvane*, 59 Kan. 313.

2. *Singer Mfg. Co. v. Converse*, 23 Colo. 247; *Gay v. Fretwell*, 9 Wis. 186.

In Michigan no special notice or plea of a lien need be made, as a judgment will be given in accordance with any facts establishing a lien. *Gratwick, etc., v. Lumber Co. v. Lewis*, 66 Mich. 533.

In South Dakota it has been held that it is not for a defendant, if the property is claimed by plaintiff under a written lease, to plead a lien as an affirmative defense, in order to avail himself of a stipulation in the lease giving him a lien on the property. *Esshom v. Watertown Hotel Co.*, 7 S. Dak. 74.

Lien of Stranger. — The defendant cannot set up a lien existing in favor of a third person. *Neff v. Thompson*, 8 Barb. (N. Y.) 213.

the general issue, as they are in the nature of affirmative relief.¹

9. Denying Value. — Under the code it would seem that unless the defendant in his answer denies the value of the property as stated in the complaint, it will be deemed admitted.²

10. Prayer for Return. — The weight of authority requires the defendant in his answer to make a special claim of property and a demand for its return; otherwise there will not be a judgment for the return of the property to the defendant.³

1. Hess v. Griggs, 43 Mich. 397.

Counterclaim. — To an action of replevin for goods sold with reservation of title in the vendor until the purchase price is paid, the vendee may in defense counterclaim the damage sustained by him on account of the vendor's failure to deliver the goods at the time agreed, and tender to the vendor the balance of the purchase money after deducting such damages. *Ames Iron Works v. Rea*, 56 Ark. 450.

Plea with Notice of Special Damage. — Household goods covered by a chattel mortgage were replevied by the mortgagee. The defendant pleaded the general issue, under which he sought to show as an element of damage the sickness of his child, caused, as claimed, by the manner in which the writ was executed; and it was held that such sickness was not an injury that would ordinarily result from the service of a writ of replevin, and that notice of such special damage should have been given with the plea. *Bateman v. Blake*, 81 Mich. 227.

2. Tucker v. Parks, 7 Colo. 62; *Corbell v. Childers*, 17 Oregon 528.

Contra. — In *Jenkins v. Steanka*, 19 Wis. 128, Downer, J., said: "In actions of trover, trespass, or replevin, before the code, it was not necessary for the defendant to deny the amount of the value or the allegation of damages, and in this respect the code has not altered the practice. They must be proved even though the defendant puts in no answer."

Denial of Knowledge or Information. — The denial as to value, being based on the want of knowledge or information, is insufficient. *Kuhland v. Sedgwick*, 17 Cal. 123.

3. California. — *Gould v. Scannell*, 13 Cal. 430; *Pico v. Pico*, 56 Cal. 453; *Acock v. Halsey*, 90 Cal. 215; *Banning v. Marleau*, 101 Cal. 238.

Illinois. — *Mattson v. Hanisch*, 5 Ill. App. 102; *Johnson v. Howe*, 7 Ill. 342; *Bourk v. Riggs*, 38 Ill. 321; *Chandler v. Lincoln*, 52 Ill. 74.

Massachusetts. — *Bartlett v. Brickett*, 98 Mass. 521.

Michigan. — *Hinchman v. Doak*, 48 Mich. 168.

Missouri. — *Young v. Glascock*, 79 Mo. 574; *Clinton v. Stovall*, 45 Mo. App. 642; *Wm. S. Merrill Chemical Co. v. Nickells*, 66 Mo. App. 678.

Oregon. — *Capital Lumbering Co. v. Hall*, 10 Oregon 202.

Wisconsin. — *Gallagher v. Bishop*, 15 Wis. 276.

Reason of Rule. — A defendant cannot have judgment for a return of the property, or its value, unless he has claimed a return in his answer. But this, even if it be held to require a formal demand, is not because such demand is necessary in order to eke out the denials, or constitutes of itself an affirmative allegation, but because it is arbitrarily made the duty of the defendant to assert his formal claim for a return as a prerequisite to a judgment for the return of the property or its value. *Pico v. Pico*, 56 Cal. 453.

Suggestion in Lien of Prayer. — If a plea in abatement to a writ of replevin contains no prayer for a return of the property replevied, still a return may be ordered on a written suggestion that the property was attached by the defendant as an officer and that he is still responsible for its safe keeping. *McArthur v. Lane*, 15 Me. 245.

Judgment for Return Property — Massachusetts. — In an action of replevin the defendant denied that the goods were the property of the plaintiff, admitted that they were in the defendant's possession at the time of the replevin, substantially alleged that such possession was lawfully acquired and rightfully continued, also alleged that they "were" property of A B, deceased, and that C D "is" his administrator, and further denied that the defendant took and detained them. Judgment was ordered for the defendant on the ground that the plaintiff failed to show property in the goods. It was held that the defendant was

11. Plea in Abatement. — A plea in abatement must have the highest degree of certainty and precision. Every allegation necessary to make out the case covered by it must be distinctly and not inferentially set forth.¹

12. Joinder of Pleas — Consistency. — The pleas of *non cepit* and property in defendant or a stranger may be joined in an action of replevin, though they seem inconsistent;² and other pleas,

prima facie entitled to a return of them. Bartlett v. Brickett, 98 Mass. 521.

Montana. — In an action of claim and delivery for personal property, where there is an issue as to the title and right of possession, and a finding in favor of the defendant, a judgment for a return of the property follows as a matter of course, even if the answer does not contain a formal prayer for the return thereof. In such case a finding that, at the commencement of the action, the property was delivered to the plaintiff, is immaterial and will not vitiate the judgment. Lavelle v. Lowry, 5 Mont. 498.

Property in Plaintiff and Defendant. — The defendant may plead property in the plaintiff and himself, which, if true, will entitle him to a return. Wilson v. Gray, 8 Watts (Pa.) 25.

1. Belden v. Laing, 8 Mich. 500. And see generally article ABATEMENT IN PLEADING, vol. 1, p. 1.

Another Action Pending. — In replevin a plea in abatement was interposed, setting up the pendency of a prior suit in replevin, by virtue of the writ on which the property in controversy was taken and held by one of the defendants as sheriff. The plea did not allege that any affidavit was attached to the writ in the first suit, or that the writ commanded the sheriff to take the property in controversy. The court held that the plea was insufficient on both grounds. Belden v. Laing, 8 Mich. 500.

That Defendant Holds under Process. — A plea in abatement is not good, that the defendant as deputy sheriff held the property by virtue of the levy of an execution, and that the writ was directed to and executed by the sheriff, nor, *a fortiori*, is it a good plea in bar of the action. Carson v. Browder, 2 Lea (Tenn.) 701.

Objection to Venue. — If the complaint in replevin does not aver that the property is detained in the county where the action is commenced, it will be a good plea in abatement to allege that

the defendant is a nonresident of the state, has never been in the county, and has never been served with process. Rauber v. Whitney, 125 Ind. 216.

Verification. — A plea in abatement of the writ that no affidavit was filed must be verified, since the affidavit which the plaintiff is required to file under the statute forms no part of the record. Town v. Wilson, 8 Ark. 464.

2. **Arkansas.** — Davis v. Calvert, 17 Ark. 85.

Kansas. — Deford v. Hutchison, 45 Kan. 318.

Kentucky. — Scott v. Hughes, 9 B. Mon. (Ky.) 105.

Maryland. — Smith v. Morgan, 8 Gill (Md.) 133; Lamotte v. Wisner, 51 Md. 543.

Massachusetts. — Quincy v. Hall, 1 Pick. (Mass.) 357, 11 Am. Dec. 198; Simpson v. M'Farland, 18 Pick. (Mass.) 427, 29 Am. Dec. 602; Whitwell v. Wells, 24 Pick. (Mass.) 25; Bartlett v. Brickett, 98 Mass. 521.

Nebraska. — Williams v. Eikenberry, 22 Neb. 210.

New York. — Shuter v. Page, 11 Johns. (N. Y.) 196; Sprague v. Kneeland, 12 Wend. (N. Y.) 161.

Pennsylvania. — Cummings v. Gann, 52 Pa. St. 484; Susquehanna Boom Co. v. Finney, 58 Pa. St. 200.

United States. — Dickson v. Mathers, Hempst. (U. S.) 65.

Replication to Pleas — Judgment. — The defendant may plead *non cepit*, and property in himself or in a stranger, inconsistent though these pleas may seem. The plaintiff's replication of these pleas must set up property in himself, and on this the issue is joined. And where the defendant pleads property in a third person, the burden of proof is upon the plaintiff to show a superior title to that third person. Upon these pleas of property the defendant, if he succeeds, is entitled to a return of the property without making avowry or cognizance, because they destroy the plaintiff's title. Lamotte v. Wisner, 51 Md. 543.

which are not inconsistent, may be joined if their joinder is not prohibited by statute.¹

13. Amendments. — In a proper case where neither injustice nor surprise will be visited upon the opposing party, the court will in its discretion liberally grant permission to amend defective pleas or answers.²

X. REPLICATION OR REPLY — 1. In General. — The replication or reply is the third stage of the pleadings in replevin, and when it is in answer to the defendant's avowry or cognizance it is called a plea.³ A replication or reply is necessary if the defendant in his answer sets up new matter in defense or allegations having that effect;⁴ and it must fully meet the allegations of

1. Kentucky Statute. — The statute of 1842 admits of the filing of as many pleas in replevin, either of law or fact, as defendant or plaintiff may think necessary for his defense. *Scott v. Hughes*, 9 B. Mon. (Ky.) 105.

Liberum Tenementum and Other Pleas. — In *Sibbard v. Glover*, Barnes N. Cas. 364, *non cepit*, property in a stranger, and *liberum tenementum* were allowed to be pleaded together in replevin. *Shuter v. Page*, 11 Johns. (N. Y.) 196.

Defenses of Officer. — In *Williams v. Eikenberry*, 22 Neb. 210, the defendant, a sheriff, denied generally the allegations of the petition, and also pleaded affirmatively his official character and justified the seizure under an order of attachment, alleging the ownership of the property to be in the attachment defendant. The defenses were held not to be inconsistent, and the decision of the trial court, in overruling a motion to require defendant to elect upon which of the defenses set up in his answer he would proceed to trial, was held correct.

Answer of Mortgagor. — In an action by a mortgagee against a mortgagor, the defendant may set up a counterclaim for the breach of a contract by the mortgagee to buy the goods and pay the difference between the amount of the mortgage and the price of the goods, notwithstanding a paragraph of the answer which alleges that the mortgage was void from the beginning. *Deford v. Hutchison*, 45 Kan. 318.

Claim of Property and Lien. — A plea of property may be joined with one of lien; they are not inconsistent. *Hartshorne v. Seeds*, 1 Chest. Co. Rep. (Pa.) 460.

Error Cured by Verdict. — In *Virginia* the statute does not permit several

pleas in replevin, but the error will be cured by verdict. *Vaiden v. Bell*, 3 Rand. (Va.) 448.

2. Pico v. Pico, 56 Cal. 453; *Smith v. Smith*, 3 B. Mon. (Ky.) 296; *Aultman v. O'Dowd*, (Minn. 1898) 75 N. W. Rep. 756; *Hellings v. Wright*, 14 Pa. St. 373; *Gregory v. Morris*, 1 Wyo. 213; *Bargamin v. Poitiaux*, 4 Leigh (Va.) 412; *Semmes v. Oneale*, 1 Cranch (C. C.) 246. And see generally article AMENDMENTS, vol. 1, p. 458.

Prayer for Return of Property. — It is proper even after appeal to permit the answer to be amended by inserting a claim for a return of the property, when the answer is a general denial. *Aultman v. O'Dowd*, (Minn. 1898) 75 N. W. Rep. 756.

Availing Title in Defendant. — Where in an action of replevin the court refused under the pleadings to permit the defendant to prove title to the property, but permitted the defendant to so amend his answer that the court might admit such evidence, it was held that the court did not err in so doing. *Gregory v. Morris*, 1 Wyo. 213.

Availing Property in Stranger. — After plea of "property in the defendant," the court will permit the defendant to plead "property in a stranger," on payment of all antecedent costs and a continuance if requested. *Semmes v. Oneale*, 1 Cranch (C. C.) 246. See also *Butler v. Farley*, (Supm. Ct. Gen. T.) 1 N. Y. Supp. 849, in which case an amendment at the trial was denied.

3. Mt. Carbon Coal, etc., Co. v. Andrews, 53 Ill. 176; *Moore v. Stevens*, 42 N. H. 404; *McCarty v. Hudson*, 24 Wend. (N. Y.) 291. And see generally article REPLICATIONS AND REPLIES, *post*, p. 639.

4. Warfield v. Walter, 11 Gill & J. (Md.) 80; *Lamotte v. Wisner*, 51 Md.

the defendant's plea or answer.¹

Replication or Reply Unnecessary. — Where the issues tendered by the declaration or complaint are simply joined by the defendant, it is unnecessary to file a replication or reply.²

Alleging Special Property. — If the plaintiff relies upon a special property in the goods he must set out his right clearly and precisely in his reply.³

Denying Matters of Inducement. — The plaintiff in his reply will not be permitted to pass by the material averments of the answer and deny the matters set out in the introductory part, which are mere matters of inducement and not traversable.⁴

2. Pleas to Avowry. — A plea strictly denying any rent in arrear is necessary as a reply to an avowry of distress for rent.⁵

543; *Westover v. Vandoran*, 29 Neb. 652; *Harrison v. M'Intosh*, 1 Johns. (N. Y.) 380; *Ingraham v. Hammond*, 1 Hill (N. Y.) 353.

Sufficient Replication. — Where the defendant in replevin avows the taking under a vote of the town to raise a sum of money to be expended upon a certain highway, a replication that the highway in question was never legally laid out is sufficient. *Stoddard v. Gilman*, 22 Vt. 568.

Replication to Plea of Property in Defendant. — If to the plea of property in an action of replevin, the plaintiff replies property in himself, and issue is joined upon the replication, the onus is upon him and he must support the replication by proof. *Warfield v. Walter*, 11 Gill & J. (Md.) 80.

1. *Dixon v. Thatcher*, 14 Ark. 141; *Powell v. Triplett*, 6 B. Mon. (Ky.) 420; *Boies v. Witherell*, 7 Me. 162; *Phillips v. Townsend*, 4 Mo. 101; *Foshay v. Riche*, 2 Hill (N. Y.) 247; *Nichols v. Dusenbury*, 2 N. Y. 283; *Harrison v. M'Intosh*, 1 Johns. (N. Y.) 380; *Hopkins v. Hopkins*, 10 Johns. (N. Y.) 369.

To Plea of Property in Stranger. — Where a defendant in replevin pleads property in a third person, traversing plaintiff's right, the plaintiff should accept the issue tendered, reaffirm his title and conclude to the country. *Prosser v. Woodward*, 21 Wend. (N. Y.) 205; *Pringle v. Phillips*, 1 Sandf. (N. Y.) 292.

2. *Woodworth v. Knowlton*, 22 Cal. 164; *Landers v. George*, 40 Ind. 160; *Darter v. Brown*, 48 Ind. 395; *Hunt v. Bennett*, 4 Greene (Iowa) 512; *Williams v. Mathews*, 30 Minn. 131; *Ward v. Anderberg*, 36 Minn. 300; *Brown v. Bissett*, 21 N. J. L. 267; *Ferrell v. Humphrey*, 12 Ohio 112.

New Matter — Title in Stranger. — A complaint averred that the plaintiff was the owner and possessor of the property at the time of the taking by defendant. The answer denied this allegation, and in addition averred affirmatively that the property was at that time owned and possessed by a third person. This averment was held to be but another form of denial, and not new matter which, under the system of replication formerly in force, was admitted by a failure to reply. *Woodworth v. Knowlton*, 22 Cal. 164. See also *Landers v. George*, 40 Ind. 160; *Riddle v. Parke*, 12 Ind. 89.

Cumulative Denials. — An allegation that the defendant "is rightfully entitled to the property and to the possession thereof," following a denial of all the averments in the plaintiff's petition, is cumulative of these denials, and is not new matter requiring a denial. *Hunt v. Bennett*, 4 Greene (Iowa) 512. See also *Ferrell v. Humphrey*, 12 Ohio 112.

3. Insufficient Replication. — A replication that the goods were delivered to the plaintiff by a third person for safe keeping, and that the plaintiff has a special property in them, without showing the title or authority of such third person, is insufficient. *Harrison v. M'Intosh*, 1 Johns. (N. Y.) 380.

4. *Brown v. Bissett*, 21 N. J. L. 267; *Chambers v. Hunt*, 22 N. J. L. 552.

Matter of Inducement. — Where the avowries admit the taking and traverse property in the plaintiff, what precedes this traverse is merely matter of inducement and not traversable. *Boswell v. Green*, 25 N. J. L. 390.

5. *Lougee v. Colton*, 2 B. Mon. (Ky.) 115; *Whitney v. Carle*, 8 B. Mon. (Ky.) 172.

General Issue to Avowry. — *Riens in arriere* is the general issue to an avowry for rent, and it admits the defendant's title and puts the defense on subsequent matters.¹

Questions of Title. — The plaintiff may in his replication controvert the title shown by the defendant in his plea or avowry, and if the replication is maintained the defendant's justification fails, and he is not entitled to a return of the property.² When the defendant pleads property in himself the plaintiff must reply such facts as show absolute title in himself, an exclusive right of possession, or such a possessory title as gives him the right of dominion or control even against the holder of the legal title.³

Number of Pleas. — In replevin the plaintiff may plead several pleas to the cognizance of the defendant.⁴

Place of Taking. — While the place of taking a distress for rent is material and traversable,⁵ yet in a plea to an avowry or cogni-

To Plea of Property and Avowry. — Where the defendant pleads property in a stranger, adding an avowry inducing a return of the goods, the plaintiff must answer the avowry as well as the plea. *People v. New York C. Pl.*, 2 Wend. (N. Y.) 644. *

That Defendant Was a Trespasser. — In replevin for goods distrained, the plaintiff may plead in bar of the avowry matters which show the defendant a trespasser *ab initio*. *Kimball v. Adams*, 3 N. H. 182; *Osgood v. Green*, 30 N. H. 210.

Denial that Rent Was Due. — If the avowry alleges that a sum of money was in arrear for rent, and the plaintiff replies that he did not owe it at the time of the distress, there is a sufficient issue. *Turberville v. Self*, 4 Call (Va.) 580. See also *Pattison v. Adams*, Hill & D. Supp. (N. Y.) 426; *Hurlburt v. Goodsill*, 30 Vt. 146.

1. *Lewis v. Payn*, 4 Wend. (N. Y.) 423; *Bloomer v. Juhel*, 8 Wend. (N. Y.) 448; *Hill v. Miller*, 5 S. & R. (Pa.) 355; *Williams v. Smith*, 10 S. & R. (Pa.) 202.

Abuse of Process. — The plaintiff may reply on abuse of the distress, or any matter showing the defendant's proceedings to have been irregular. *Osgood v. Green*, 30 N. H. 210.

Where, to an avowry of the taking, etc., the plaintiff pleads that the cattle "were in the possession and keeping of the plaintiff, of which the defendant was well knowing," the plaintiff need not prove the knowledge, unless the defendant take issue upon that as well as upon the keeping and possession,

although both are material. *Edmunds v. Leavitt*, 27 N. H. 198.

2. *Chambers v. Hunt*, 22 N. J. L. 552; *Brown v. Bissett*, 21 N. J. L. 267; *Boswell v. Green*, 25 N. J. L. 390.

Denial of Title to Premises in Avowant. — A plea that the avowant has parted with all his estate in the premises is bad on demurrer, unless it be averred that such estate was one for years; a tenant in fee may grant all his estate, reserving the right of distress for accruing rent. *Manuel v. Reath*, 5 Phila. (Pa.) 11, 19 Leg. Int. (Pa.) 38.

3. *Dixon v. Thatcher*, 14 Ark. 141.

Plea of Non Demisit. — Where the avowry states the written demise, the tenant cannot, under plea of *non demisit*, prove a different contract by parol; but if the demise be laid generally, he may, though the original letting was by deed. *Jackson v. Patterson*, 4 Harr. (Del.) 534.

A Plea of Tender to an Avowry or cognizance need not say *tout temps prist*, nor make a profert of the money in court. *Hunter v. Le Conte*, 6 Cow. (N. Y.) 728.

Admissions in Answer. — If plaintiff relies upon the admissions in the answer to recover, he should not deny such admissions in his replication. *Spores v. Boggs*, 6 Oregon 122.

4. *Roberts v. Tennell*, 4 Litt. (Ky.) 287; *Cotter v. Doty*, 5 Ohio 394; *People v. Schoharie*, 6 Wend. (N. Y.) 505; *McPherson v. Melinch*, 20 Wend. (N. Y.) 671.

5. *Jackson v. Rogers*, 11 Johns. (N. Y.) 33; *Williams v. Welch*, 5 Wend. (N. Y.) 290.

zance it is unnecessary to allege a place of taking.¹

Time of Claim. — If the plaintiff sets up a claim of property in reply to a plea justifying the taking, in an action of replevin, he must designate with precision the time of his claim, so that the issue may be clearly made upon it.²

Replication Must Conform to Avowry. — The replication to an avowry must in its descriptions conform to the avowry, or the departure will be fatal.³

XI. RIGHT TO JURY TRIAL. — The action of replevin falls within the scope of that constitutional provision which grants a trial by jury as a matter of right and demand.⁴

XII. PLEADING AND PROOF — VARIANCE. — What will constitute

1. *Judd v. Fox*, 9 Cow. (N. Y.) 259; *Gardner v. Humphrey*, 10 Johns. (N. Y.) 53.

Single Traverse Concluding to Country. — An avowry in replevin averred the taking of the cattle "in a field and inclosure used and improved, etc., the soil and freehold of the defendant, etc." The plea to the avowry averred that the defendant "did not find said cattle in any field of the defendant inclosed with a legal fence," and concluded to the country. On special demurrer the plea was held ill, for its conclusion, that the terms of the averment of the avowry do require proof that the field and inclosure was surrounded by [what the statute makes] a legal fence; and that it is not competent to make an issue, in the form of a single traverse concluding to the country, by using terms that would require the other party to make a different proof from what would be required if the traverse had been in the terms of the averment. *Keith v. Bradford*, 39 Vt. 34.

2. *Lisher v. Pierson*, 2 Wend. (N. Y.) 345, 20 Am. Dec. 612.

Plea de Injuria. — The replication *de injuria* cannot be pleaded to an avowry. *Hopkins v. Hopkins*, 10 Johns. (N. Y.) 369; *Fredericks v. Royal*, 7 W. N. C. (Pa.) 64.

Set-off. — A set-off is not a good plea to an avowry in replevin. *Wolgamot v. Bruner*, 4 Har. & M. (Md.) 89.

3. **Variance in Description of Place.** — An avowry in replevin justified the taking and impounding, by reason that the beast was taken damage-feasant in the defendant's close. The replication to the plea to the avowry described the place where, etc., as lands occupied by the plaintiff and defendant in common. It was held that the replication was a

departure from the avowry. *Hurlburt v. Goodsill*, 30 Vt. 146.

4. *Carroll v. Byers*, (Ariz. 1894) 36 Pac. Rep. 499.

In Justice's Court. — Where a jury is not demanded, the justice may proceed to hear and determine the matter, making the same findings and assessments that the jury is empowered to do. *Latimer v. Motter*, 26 Ohio St. 480.

On Default Before Justice of the Peace. — Where the plaintiff in a justice's court fails to prosecute the action to final judgment, a jury must be impaneled and sworn to inquire and assess the value of the property replevied, together with the damages for the detention of the same, and the justice must render judgment for the defendant for such value and damages as assessed. Where the jury is sworn to assess damages only, such oath does not include the assessment of the value of the property replevied, and a general verdict for the plaintiff and judgment for damages only and not for the value of the property replevied are erroneous. The value and damages should be stated separately, both in the verdict and judgment. *Garland v. Bartels*, 2 N. Mex. r.

Waiver of Jury. — Where a party dismisses the action or fails to appear at the trial, he will be deemed to have waived his right to a jury trial. *Waltham v. Carson*, 10 Cal. 178; *Wilkins v. Treynor*, 14 Iowa 391; *Barruel v. Irwin*, 2 N. Mex. 223; *Latimer v. Motter*, 26 Ohio St. 480.

Assessment by the Court of Defendant's Damages. — Where plaintiff by dismissal abandons his action the court may retain the cause for the benefit of the defendant, and as against plaintiff and in favor of the defendant the court

a material variance between the complaint and proof, must in a large measure depend upon the facts of each particular case, but a material variance is fatal to the cause. Generally speaking, any variance that is so vague and uncertain as to mislead the other side will be deemed material.¹

XIII. INSTRUCTIONS — In General. — The court in giving or refusing instructions to the jury in an action of replevin is governed to a large extent by the general rules applicable to the instruction of juries, as will be seen by the cases cited in the notes in which familiar principles have been applied.²

may assess the value of the property and damages and render judgment therefor in defendant's favor. Such an assessment of damages and the value of the property is not an invasion of the constitutional right of a trial by jury. *Lamy v. Remuson*, 2 N. Mex. 245; *Latimer v. Motter*, 26 Ohio St. 480.

Presumption as to Waiver. — In the absence of any showing to the contrary by way of exception or otherwise in the record, it will be presumed that a jury was not demanded. *Latimer v. Motter*, 26 Ohio St. 480.

1. *Schmidt v. Denver First Nat. Bank*, 10 Colo. App. 261; *Taylor v. Riddle*, 35 Ill. 567; *Buck v. Young*, 1 Ind. App. 558; *Harward v. Davenport*, 105 Iowa 592; *George R. Barse Live-Stock Commission Co. v. Turner*, 56 Kan. 778; *Breitenwischer v. Clough*, 116 Mich. 340; *Deyerle v. Hunt*, 50 Mo. App. 541; *Eikenbury v. Clifford*, 34 Neb. 607; *Merrill v. Equitable Farm, etc.*, Imp. Co., 49 Neb. 198; *Robinson v. Kilpatrick-Koch Dry Goods Co.*, 50 Neb. 795; *Corn v. Brazelton*, 2 Swan (Tenn.) 273; *Silsby v. Aldridge*, 1 Wash. 117. And see generally article VARIANCE.

Total Variance. — Where the plaintiff declares upon the sole ownership of the property he cannot recover upon proof of a joint ownership alone. *Eakin v. Eakin*, 63 Ill. 160.

An Immaterial Variance as to the description of the property will be disregarded. *King v. Connery*, 52 Ark. 115.

2. See generally article INSTRUCTIONS, vol. II, p. 47.

Must State Law and Not Invade Province of Jury. — *Sopris v. Truax*, 1 Colo. 89; *Smith v. Arnold*, 56 Cal. 640; *Buchanan v. Scandia Plow Co.*, 6 Colo. App. 34; *O'Connor v. Gidday*, 63 Mich. 630; *Hood v. Olin*, 68 Mich. 165; *Buckley v. Buckley*, 9 Nev. 373.

Sufficiency of Evidence. — In an action of replevin against two defendants, where a joint taking and a joint detention are admitted by the answer, it is not error to refuse to instruct the jury that the evidence fails to establish any cause of action against one of the defendants. *Moorhouse v. Donaca*, 14 Oregon 430.

Must Be Confined to Issues. — *Search v. Miller*, 9 Neb. 26.

Repugnancy to Admissions of Party. — If the general issue only is pleaded and the right of property admitted in plaintiff, the court cannot instruct against plaintiff's right so admitted. *Harper v. Baker*, 3 T. B. Mon. (Ky.) 422.

In *Sukeforth v. Lord*, 87 Cal. 399, it was admitted by the defendant that the value of the property was a definite amount; it was held that it was erroneous to direct a verdict for a smaller sum than the admitted value.

As to Conclusiveness of Allegations in Writ. — The following instruction was held proper in *Washington Ice Co. v. Webster*, 68 Me. 449: "The allegations in the writ have been commented on. I instruct you that the alleged quantity in the writ is not conclusive on the plaintiffs in this case. You may consider it as evidence of the declaration of the plaintiffs. If it was a mistaken declaration it is not binding on the plaintiffs. You may regard it as a piece of evidence tending to show quantity."

Error as to Burden of Proof. — The instructions should not mislead the jury as to the burden of proof. *Hanchett v. Buckley*, 27 Ill. App. 159.

Using Technical Phraseology. — It is erroneous in an instruction to use a term of technical meaning such as "wrongfully took," without enlightening the jury upon its particular meaning. *Mathews v. Granger*, 71 Ill. App. 467.

As to Right of Possession and Ownership. — It is improper to instruct the jury that the possession of the property by defendant at the commencement of the suit is ground for presuming his ownership; ¹ but a general instruction that the jury should consider all

As to Status at Institution of Action. — In an action of replevin the court should instruct the jury that the case must be determined on the state of facts existing at the commencement of the action. *Fischer v. Burchall*, 27 Neb. 245.

That Certain Matters Are Not in Controversy. — Where the record showed that the defendants asserted a right of property and possession adverse to the plaintiff and inconsistent with his claim, and nothing of a contrary tendency appeared, it was held that a charge to the jury that the detention was not in dispute was not error. *Johnson v. Moore*, 28 Mich. 3.

Measure of Damages. — In an action to recover possession of the property and damages for its wrongful detention, where no special damage is alleged, it is prejudicial error to instruct the jury that the measure of damages is "the reasonable value of the use or hire of the property while in the possession of the defendant from the time of the demand," without also directing the attention of the jury to the consideration of whether the plaintiff could have kept such property constantly employed at a given rate, either by hiring to others or by employment at home, or whether the gross earnings would have been diminished by expenses of keeping. *Brunell v. Cook*, 13 Mont. 497.

Error Cured by Finding of Jury. — Where the question at issue was whether or not the plaintiff was a *bona fide* purchaser of the property, and the jury made a special finding that the plaintiff did not know that the sale to him was made with intent to hinder, delay, or defraud creditors, a charge to the jury that "when a person purchases personal property with a knowledge that his vendor intends by the sale to defraud or defeat his creditors, or hinder or delay them in the collection of their debts, such purchaser will not be affected if he takes the property in good faith in payment of an honest debt," was not prejudicial, even if erroneous, for the reason that it might imply that any debt less than the value of the property would suffice. *Eicholtz v. Holmes*, 8 Wash. 71.

Instruction as to Damages. — In *McCarty v. Quimby*, 12 Kan. 494, in which case the plaintiff retained possession of the property, the court instructed the jury that if they found for the defendant they must find what actual damage she had sustained by reason of the detention of the property, the actual value of the property, and also interest on said actual value at seven per cent. from the time the property was taken. It was held that the portion of the instruction which required the jury to find interest was erroneous, but that as the jury found the value and the interest separately, and as no judgment seemed to have been rendered for the interest, the error was immaterial.

1. *McElhanon v. McFerron*, 36 Ill. App. 22; *Gulath v. Waldstein*, 10 Mo. App. 586.

Instruction Not Warranted by Evidence. — Where it appears that the defendant is in possession of plaintiff's property for the purpose of doing work upon it, but neither has nor claims any lien thereon, it is error to instruct that defendant was justified in refusing to deliver the property on plaintiff's demand, if the plaintiff had failed to pay for a part of the work, according to contract. *Nettleton v. Jackson*, 30 Mo. App. 135.

Questions as to Which Evidence Is Not Conflicting. — Where the plaintiff is, according to the undisputed evidence, beyond doubt the owner of the property in an action against an attaching officer and is hence entitled to the immediate possession, the question of ownership may be determined as a matter of law by the court and the question of value alone should go to the jury. *Griswold v. Sundback*, 6 S. Dak. 269.

Misleading Instruction. — An instruction that "the plaintiff claims that the defendant detains her property, fifty head of neat cattle; * * * the defendant denies that he detains any of said property; so, as to the cattle, the issue is clear and positive," is misleading, because it ignores the question of ownership, or right of possession of the property. *Chamberlin v. Winn*, 1 Wash. 501.

the statements made as to ownership and the denial of the same, and thus determine the ownership from the entire testimony, is proper.¹

Circumstances Warranting Verdict for Plaintiff. — It is proper to instruct the jury that, should they find either a general or special property in the plaintiff, and that the property was wrongfully taken from his possession and is wrongfully detained, they should return a verdict for plaintiff.² Where there is no question of the ownership, it is proper to refuse an instruction based on such ownership.³

Failure or Refusal to Submit Question of Possession to a Jury. — It is reversible error for the court either to fail or refuse to submit to the jury the question of possession of the property, in a proper case where there is a conflict of testimony.⁴

As to Fraud. — In charging the jury in an action of replevin where fraudulent and false representations are in issue the instruction must not be so couched as to assume, apparently, the existence of fraud, since the finding of that fact is entirely within the province of the jury.⁵

Identification of Property. — Where the plaintiff testifies that he knows his sheep by their countenance, an instruction that "it is immaterial how plaintiff knows the sheep, if they in fact belong to him," is not erroneous. *Welch v. Miller*, 32 Ill. App. 110.

1. *McDonald v. McDonald*, 55 Mich. 155; *Murray v. Norwood*, 77 Wis. 405.

As to Plaintiff's Acts and Declarations. — A plaintiff in replevin, claiming title by sale from a former owner, has no ground of exception to an instruction to the jury that, if the acts and declarations relied on by him to show a sale were merely colorable and not intended to pass any title or possession to him, they might disregard them as evidence of ownership in him. *Dawson v. Wetherbee*, 16 Gray (Mass.) 123.

As to Identity of Property. — It is proper to refuse an instruction that "it is not enough for the plaintiffs to prove themselves the owners of and entitled to the possession of property of the same kind and quality as that in controversy, but that they must show that they are the owners of the identical property," since to maintain replevin one need not always prove ownership of property. *Nollkamper v. Wyatt*, 27 Neb. 565.

2. *Jeffreys v. Greeley*, 20 Fla. 819; *Holton v. Carter*, 90 Ga. 299; *Minthorn v. Lewis*, 78 Iowa 620; *Poe v. Stockton*, 39 Mo. App. 550; *Moorhouse v. Donaca*, 4 Oregon 430; *Kent Iron, etc., Co. v. Norbeck*, 150 Pa. St. 559.

Where the Defendant Introduces No Evidence, a contention that the goods described in the declaration are not identical with those mentioned in the bond should be ignored by the court in giving instructions. *Kellogg v. Boyden*, 126 Ill. 378.

3. *Russell v. Longmoor*, 29 Neb. 209. See also *Winchester v. Bryant*, 65 Ark. 116.

4. *Reed v. Bank of Commerce*, 8 Wash. 539.

Instruction as to Party in Possession. — The jury should be informed as to which party is in possession of the property at the time of the trial. *Search v. Miller*, 9 Neb. 26.

Temporary Right of Possession. — An instruction that plaintiff cannot recover on a temporary right of possession should be refused, in the absence of an explanation as to what facts in evidence would establish such a right. *Hopper v. Callahan*, 78 Md. 529.

Necessity for Demand. — When no question is raised in the proof as to the fact of a demand previous to suit, the court is justified in treating such demand as an established fact, and failure to charge as to the necessity for it is not reversible error. *Muir v. Miller*, 82 Iowa 700.

5. *Poe v. Stockton*, 39 Mo. App. 550.

As to Inference of Fraud. — A charge to the jury that they cannot infer fraud, and that fraud cannot rest upon implication, is erroneous, as fraud, like any other fact, is to be proved by any

Directing Verdict. — In an action of replevin where the facts are admitted or uncontested, it is proper for the court to direct a verdict accordingly, and the same rule applies where the evidence is plainly insufficient or entirely wanting.¹

XIV. THE VERDICT — 1. **In General.** — The Form of the Verdict depends largely upon the number and nature of the issues, and must always be consistent therewith.²

facts or circumstances which satisfy the mind of its existence. *O'Donnell v. Segar*, 25 Mich. 367.

1. *Norcross v. Nunan*, 61 Cal. 640; *Sukeforth v. Lord*, 87 Cal. 399; *Altamus v. Holcomb*, (Ky. 1898) 45 S. W. Rep. 360; *Wiggins v. Snow*, 89 Mich. 476; *Gamble v. Wilson*, 33 Neb. 270; *Barbee v. Scoggins*, 121 N. Car. 135; *Fletcher v. Nelson*, 6 N. Dak. 94; *Moorhouse v. Donaca*, 14 Oregon. 430; *Brewster v. Carmichael*, 39 Wis. 456.

Right to Nominal Damages. — Since the defendant is entitled to nominal damages at least where there is a failure on the part of plaintiff in replevin to prosecute, it is error to direct a verdict for the defendant, on the ground that the bond is one for indemnity alone, unless actual damages were suffered by the plaintiff for the taking. *Crabbs v. Koontz*, 69 Md. 59; *Alderman v. Roesel*, 52 S. Car. 162.

As to Portions of Property. — Where in an action of replevin for goods sold on instalments, the plaintiff admits that he has no right or title to portions of the property, the court should instruct for the defendant for such portions. *Wiggins v. Snow*, 89 Mich. 476.

No Necessity to Bring In Owner. — Where the plaintiff in an action of replevin is without any right to the possession of the property and the court hence instructs for the defendant, the plaintiff cannot be heard to complain that the court did not of its own motion have the proper plaintiff brought in. *Gamble v. Wilson*, 33 Neb. 270.

2. *Walker v. Hunter*, 5 Cranch (C. C.) 462; *Thorn v. Whitbeck*, (County Ct.) 11 Misc. (N. Y.) 171.

The Court May Direct the Form of the verdict. *Owens v. Gentry*, 30 S. Car. 490.

Reducing Verdict to Form. — If the jury fail to find all the issues submitted to them, the judge may direct them to supply such omission. *Hanf v. Ford*, 37 Ark. 544; *Muller v. Jewell*, 66 Cal. 216; *Noble v. Epperly*, 6 Ind. 468; *Farmers' Packing Co. v. Brown*, 87 Md. 1.

Verdict in Separate Parts. — A verdict in replevin is not bad because it is in separate parts as to the property taken under the writ and that not taken. *Mitchell v. Burch*, 36 Ind. 529.

Objections to the Form of the Verdict in replevin must be made before judgment, for although the verdict is informal, it will not thereafter be set aside, if it can be clearly understood. *Blackfoot Stock Co. v. Delamue*, 2 Idaho 1017; *Faulkner v. Meyers*, 6 Neb. 414.

Amendments. — Defects of form merely, and not of substance, may be amended by the court by moulding the verdict according to its evident meaning and treating it as a verdict upon all the issues. *Pope v. Bowzer*, 1 Kan. App. 727; *Smith v. Morgan*, 8 Gill (Md.) 133; *Coit v. Waples*, 1 Minn. 134; *Segelke v. Finan*, 48 Hun (N. Y.) 310, 15 Civ. Pro. (N. Y.) 1; *Lindauer v. Teeter*, 41 N. J. L. 255; *Thornton v. Sprague*, Wright (Ohio) 645.

Illustration. — Where the jury agreed upon a verdict that the plaintiff was the owner and entitled to the possession of the property, and that the value thereof was \$200, and the jurors, on being polled, stated that they had not found anything as to damages, it was competent for the judge to direct that the words "and six cents damages for the detention thereof" be entered in the verdict. *Segelke v. Finan*, 48 Hun (N. Y.) 310. See *Coit v. Waples*, 1 Minn. 134.

In *Thornton v. Sprague*, Wright (Ohio) 645, it was held that the court may on motion of the defendant insert in the verdict a finding of joint property in the defendant and another, instead of the defendant alone, in accordance with the evidence and the claims of the parties on the trial.

Failure to Find Value. — Where the verdict does not fix the value of the property at the time of the trial, such an omission cannot be supplied by the court. *Pakas v. Racy*, 13 Daly (N. Y.) 227, 2 How Pr. N. S. (N. Y.) 227; *Eaton v. Caldwell*, 3 Minn. 134; *Stew-*

Compliance with Statute. — Although it has been held that the failure of the verdict to find all the facts it should find, under the statute, in an action of claim and delivery, while somewhat irregular, does not invalidate the verdict,¹ yet the better and safer rule requires a complete compliance with the statute.²

2. Responsiveness to Issues. — In an action of replevin the verdict must pass upon and be responsive to all the issues presented by the pleadings, as otherwise no valid judgment can be rendered thereon.³

art *v.* Taylor, 68 Cal. 5, holding that such amendment cannot be made by reference to the stenographer's notes.

Surplusage. — When the jury make in their verdict findings that are immaterial and unwarranted by the pleadings, evidence, or statute, such findings will be disregarded as mere surplusage, in cases where no harm or prejudice is thereby occasioned against the adverse party. *Hecklin v. Ess*, 16 Minn. 51; *Drennon v. Dalincourt*, 56 Mo. App. 128. See also *Lindauer v. Teeter*, 41 N. J. L. 255.

Illustration. — The finding of a jury in replevin, of the amount of rent in arrear, is surplusage, unless accompanied by a finding of the value of the goods distrained. *Wood v. May*, 3 Cranch (C. C.) 172.

1. *Miles v. Edsall*, 7 Mont. 185.

Insufficient Verdict. — A verdict as follows: "We, the jury, find that the plaintiff had a right to replevy the mill," was held to be insufficient to authorize a judgment. *Keller v. Boatman*, 49 Ind. 104.

Sufficient Finding by Justice for Plaintiff. — Where the goods had been delivered to the plaintiff a finding by a justice "for the plaintiff and against the defendants for the goods and for all the costs of this action by her expended" was held sufficient to sustain a judgment in favor of the plaintiff. *Degering v. Flick*, 14 Neb. 448.

Delivery of Property. — It is unnecessary in an action of claim and delivery for the verdict to provide for a delivery of the property, if such could be had. *Ryan v. Fitzgerald*, 87 Cal. 345.

2. *Washburn v. Huntington*, 78 Cal. 573; *Wilsey v. Rooney*, (Supm. Ct. Gen. T.) 16 N. Y. Supp. 471; *Brannin v. Bremen*, 2 N. Mex. 40; *Corbell v. Childers*, 17 Oregon 528; *Yick Kee v. Dunbar*, 20 Oregon 419.

Compliance with Statute Sufficient. — In an action of replevin, if the verdict contains all that is required by section

214 of Hill's Code, it must be held to be sufficient. *Corbell v. Childers*, 17 Oregon 528.

Right to Recover Property — California Statute. — In an action to recover the possession of personal property under section 667 of the Code of Civil Procedure, it is essential to sustain a judgment for the plaintiff, that the court should find that he is entitled to a recovery of the property sued for. A finding that he is entitled to a judgment for a particular amount is not a compliance with the statute. *Washburn v. Huntington*, 78 Cal. 573.

Oregon Statute. — Where an issue is raised as to the ownership or title, and there is no finding "for the plaintiff" as to such issue, the verdict is defective in substance, under the Oregon statute, and will not support a judgment as to such issue. *Yick Kee v. Dunbar*, 20 Oregon 419.

3. *Arkansas.* — *Smith v. Houston*, 25 Ark. 183.

California. — *Muller v. Jewell*, 66 Cal. 216.

Colorado. — *Freas v. Lake*, 2 Colo. 480; *Witcher v. Watkins*, 11 Colo. 548.

Dakota. — *Holt v. Van Eps*, 1 Dak. 206.

Illinois. — *Peck v. Hubbard*, 4 Ill. App. 566; *Mattson v. Hanisch*, 5 Ill. App. 102; *Nelson v. Bowen*, 15 Ill. App. 477; *Hackett v. Jones*, 34 Ill. App. 562; *Dobbins v. Hanchett*, 20 Ill. App. 396; *Dole v. Kennedy*, 38 Ill. 282; *Bourk v. Riggs*, 38 Ill. 321; *Hanford v. Obrecht*, 38 Ill. 493, 49 Ill. 146; *Underwood v. White*, 45 Ill. 437; *Shelton v. Franklin*, 68 Ill. 333; *Simmons v. Jenkins*, 76 Ill. 479.

Indiana. — *Clark v. Heck*, 17 Ind. 281; *Ridenour v. Beekman*, 68 Ind. 236.

Maryland. — *Smith v. Wood*, 31 Md. 293.

Missouri. — *Robbins v. Foster*, 20 Mo. App. 519; *Fulkerson v. Dinkins*,

3. General Verdict. — In an action of replevin where several

28 Mo. App. 160; *Ramsey v. Waters*, 1 Mo. 406.

Nebraska. — *Degering v. Flick*, 14 Neb. 448; *Creighton v. Haythorn*, 49 Neb. 526; *Wilson v. City Nat. Bank*, 51 Neb. 87; *Hayes v. Slobodny*, 54 Neb. 511, in which last case the plaintiff claimed as a mortgagee and the verdict erroneously found that he had the right of possession and right of property.

New York. — *Bemus v. Beekman*, 3 Wend. (N. Y.) 667; *Sprague v. Kneeland*, 12 Wend. (N. Y.) 161; *Boynton v. Page*, 13 Wend. (N. Y.) 425; *Thompson v. Button*, 14 Johns. (N. Y.) 84.

Ohio. — *Hewson v. Saffin*, 7 Ohio (pt. ii.) 232.

Oregon. — *Phipps v. Taylor*, 15 Oregon 484; *Smith v. Smith*, 17 Oregon 444; *Yick Kee v. Dunbar*, 20 Oregon 416.

Washington. — *McGraw v. Franklin*, 2 Wash. 17.

Wisconsin. — *Donaldson v. Johnson*, 2 Chand. (Wis.) 160; *Swain v. Roys*, 4 Wis. 150; *Smith v. Phelps*, 7 Wis. 211; *Ronge v. Dawson*, 9 Wis. 246; *Child v. Child*, 13 Wis. 17; *Fitzer v. McCannan*, 14 Wis. 63; *Appleton v. Barrett*, 22 Wis. 568; *Single v. Barnard*, 29 Wis. 463; *Hass v. Prescott*, 38 Wis. 146; *Carrier v. Carrier*, 71 Wis. 111; *Feder v. Daniels*, 79 Wis. 578.

Pleas of Non Cepit and Property in Defendant. — A verdict in replevin that the plaintiff is entitled to the property is not responsive to the issue upon the pleas of *non cepit* and property in defendant, and no valid judgment can be rendered upon it. *Smith v. Houston*, 25 Ark. 183.

Finding as to Portion of Property. — A verdict which awards the defendant a portion of the property and is silent as to the rest of it does not respond to the issues. *Muller v. Jewell*, 66 Cal. 216.

Property Not Taken — Finding Damages. — Gen. Stat. Colo., § 2033, provides that in replevin before justices of the peace, where the property has not been taken on the writ, the action may proceed as for damages. On the trial of an appeal from a justice in a replevin suit, in which there were no written pleadings, the jury found for plaintiff, and assessed her damages at \$225, for which sum the court entered judgment reciting therein that it appeared by the records and evidence that the property

had never been replevied or delivered to plaintiff. It was held that the verdict and judgment were sufficiently responsive to the issues. *Witcher v. Watkins*, 11 Colo. 548.

Not Guilty. — A verdict of not guilty in replevin against a sheriff for property levied upon by him, where pleas of *non cepit*, *non detinet*, property in another, and special pleas are filed, is responsive only to the pleas of *non cepit* and *non detinet*, and will not warrant a writ of *retorno*. *Hackett v. Jones*, 34 Ill. App. 562.

Sufficient Verdict for Plaintiff. — A verdict, "We, the jury, find for the plaintiff; find the property in the horse to be in him, and that he is entitled to the possession, etc.; we also find the value of the horse to be \$125," is sufficient. *Clark v. Heck*, 17 Ind. 281.

Silence as to Some Issues Joined. — When the verdict is rendered only upon the issue joined upon the plea of *non cepit* and is silent as to the other issues, it is defective and no judgment should be rendered upon it. *Smith v. Wood*, 31 Md. 293.

Where the defendant in an action of replevin pleaded property in himself and others, representatives of A, property in B, and also property in himself alone, and issues were joined and the jury found for the defendant on the first plea alone, disregarding the other issues, it was held that this finding was sufficient, because a finding of the other issues in favor of the plaintiff could not have affected the judgment. *Ramsey v. Waters*, 1 Mo. 406.

A defendant in replevin pleaded, (1) *non cepit*; (2) an avowry, averring the goods taken to be his property; to which the plaintiff replied and took issue. The jury found a general verdict for the plaintiff on the issue of *non cepit*, without any mention of the other issue, and this was held sufficient to sustain a judgment for plaintiff. *Thompson v. Button*, 14 Johns. (N. Y.) 84.

Finding Right of Property or of Possession — Missouri Statute. — Finding the "issues" for the defendant and assessing his damages at a certain sum are not a compliance with the statute, which requires to find whether he had the right of property or the right of possession only, and then to find the value of the property or of the posses-

pleas have been filed, a general verdict for either party finding all the issues in his favor is sufficient.¹

Scope of General Verdict. — A general verdict must be understood

sion and damages. *Fulkerson v. Dinkins*, 28 Mo. App. 160.

Value of Possession — Nebraska Statute. — Where the defendant claims under a lien, a verdict which does not find as to the value of the possession is irresponsible to the issues and contrary to law, within Neb. Code Civ. Pro., § 314, subd. 6. *Creighton v. Haythorn*, 49 Neb. 526.

Verdict upon Inconsistent Pleas. — In replevin, where issues are made upon different and inconsistent pleas, a general verdict upon all is bad. *Hewson v. Saffin*, 7 Ohio (pt. ii.) 232.

Nature of Detention. — A verdict that the property detained is that of the plaintiff, and awarding damages for the detention, is defective, and must be set aside unless it be also found by the jury that the detention was unjust on the part of the defendant. *Swain v. Roys*, 4 Wis. 150.

In Alternative for Damages or Return of Property. — Where it appeared that the verdict in an action of replevin was for damages only, it is sufficient without being in the alternative for a return of the property or for the value thereof in case a return cannot be had, when the point was not raised in the court below. *McGraw v. Franklin*, 2 Wash. 18.

Action Against Sheriff — Property in Stranger. — In an action of replevin the defendant, a sheriff, pleaded property in himself and in A., a judgment debtor, and the jury found "the right of property in the defendant." The court held that the form of the verdict should have been that they found the issues for the defendant, and that the property in question was the property of A. *Gilligan v. Stevens*, 4 Ill. App. 401.

Inconsistent Findings. — A finding that plaintiff has the general property, but that defendant did not unlawfully detain the goods, is contradictory and cannot sustain a judgment in a case where it is impossible that a special property should co-exist with the general ownership. *Rodman v. Nathan*, 45 Mich. 607.

Disclaimer of Title by Plaintiff. — A verdict which finds the plaintiff to be the owner of property, the title to which he has disclaimed, is erroneous. *Updyke v. Wheeler*, 37 Mo. App. 680.

1. *California.* — *Cain v. Cody*, (Cal. 1892) 29 Pac. Rep. 778.

Dakota. — *Holt v. Van Eps*, 1 Dak. 206.

Illinois. — *Underwood v. White*, 45 Ill. 437; *Atlas Sewer Pipe Co. v. Stickney*, 70 Ill. App. 176.

Indiana. — *Huff v. Gilbert*, 4 Blackf. (Ind.) 19; *Tardy v. Howard*, 12 Ind. 404; *Conner v. Comstock*, 17 Ind. 90; *Wheat v. Catterlin*, 23 Ind. 85; *Rowan v. Teague*, 24 Ind. 304; *McKeal v. Freeman*, 25 Ind. 151; *Whitney v. Lehmer*, 26 Ind. 503; *Mitchell v. Burch*, 36 Ind. 529; *Crocker v. Hoffman*, 48 Ind. 207; *Payne v. June*, 92 Ind. 252; *Baldwin v. Burrows*, 95 Ind. 81; *Van Gundy v. Carrigan*, 4 Ind. App. 333; *McAfee v. Montgomery*, 21 Ind. App. 196.

Iowa. — *Hunt v. Bennett*, 4 Greene (Iowa) 512.

Kansas. — *Arthur v. Wallace*, 8 Kan. 267; *O'Farrel v. McClure*, 5 Kan. App. 880.

Michigan. — *Guerold v. Holtz*, 103 Mich. 118.

Minnesota. — *Coit v. Waples*, 1 Minn. 134; *Ladd v. Newell*, 34 Minn. 107.

Nebraska. — *Baum Iron Co. v. Union Sav. Bank*, 50 Neb. 387.

Nevada. — *Carson v. Applegarth*, 6 Nev. 187.

New Jersey. — *Lindauer v. Teeter*, 41 N. J. L. 255.

New York. — *Rhodes v. Bunts*, 21 Wend. (N. Y.) 19.

North Dakota. — *Branstetter v. Morgan*, 3 N. Dak. 290.

Oregon. — *Jones v. Snider*, 8 Oregon 127; *Prescott v. Heilner*, 13 Oregon 200; *Smith v. Smith*, 17 Oregon 446.

Pennsylvania. — *Shoemaker v. Shoemaker*, 7 Kulp (Pa.) 528.

South Carolina. — *Gregory v. Ducker*, 31 S. Car. 141.

South Dakota. — *Gaines v. White*, 1 S. Dak. 434; *Hormann v. Sherin*, 6 S. Dak. 82; *Pitts Agricultural Works v. Young*, 6 S. Dak. 557.

Wisconsin. — *Everit v. Walworth County Bank*, 13 Wis. 419; *Fitzer v. McCannan*, 14 Wis. 63; *Krause v. Cutting*, 28 Wis. 655, 32 Wis. 687; *Eldred v. Oconto Co.*, 33 Wis. 133; *Blakeslee v. Rossman*, 44 Wis. 550.

Wyoming Statute. — Although a general verdict in an action of replevin is

as a decision by the jury in favor of the successful party upon all the questions put in issue by the pleadings.¹

Definiteness and Certainty. — Where the record does not show who has the possession of the property, a general verdict for the defendant is uncertain and should be set aside.²

not strictly in accordance with the provisions of the Code of Procedure, yet it is not such an error as to justify the interference of an appellate court, unless it is shown that the plaintiff in error sustained injury thereby. *Gregory v. Morris*, 1 Wyo. 213.

Which Party Entitled to Property. — It is only in the judgment that it is necessary to specify which party is entitled to the property. Where plaintiff was in possession under the writ, a verdict of the jury for the plaintiff simply was held sufficient to warrant judgment that he was entitled to the possession. *Newlien v. Reed*, 30 Iowa 406.

Judgment for Plaintiff for Costs — Insufficient Verdict. — In replevin where the pleas were, (1) that the defendant had not taken nor detained the property, (2) property in a stranger, (3) property in the defendant, the plaintiff joined issue on the first plea, and replied to the second and third, property in himself. The verdict was: "We find the property to be in the plaintiff," and judgment was against the defendant for costs. It was held that this verdict did not authorize a judgment for plaintiff, as the jury had not found that the property was taken or detained by the defendant. *Huff v. Gilbert*, 4 Blackf. (Ind.) 19.

General Verdict for Damages — Nevada Statute. — Where in replevin it appeared that a portion of the property had been delivered to plaintiff, and defendant claimed a return, and there was a general verdict for the plaintiff in a sum certain, the verdict was held erroneous, for the reason that no such peculiar judgment or execution as are provided for by statute in such cases could be rendered or issued thereon. *Carson v. Applegarth*, 6 Nev. 187.

Oregon Statute. — In an action to recover specific personal property, where the jury find a general verdict for damages, without finding on the issues of ownership and of the value of the property, such general verdict is not warranted by the statute, and no judgment can be rendered thereon. *Jones v. Snider*, 8 Oregon 127.

Findings by the Court. — In a case tried by the court without a jury, the finding should determine the right of possession, and the value of the goods, and if for the plaintiff should assess his damages. *Bates v. Wilbur*, 10 Wis. 415.

1. *Fitzer v. McCannan*, 14 Wis. 63.

Construction with Reference to Pleas. — A verdict finding "the issues for the defendant" must be construed to mean all the issues; it is not equivalent to a verdict of not guilty where there are issues on pleas other than *non cepit* and *non detinet*. *Underwood v. White*, 45 Ill. 437.

Judgment for Return of Property Not Authorized. — Where the property is in the possession of the plaintiff, and there is a general verdict for the defendant, without fixing the value of the property, the verdict only amounts to a finding that the defendant did not take the property, and will not authorize a judgment for the return of the same to the defendant. *Tardy v. Howard*, 12 Ind. 404; *Conner v. Comstock*, 17 Ind. 90; *McKeal v. Freeman*, 25 Ind. 151.

2. *McKeal v. Freeman*, 25 Ind. 151.

Breach of Replevin Bond. — A general verdict for defendant in replevin shows that the plaintiff unlawfully took the property from the defendants, and is a breach of the bond to prosecute the action with effect. *Wheat v. Catterlin*, 23 Ind. 85; *Whitney v. Lehmer*, 26 Ind. 503.

Title in Stranger Subject to Special Property in Defendant. — In replevin, defendant justified as sheriff, under an attachment against the property of one F., alleging that the goods in dispute belonged to F., and that the mortgage under which plaintiff claimed was fraudulent and void as to creditors. A verdict "for the defendant" generally, and that he was then and at the commencement of the action owner and entitled to the possession of the goods, was held equivalent (under the pleadings) to a finding that the general property was in F., subject to the special property in defendant. *Blakeslee v. Rossman*, 44 Wis. 550.

4. Finding Title, Ownership, or Right of Possession. — Since the right of possession is the gist of the action of replevin, a verdict must always find this fact, and where the title or ownership of the property is put in issue by the pleadings this fact must also be found in the verdict.¹

1. *Arkansas*. — Hanf v. Ford, 37 Ark. 544.

California. — Pico v. Pico, 56 Cal. 453; Ryan v. Fitzgerald, 87 Cal. 345; Humphreys v. Hopkins, (Cal. 1889) 20 Pac. Rep. 713; Banning v. Marleau, 101 Cal. 238.

Connecticut. — McNamara v. Lyon, 69 Conn. 447.

Delaware. — Knowles v. Pierce, 5 Houst. (Del.) 178.

Illinois. — Gilligan v. Stevens, 4 Ill. App. 401; Harris v. McCasland, 29 Ill. App. 430; O'Keefe v. Kellogg, 15 Ill. 347; White v. Jones, 38 Ill. 159; Jarrard v. Harper, 42 Ill. 457; Hanford v. Obrecht, 49 Ill. 146; Gotloff v. Henry, 14 Ill. 384.

Indiana. — Robertson v. Caldwell, 9 Ind. 514; Dowell v. Richardson, 10 Ind. 573; Stephens v. Scott, 13 Ind. 515; Rowan v. Teague, 24 Ind. 304; Ridenour v. Beekman, 68 Ind. 236; Brunk v. Champ, 88 Ind. 188; Baldwin v. Burrows, 95 Ind. 81; Van Meter v. Barnett, 119 Ind. 35; Hess v. Hess, 119 Ind. 66; Buck v. Young, 1 Ind. App. 558.

Iowa. — Newlien v. Reed, 30 Iowa 496; Morris v. Burley, 74 Iowa 45; Harward v. Davenport, 105 Iowa 592.

Maryland. — Edelen v. Thompson, 2 Har. & G. (Md.) 31.

Michigan. — Riley v. Littlefield, 84 Mich. 22.

Mississippi. — Jackson v. Smith, (Miss. 1888) 4 So. Rep. 119.

Missouri. — Fulkerson v. Dinkins, 28 Mo. App. 160; Updyke v. Wheeler, 37 Mo. App. 680.

Montana. — Collier v. Fitzpatrick, 19 Mont. 562.

Nebraska. — Mercer v. James, 6 Neb. 406; Faulkner v. Meyers, 6 Neb. 414; Search v. Miller, 9 Neb. 26; Hershiser v. Delone, 24 Neb. 380; Rogers v. Sample, 28 Neb. 141; Connelly v. Edgerton, 22 Neb. 82; Heffley v. Hunger, 54 Neb. 776.

New Hampshire. — Williams v. Beede, 15 N. H. 483.

New Jersey. — Boswell v. Green, 25 N. J. L. 390; Chambers v. Hunt, 22 N. J. L. 552, 18 N. J. L. 339.

New York. — Phillips v. Phillips,

(Supm. Ct. Gen. T.) 18 N. Y. Supp. 886; Woodburn v. Chamberlin, 17 Barb. (N. Y.) 446.

North Dakota. — Branstetter v. Morgan, 3 N. Dak. 290.

Ohio. — Ferrell v. Humphrey, 12 Ohio 112; Wolff v. Meyer, 12 Ohio St. 432; Rowan v. Johnson, 2 West. L. Month. 155, 2 Ohio Dec. (Reprint) 254.

Oregon. — Moorhouse v. Donaca, 14 Oregon 430; Phipps v. Taylor, 15 Oregon 484; Smith v. Smith, 17 Oregon 445; Yick Kee v. Dunbar, 20 Oregon 416; Corbell v. Childers, 17 Oregon 528.

South Dakota. — Holt v. Van Eps, 1 Dak. 206; Hormann v. Sherin, 6 S. Dak. 82; Griswold v. Sundback, 6 S. Dak. 269.

Texas. — Avery v. Avery, 12 Tex. 54.

Wisconsin. — Heeron v. Beckwith, 1 Wis. 17; Ford v. Ford, 3 Wis. 399; Smith v. Phelps, 7 Wis. 211; Bates v. Wilbur, 10 Wis. 415; Child v. Child, 13 Wis. 17; Everit v. Walworth County Bank, 13 Wis. 419; Rose v. Tolly, 15 Wis. 443; Goldsmith v. Bryant, 26 Wis. 34; Appleton v. Barrett, 22 Wis. 568; Krause v. Cutting, 28 Wis. 655, 32 Wis. 687; Single v. Barnard, 29 Wis. 463; Warner v. Hunt, 30 Wis. 200; Ela v. Bankes, 37 Wis. 89; Blakeslee v. Rossman, 44 Wis. 550; Riess v. Delles, 45 Wis. 662; Burke v. Birchard, 47 Wis. 35; Woodruff v. King, 47 Wis. 261.

Missouri Statute. — The verdict should be in substantial compliance with the terms of the statute providing that where property has been delivered to the defendant, the jury should find whether defendant had the right of property or the right of possession. Fulkerson v. Dinkins, 28 Mo. App. 160.

Right of Possession in One Defendant. — The jury may find the exclusive right of possession to be in one of the defendants, and the court may adjudge a return in favor of him and refuse it as to the others. Woodburn v. Chamberlin, 17 Barb. (N. Y.) 446.

Verdict for Damages Insufficient. — In an action of replevin, when the issues are the ownership, right to the possession and value of the property, and the wrongful taking by the defendant, a verdict which simply finds for the plaintiff in the sum of \$512, will not

Finding for Defendant. — The jury are bound to inquire into the right of property and right of possession of the defendant, and should they find him entitled to either it is their duty to assess such damages as are proper.¹

As of What Time. — The time of detention and right of possession are material, and the jury should state in their verdict whether the defendant had the right of property or the right of possession at the commencement of the action.²

Equivalent to Finding the Issues. — Where there is but one issue

authorize a judgment in his favor. *Smith v. Smith*, 17 Oregon 444.

To Warrant Return of Property to Defendant. — The defendant's allegation of property in himself is only inducement and not traversable, but it would seem that, to entitle him to a judgment of return, the allegation of property in himself must be found for him. *Chambers v. Hunt*, 22 N. J. L. 552.

For Possession or Value — *California Statute.* — A verdict for the plaintiff for the possession of the property or its value is good under California Code Civ. Pro., § 627. *Ryan v. Fitzgerald*, 87 Cal. 345.

Nebraska Statute. — Under Civ. Code Neb., § 191, it has been held that a verdict which found for the defendants, and that they were entitled to the possession of the property, and also found the value of the interests of defendants to be \$2,597, and damages for the wrongful detention, was sufficient. *Connelly v. Edgerton*, 22 Neb. 82.

Failure to Find as to Title. — Where the complaint alleged that the plaintiff was the owner of certain personal property which the defendant unlawfully detained, and upon the issue of "not guilty" the jury found that the plaintiff was entitled to the possession of the property, and assessed its value and damages for its detention, but did not pass upon the question of the title to the property, the verdict was defective in substance and a new trial should be awarded. *Child v. Child*, 13 Wis. 18.

Indiana Statute. — Under Rev. Stat. Ind. 1881, § 1547, providing that a complaint in an action of replevin before a justice of the peace shall show the wrongful taking and unlawful detention of the goods, a verdict which finds that the right of possession to the property is in the plaintiff, but is silent as to the ownership, is sufficient to support a judgment for plaintiff, as proof of either a general or special ownership would have entitled him to recover

under such a complaint. *Buck v. Young*, 1 Ind. App. 558.

In County or Justice's Court. — In *Nebraska*, where the jury in a county or justice's court find for the plaintiff, and assess his damages for the wrongful detention of the property by the defendant, it is unnecessary for them to find whether the plaintiff has the right of property or the right of possession therein. *Rogers v. Sample*, 28 Neb. 141.

Harmless Error. — Where the word "possession" is omitted from the verdict in an action of replevin, but the special findings of the jury and the evidence showed that the plaintiff is the owner of the property, and entitled to the possession thereof, the verdict will not be set aside because of the defect. *Hershiser v. Delone*, 24 Neb. 380.

1. *Ferrell v. Humphrey*, 12 Ohio 112.

Finding Title in Stranger. — Where on replevin the defendant denies plaintiff's property and right of possession and unlawful detention, and asserts property and right of possession in another under whom he claims, and the jury find the property and right of possession are neither in plaintiff nor in the one under whom he claims, but in a third person, this is substantially a verdict for the defendant, entitling him to full costs. *Rowan v. Johnson*, 2 West. L. Month. 155, 2 Ohio Dec. (Reprint) 254.

Finding that Defendant Is Tenant in Common. — Where the defendant claims as tenant in common with the plaintiff, a verdict finding "for the defendant, and that he is entitled to the possession of the property," and also the value of the whole property and damages, must be construed as finding him so entitled as tenant in common, and is good. *Ela v. Bankes*, 37 Wis. 89.

2. *Search v. Miller*, 9 Neb. 26; *Boswell v. Green*, 25 N. J. L. 390.

Verdict in Present Tense. — Notwithstanding the verdict is in the present

made by the pleadings, which is as to the title to the property, if the jury "find for the plaintiff," and find the value and assess the damages, such finding is equivalent to finding the issue, submitted to them, for the plaintiff.¹

Failure to Find Right of Possession. — Where a verdict fails to find and determine who is entitled to the right of possession, or the ownership of property, when in issue, it is of course fatally defective and will not support a judgment.²

tense and finds that the defendant "does not unlawfully detain," and that "the right of property and the right of possession thereof is in the defendant," if there be nothing in the record showing a possible prejudice to the plaintiff by reason of the defect, the verdict will not be disturbed. *Mercer v. James*, 6 Neb. 406.

A finding in the present tense that plaintiff "is" the owner, etc., is to be construed as referring to his title and right of possession at the commencement of the action, although such finding was not made until nearly a year after. *Riess v. Delles*, 45 Wis. 662.

Defendant's Right of Possession "as Agent." — A verdict that the plaintiff is "entitled to the possession of the goods," the words "as agent" being omitted, is not prejudicial to the defendant. *Morris v. Burley*, 74 Iowa 45.

1. *Everit v. Walworth County Bank*, 13 Wis. 419; *Krause v. Cutting*, 32 Wis. 687. See also *Rowan v. Teague*, 24 Ind. 304; *Harris v. McCasland*, 29 Ill. App. 430.

Verdict of "Guilty" in Justice's Court. — In a justice's court in which the pleadings are oral, a verdict, "We, the jury, find the defendant guilty," although informal, is equivalent to a finding of property in the plaintiff. *Jarrard v. Harper*, 42 Ill. 457.

Failure to Show Right of Possession in Plaintiff. — In replevin in the *detinet* the finding was that the plaintiff was a mortgagee of the chattel in dispute and possession; that the defendant as constable took and detained the same on an execution against the mortgagor, and that by law a mortgagee of a chattel in possession might maintain replevin in the *detinet* against a constable who took and detained the mortgaged chattel for the mortgagor's debts. It was held that the finding did not, even by necessary implication, show a right of possession in the plaintiff. *Bates v. Wilbur*, 10 Wis. 415.

A Finding by the Court "that the pos-

session of the property mentioned in the complaint be given to the plaintiff" is not as comprehensive as it should be, but is equivalent to finding the property in the plaintiff, and that he is entitled to the possession. *Robertson v. Caldwell*, 9 Ind. 514.

2. *Humphreys v. Hopkins*, (Cal. 1889) 20 Pac. Rep. 713; *Banning v. Marlean*, 101 Cal. 238; *Wolf v. Meyer*, 12 Ohio St. 432; *Phipps v. Taylor*, 15 Oregon 484; *Smith v. Smith*, 17 Oregon 445; *Yick Kee v. Dunbar*, 20 Oregon 419; *Holt v. Van Eps*, 1 Dak. 106; *Bates v. Wilbur*, 10 Wis. 415; *Warner v. Hunt*, 30 Wis. 200.

Requisites of Verdict for Defendant. — In replevin, when the property has been delivered to the plaintiff, if the jury find for the defendant they must also find whether the defendant had the right of property or the right of possession only at the commencement of the suit; if they find either in his favor they must also find the value of the property, or the value of the possession of the same, and damages for withholding the property. If the verdict is silent upon these points, no judgment can be rendered for any amount whatever. *Search v. Miller*, 9 Neb. 26.

Failure to Find as to Plaintiff's Ownership. — Where in replevin the plaintiff alleged that he was the owner of certain personal property and entitled to its possession, which the defendant wrongfully detained, etc., and upon issue joined the jury found that the plaintiff was entitled to the possession of the property and assessed its value, etc., but did not pass upon the fact of ownership of the property, it was held that the verdict was defective in substance and that a judgment upon it that the plaintiff was the owner was not sustained by the verdict. *Yick Kee v. Dunbar*, 20 Oregon 416.

Verdict for "Plaintiff upon All the Issues." — Where a verdict was given in replevin for "plaintiff upon all the issues," and that "plaintiff is entitled

Special Verdict. — Where a party has a special property in the goods in question by virtue of a lien, or an execution, or other limited right of possession, the jury should specially find such facts, if they find for such party.¹ A special finding must be consistent with the other findings on the questions to be solved by the verdict.²

Finding in Favor of Officer. — Where an action is brought to recover

to the immediate possession" of the property, such verdict was held sufficient in the absence of objection, even though it failed to find ownership in the plaintiff or wrongful detention by the defendant. *Hormann v. Sherin*, 6 S. Dak. 82.

No Express Finding as to Right to Immediate Possession. — A plaintiff in replevin may recover, though the court make no express finding that he is entitled to the immediate possession of the property replevied, where the right to immediate possession was in issue, and the issues were found for the plaintiff. *McNamara v. Lyon*, 69 Conn. 447.

Failure to Answer Special Interrogatories. — In replevin, where the jury by general verdict find the right of possession in the plaintiff, assessing damages for the detention of the property, this will support a judgment in his favor, although several specific questions were submitted to the jury, to some of which no answers were returned. *Faulkner v. Meyers*, 6 Neb. 414.

"No Cause of Action." — When the title and right of possession are both put in issue, the jury must find as to both, and also assess the value and damages for detention, whether they find for the plaintiff or defendant. A verdict of "no cause of action" is insufficient. *Heeron v. Beckwith*, 1 Wis. 17; *Ford v. Ford*, 3 Wis. 399; *Child v. Child*, 13 Wis. 17; *Appleton v. Barrett*, 22 Wis. 568.

1. *Rudolph v. North*, 6 Dak. 79; *Wilhelm v. Scott*, 14 Ind. App. 275; *Foster v. Gaffield*, 34 Mich. 356; *Alderman v. Manchester*, 49 Mich. 48; *Nottingham v. Vincent*, 50 Mich. 461; *Kilpatrick-Koch Dry Goods Co. v. Strauss*, 45 Neb. 793; *Feder v. Daniels*, 79 Wis. 578.

Estrays Impounded by Officer. — The defendant in an action of replevin pleaded that the animals came into his possession by virtue of his official duty to seize animals found running at large and impound them; that notice

of this fact had been given plaintiff, and that plaintiff brought the action without the payment of defendant's charges and without demand, defendant having retained possession of the property for twenty days. A special verdict finding the above facts will support a judgment for the defendant, even where no finding was made as to whether the statutory advertisement was observed, since there is a presumption that the defendant officer did his duty. *Wilhelm v. Scott*, 14 Ind. App. 275.

2. *Alderman v. Manchester*, 49 Mich. 48.

Consistency of Findings. — A jury answering special questions in a replevin suit stated that the property was not held by defendant when the affidavit was made and that he was then connected with the detention or possession. It was held that these special findings are not necessarily inconsistent with a general verdict for the plaintiff; it is presumable that the jury meant that defendant did not hold the property personally. *Foster v. Gaffield*, 34 Mich. 356.

A special finding involving the conclusion that a certain person is holding chattels under an unexpired lease is inconsistent with a general verdict for the lessor in an action of replevin brought by him against an officer who has levied on the chattels under an execution against the lessee, as it negatives the plaintiff's possessory right. *Nottingham v. Vincent*, 50 Mich. 461.

Insufficiency to Warrant Alternative Judgment. — A mortgagee brought an action of replevin against an attaching creditor. The finding was that from the sale of the property the proceeds were sufficient to meet plaintiff's mortgage, as well as defendant's claim, but this finding does not warrant a judgment giving defendant the property, or, alternatively, the value thereof. *Kilpatrick-Koch Dry Goods Co. v. Strauss*, 45 Neb. 793.

property from an officer holding it under legal process, a verdict for the officer, under a plea of property in himself and property in the debtor, should not find the property in the officer, but find the issues for him and the property in the debtor.¹

5. Partial Verdict. — Where the action involves the ownership of several articles the verdict may be in favor of the plaintiff for a part and the defendant for the balance.²

Plurality of Defendants. — If there are two or more defendants the jury may find in favor of a part and against the others.³

6. Finding for Different Interests. — Where different interests are in issue in an action of replevin, the jury should specify in their verdict for what interests replevin should lie and for what it should not lie, and they should find distinctly for the different claimants the extent and nature of the different or special interests.⁴

1. Gilligan v. Stevens, 4 Ill. App. 401; **Hanford v. Obrecht**, 49 Ill. 146; **Hefley v. Hunger**, 54 Neb. 776.

Immaterial Finding. — A verdict that the property is not in the defendant, or not in those in whom by the inducement to the plea it has been stated to be, is not sufficient, as such a finding is an immaterial one. **Chambers v. Hunt**, 18 N. J. L. 339.

Failure to Find General Ownership and Value. — A verdict for defendant, in a case where he claimed by virtue of a levy under an execution, that defendant had a special property in the lumber to the amount of the execution (stating it), and was entitled to the possession, and that plaintiffs had unjustly taken and detained it, assessing the damages, was held sufficient, although it did not determine the general ownership nor the value of the property. **Single v. Barnard**, 29 Wis. 463.

Amount of Officer's Special Interest. — Where in an action against an officer for attached goods the answer alleges the amount due the attaching creditor, a general verdict for the defendant finding a less sum than that stated in the answer is sufficient, although it does not find the amount of defendant's special interest, he being clearly entitled, if he recovers at all, to the full value of the property. **Blakeslee v. Rossman**, 44 Wis. 550.

2. O'Keefe v. Kellogg, 15 Ill. 347; **Edelen v. Thompson**, 2 Har. & G. (Md.) 31; **Updyke v. Wheeler**, 37 Mo. App. 680; **Clark v. Keith**, 9 Ohio 72; **Wright v. Funck**, 94 Pa. St. 26. See also **Knowles v. Pierce**, 5 Houst. (Del.) 178; **Collier v. Fitzpatrick**, 19 Mont.

562. See also **Brunk v. Champ**, 88 Ind. 188.

Assessment of Damages. — Where the jury find that a part of the chattels belong to the plaintiffs, but that the residue does not, damages may be assessed to each party to the suit according to the finding of the jury. **Williams v. Beede**, 15 N. H. 483.

Effect of Plaintiff's Disclaimer as to Part. — Where plaintiff in replevin disclaims ownership of part of the property, it is error to sustain a verdict for him for that part. **Updyke v. Wheeler**, 37 Mo. App. 680.

3. Carothers v. Van Hagan, 2 Greene (Iowa) 481.

4. O'Keefe v. Kellogg, 15 Ill. 347; **White v. Jones**, 38 Ill. 159; **Dowell v. Richardson**, 10 Ind. 573; **Edelen v. Thompson**, 2 Har. & G. (Md.) 31; **Farmer's L. & T. Co. v. St. Clair**, 34 Mich. 518; **Giddy v. Witherspoon**, 35 Mich. 368; **Williams v. Bresnahan**, 66 Mich. 634; **Gillham v. Kerone**, 45 Mo. 487; **Williams v. Beede**, 15 N. H. 483; **Warner v. Hunt**, 30 Wis. 200; **Burke v. Birchard**, 47 Wis. 35; **Blakeslee v. Rossman**, 44 Wis. 550.

Uncertainty. — Where the court cannot understand what property the jury intended to find for the successful party, such a verdict is bad for uncertainty. **Dowell v. Richardson**, 10 Ind. 573.

Lien or Special Property — Michigan Statute. — Under Howell's Stat. 1882, § 8342, requiring a specific finding, in replevin, of any lien or special property claimed, it was held that if not found the judgment cannot recognize it; much less if the evidence will not sup-

7. Finding Unlawful Taking and Detention. — Where the unlawful taking and wrongful detention of property is put in issue by the pleadings, the jury should in their verdict make findings of such issues or their verdict will be defective.¹

8. Description of Property. — There must appear in the verdict such a sufficiently clear description of the property in question, or certain reference thereto, that its identity may be reasonably established.²

port such finding. *Gidday v. Wither-
spoon*, 35 Mich. 368.

Claimants under Mortgages. — In replevin between claimants of property under rival mortgages the verdict and judgment should specify the amount of the lien of the successful party. *Williams v. Bresnahan*, 66 Mich. 634.

Plaintiff and Defendant Joint Owners. — If plaintiff and defendant appear to be joint owners the defendant is entitled to a verdict. *Chambers v. Hunt*, 22 N. J. L. 552.

Tenants in Common. — Where the jury find that plaintiff and defendant are tenants in common of the property, they may award the exclusive possession to the one entitled thereto by agreement of the parties. *Newton v. Gardner*, 24 Wis. 232.

1. Insufficient Verdict. — Where the unjust detention is put in issue, a verdict which finds the property in plaintiff and assesses its value and damages for detention, but does not find the fact of unjust detention, is insufficient. *Swain v. Roys*, 4 Wis. 150.

Failure to Find Wrongful Detention. — A verdict in these words, "We, the jury, find the property was replevied in Miami county, and at the commencement of this suit the right of and possession thereto was in the plaintiff, and assess his damages at twenty-five dollars," was held insufficient to authorize a judgment, because it does not find that the defendant had possession, either at all or without right, and does not show upon what basis damages were assessed. *Ridenour v. Beekman*, 68 Ind. 236.

Failure to Find as to Taking. — Where the unjust taking is put in issue, a verdict of "guilty of wrongful detention," not finding as to the taking, is insufficient. *Ronge v. Dawson*, 9 Wis. 246.

Kansas — Verdict for Defendant. — In replevin under the Kansas Code, the unlawful detention is the gist of the action, and a verdict which finds there was no wrongful detention is sufficient. *Leroy v. McConnell*, 8 Kan. 273.

Verdict for Plaintiff. — Where the verdict is in favor of the plaintiff and against the defendant, and where, if construed in the light of the issues and evidence, it shows beyond all question that the defendant wrongfully detained the property from the plaintiff, it is not fatally defective, because it does not expressly state that the property was wrongfully detained by the defendant. *Clouston v. Gray*, 48 Kan. 31.

Implied Unlawful Detention. — Where by denying the ownership of the plaintiff, defendants admitted the detention, a verdict finding the ownership in plaintiff and also the right of possession implies an unlawful detention. *Kluse v. Sparks*, 10 Ind. App. 444.

The verdict ought, either in general or special terms, to pass upon the question of unlawful detention; but even if it do not, in a case where this question is controlled entirely by that of ownership, which is expressly covered by the findings, the judgment will not be reversed upon that ground. *Eiseley v. Malchow*, 9 Neb. 174.

A Finding that the Plaintiff Had Possession of the property at the commencement of the action will not sustain a judgment against the defendant for wrongfully detaining it. *Degering v. Flick*, 14 Neb. 450.

Whether Defendant's Possession Was Wrongful. — The court should find explicitly whether the defendant's possession was rightful or wrongful. *Barksdale v. Appleberry*, 23 Mo. 389, in which case is set out in full findings that were deficient in this respect and insufficient to support a judgment for the defendant.

Plea of Non Cepit and Avowry — Verdict for Defendant. — A verdict for the defendant both on the plea of *non cepit* and on an avowry for rent, is erroneous; if the avowry be sustained, the verdict on the issue of *non cepit* should be for the plaintiff. *Hill v. Stocking*, 6 Hill (N. Y.) 277.

2. Gulath v. Waldstein, 7 Mo. App. 66; **Allen v. Gardner**, 47 Kan. 337;

Certainty. — A verdict in favor of the plaintiff is bad for uncertainty, if the court cannot understand from it what property the jury intended to find for him.¹

9. Value of Property. — In order that the court may be able to render the usual alternative judgment in an action of replevin the jury should find in their verdict the value of the property in controversy.²

Barksdale v. Appleberry, 23 Mo. 389; *Plano Mfg. Co. v. Daley*, 6 N. Dak. 330; *Norris v. Clinkscales*, 47 S. Car. 488.

Reference to Complaint. — Where in an action of replevin only the title and not the identity or quantity of the articles described in the complaint is in issue, a verdict: "We, the jury, find for the plaintiff, and the value of the property taken to be \$72.05, and interest," is sufficiently clear, since the reference to the complaint makes certain what property was meant. *Hobbs v. Clark*, 53 Ark. 411.

Finding as to All of Property. — The verdict in replevin need not specifically describe the property where there is a finding in favor of the same party as to all of the property. *Anderson v. Lane*, 32 Ind. 102.

Goods Belonging to Plaintiff and Others. — Where the verdict does not distinguish the goods belonging to the plaintiff from those which do not belong to him, a new trial must be ordered. *Varnum v. Camp*, 13 N. J. L. 340.

Portion of Property Claimed. — A description in the complaint in an action to recover personal property, of the property sought to be recovered as "sixty-eight head of hogs on the macadamized road in said county, on the place formerly kept by Wong Hin Soon," is reasonably certain; but a verdict in such action which finds that "the plaintiff is entitled to that portion of the property described in the complaint, to wit, forty-nine hogs," and assessing the value at twelve dollars a head, is too indefinite to support a judgment. *Guille v. Wong Fook*, 13 Oregon 577.

1. *Dowell v. Richardson*, 10 Ind. 573; *Hess v. Hess*, 119 Ind. 66; *Rose v. Tolly*, 15 Wis. 443.

Property in Defendant. — A verdict which finds property in the defendant is sufficient in substance under pleas, each of which virtually denies property in the plaintiff. *Gotloff v. Henry*, 14 Ill. 384.

2. *Arkansas.* — *Bailey v. Ellis*, 21 Ark. 488.

Alabama. — *Averett v. Milner*, 75 Ala. 505.

California. — *Pennybecker v. McDougal*, 48 Cal. 160; *Thompson v. Corpstein*, 52 Cal. 653; *Pico v. Martinez*, 55 Cal. 148; *Pico v. Pico*, 56 Cal. 453; *Etchepare v. Aguirre*, 91 Cal. 288.

Colorado. — *Akron Bank v. Dole*, 25 Colo. 1.

Florida. — *Jeffreys v. Greeley*, 20 Fla. 819.

Indiana. — *Buck v. Young*, 1 Ind. App. 558; *Chissom v. Lamcool*, 9 Ind. 530; *Wilcoxon v. Annesley*, 23 Ind. 285; *Baldwin v. Burrows*, 95 Ind. 81; *Burket v. Pheister*, 114 Ind. 503; *Farrar v. Eash*, 5 Ind. App. 238.

Iowa. — *Western Stage Co. v. Walker*, 2 Iowa 504.

Kansas. — *Miller v. Krueger*, 36 Kan. 344; *Weil v. Ryus*, 39 Kan. 564; *Babb v. Aldrich*, 45 Kan. 218.

Kentucky. — *Young v. Parsons*, 2 Met. (Ky.) 499.

Michigan. — *White v. White*, 58 Mich. 546; *Williams v. Bresnahan*, 66 Mich. 634; *Dewey v. Hastings*, 79 Mich. 263; *Pearl v. Garlock*, 61 Mich. 419; *Treadwell v. Paddock*, 75 Mich. 286; *Whitney v. Hyde*, 91 Mich. 13; *Brown v. Horning*, 76 Mich. 542.

Minnesota. — *Eaton v. Caldwell*, 3 Minn. 134.

Missouri. — *Gulath v. Waldstein*, 7 Mo. App. 66; *Burkeholder v. Rudrow*, 19 Mo. App. 60; *Ascher v. Schaeper*, 25 Mo. App. 1; *Schultz v. Hickman*, 27 Mo. App. 21; *Clinton v. Stovall*, 45 Mo. App. 642; *Carroll v. Hancock*, 57 Mo. App. 228; *Stroud v. Morton*, 70 Mo. App. 647; *Schaffer v. Faldwesch*, 16 Mo. 337; *Pope v. Jenkins*, 30 Mo. 528; *Woodburn v. Cogdal*, 39 Mo. 228; *Hohenthal v. Watson*, 28 Mo. 360; *Miller v. Whitson*, 40 Mo. 101; *State v. Dunn*, 60 Mo. 64; *Chapman v. Kerr*, 80 Mo. 158; *Richey v. Burnes*, 83 Mo. 362.

Nebraska. — *Connelly v. Edgerton*,

Limit of Value. — It is not within the power of the jury to assess the value of the property in controversy at a greater sum than that alleged in the complaint,¹ but they may find for a smaller amount than that claimed.²

22 Neb. 82; *Rogers v. Sample*, 28 Neb. 141; *Goodwin v. Potter*, 40 Neb. 553.

New Jersey. — *Williamson v. New Jersey Southern R. Co.*, 29 N. J. Eq. 311.

New Mexico. — *Garland v. Bartels*, 2 N. Mex. 1; *Brannin v. Bremen*, 2 N. Mex. 40.

New York. — *Wood v. Orser*, 25 N. Y. 348; *Archer v. Boudinet*, (C. Pl. Gen. T.) Code Rep. N. S. (N. Y.) 372; *Tiedman v. O'Brien*, 36 N. Y. Super. Ct. 539; *Soria v. Davidson*, 53 N. Y. Super. Ct. 52; *Buck v. Remsen*, 34 N. Y. 383; *Keeney v. Swan*, 120 N. Y. 626; *Hurd v. Birch*, (Supm. Ct. Gen. T.) 11 N. Y. St. Rep. 870; *Duffus v. Schwinger*, 79 Hun (N. Y.) 541; *Fischer v. Cohen*, (Supm. Ct. App. T.) 22 Misc. (N. Y.) 117; *Seaman v. Luce*, 23 Barb. (N. Y.) 240; *Phillips v. Melville*, 10 Hun (N. Y.) 212.

Oklahoma. — *Chandler v. Colcord*, 1 Okla. 260.

Oregon. — *Moorhouse v. Donaca*, 14 Oregon 430; *Smith v. Smith*, 17 Oregon 444.

Pennsylvania. — *Warner v. Aughenbaugh*, 15 S. & R. (Pa.) 9; *Moore v. Shenk*, 3 Pa. St. 13; *Park v. Holmes*, 29 W. N. C. (Pa.) 492.

South Carolina. — *Archer v. Long*, 32 S. Car. 171.

Washington. — *Meeker v. Johnson*, 3 Wash. 247; *Quinn v. Parke*, etc., Machinery Co., 5 Wash. 279.

Wisconsin. — *Saunderson v. Lace*, 1 Chand. (Wis.) 231; *Donaldson v. Johnson*, 2 Chand. (Wis.) 160; *Wallace v. Hilliard*, 7 Wis. 627; *Child v. Child*, 13 Wis. 18; *Farmers' L. & T. Co. v. Commercial Bank*, 15 Wis. 424; *Hass v. Prescott*, 38 Wis. 146; *Blakeslee v. Rossman*, 44 Wis. 550; *Burke v. Birchard*, 47 Wis. 35.

United States. — *Williams v. Morrison*, 29 Fed. Rep. 282; *Wood v. May*, 3 Cranch (C. C.) 172.

Verdict Need Not Be for Return of Property. — A verdict for the defendant which is special as to the value of the property, and general upon all other issues, is sufficient to justify an alternative judgment for the return of the property, or for its value in case a delivery cannot be had, and is not defective

because it does not specially find in the alternative "for the return of the property." *Etchepare v. Aguirre*, 91 Cal. 288.

Waiver of Failure to Find Value. — If the verdict fails to find the value of the goods, the error will be regarded as waived by the parties when they make no objection. *Wilcoxon v. Annesley*, 23 Ind. 285.

New York Statute. — In *Archer v. Boudinet*, (C. Pl. Gen. T.) Code Rep. N. S. (N. Y.) 372, *Woodruff, J.*, said: "By that section [261 of the Code] it is provided that the jury shall assess the value of the property in two cases — one where the property has not been delivered to the plaintiff, and the other where the defendant by his answer claims a return thereof. In other cases a general verdict is proper, and the special finding as to the value is unnecessary."

Insufficient Verdict. — When the issues are the ownership, right to the possession and value of the property, and the wrongful taking by the defendant, a verdict which simply finds for the plaintiff in the sum of five hundred and twelve dollars will not authorize a judgment in his favor. *Smith v. Smith*, 17 Oregon 444.

Washington Statute. — The jury should under section 241 of the Code of 1881, assess the value of the property whether their verdict be in favor of plaintiff or defendant. *Meeker v. Johnson*, 3 Wash. 247.

Wisconsin Statute. — The jury is in all cases authorized to assess the value of the property under § 11, c. 132, Rev. Stat. Wis., where they find that the defendant in replevin is entitled to a return, whether he waives it or not. *Farmers' L. & T. Co. v. Commercial Bank*, 15 Wis. 424.

1. *Tiedman v. O'Brien*, 36 N. Y. Super. Ct. 539.

2. *Miller v. Krueger*, 36 Kan. 344, in which case it was held that a finding for the plaintiff in a less sum than that alleged was not an error of which the defendant could complain.

Objection Not Available to Plaintiff. — Where the property is turned over to the plaintiff, and judgment is rendered

Valuation as of What Time. — The finding of the value of the property should always be with reference to the commencement of the action, since any depreciation without the fault of the party in present possession must be at the loss of the real owner.¹

Failure to Find Value. — The omission of the jury to find the value is not *ipso facto* fatal, and a judgment based thereon is not void, in the absence of an appeal and where neither harm nor prejudice is occasioned against the winning party.²

Verdict on Avowry. — In replevin for goods distrained for rent in arrear, the verdict, if for the defendant, should find the amount of rent in arrear and also the value of the property in question.³

Finding Value of Special Interest. — It has been held that the jury in finding a verdict for a party, entitling him to possession of the property by virtue of a special interest therein, need not determine the value of such special interest.⁴

Finding Value of Separate Articles. — Where the property in contro-

for the defendant, and the value found to be greatly less than the amount stated by the plaintiff in his affidavit, such finding of value cannot be complained of by the plaintiff where he fails to return the property as directed by the judgment. *Weil v. Ryus*, 39 Kan. 564.

1. *Pope v. Jenkins*, 30 Mo. 528; *Woodburn v. Cogdal*, 39 Mo. 228; *Chapman v. Kerr*, 80 Mo. 158; *Riches v. Burnes*, 83 Mo. 362; *Hurd v. Birch*, (Supm. Ct. Gen. T.) 11 N.Y. St. Rep. 870.

2. *Schaffer v. Faldwesch*, 16 Mo. 337; *State v. Dunn*, 60 Mo. 64; *Stroud v. Morton*, 70 Mo. App. 647.

Value of Property and Amount of Damages. — Where the value of the property is not assessed by the jury, the value cannot be assumed to be the amount of damages found. *Eaton v. Caldwell*, 3 Minn. 134.

Failure to Find Value Not Cured by Judgment. — It is provided in Rev. Stat. Mo. 1889, § 7489, that where plaintiff fails in his replevin suit and is in possession of the property, the value thereof must be assessed by the court or jury, and so a failure to make such assessment in the verdict cannot be cured by an assessment in the judgment. *Clinton v. Stovall*, 45 Mo. App. 642.

Objection Not Waived — South Carolina Statute. — Under a code provision that "in an action for the recovery of specific personal property, if the property have not been delivered to the plaintiff, or if it have, and the defendant by his answer claim a return thereof, the jury shall assess the value

of the property if their verdict be in favor of the plaintiff, or if they find in favor of the defendant, and that he is entitled to a return thereof, and may at the same time assess the damages," it was held that a finding "for the defendant the property in dispute" is void without finding value, and the waiver of the defendant to take advantage of the defect will not cure it. *Archer v. Long*, 32 S. Car. 171.

3. *Caldwell v. Cleason*, 3 Harr. (Del.) 420; *Rosenthal v. Lehman*, 6 W. N. C. (Pa.) 559.

Surplusage. — A finding of a jury of the amount of the rent in arrear is surplusage, unless accompanied by a finding of the value of the goods distrained. *Wood v. May*, 3 Cranch (C. C.) 172.

Sufficient Verdict. — A third party brought an action of replevin against a landlord for the recovery of distrained goods, and the verdict was as follows: "The jury find that the defendant is entitled to \$561 rent in arrear, and that the value of the goods liable to said rent is \$300. As to the rest of the goods they find for the plaintiff." Although the verdict was informal, yet it "was sufficient to be moulded into proper form." *Park v. Holmes*, 29 W. N. C. (Pa.) 492.

4. *Woodruff v. King*, 47 Wis. 261.

Property Subject to Lien. — A verdict assessing the value of the goods and stating that this is to be reduced by a factor's advances and charges, without finding the amount of the same, is not sufficient. *Wood v. Orser*, 25 N. Y. 348.

versy consists of separate and distinct articles, susceptible of division and distinct valuation, the jury must in their verdict find the value of each article separately.¹

Reason for the Rule.—The reason for the rule that the jury should

1. *Alabama*.—Southern Warehouse Co. v. Johnson, 85 Ala. 178; Avary v. Perry Stove Mfg. Co., 96 Ala. 406.

Arkansas.—Noland v. Leech, 10 Ark. 504; Hanf v. Ford, 37 Ark. 544; Hickman v. Ford, 43 Ark. 207.

California.—Black v. Black, 74 Cal. 520.

Idaho.—Johnson v. Fraser, 2 Idaho 371.

Mississippi.—Drane v. Hilzheim, 13 Smed. & M. (Miss.) 336; Ketchum v. Brennan, 53 Miss. 596; Spratley v. Kitchens, 55 Miss. 578; Brady v. Cook, 68 Miss. 636; Cox v. Martin, 75 Miss. 229.

North Carolina.—Rowland v. Mann, 6 Ired. L. (N. Car.) 38.

Texas.—Blakely v. Duncan, 4 Tex. 184; Rowlett v. Fulton, 5 Tex. 458; Horton v. Reynolds, 8 Tex. 284; Hawkins v. Lee, 22 Tex. 544; Hoesser v. Kraeka, 29 Tex. 450; Cook v. Hallsell, 65 Tex. 1; Bowman v. Weber, (Tex. Civ. App. 1897) 41 S. W. Rep. 493; Byrne v. Lynn, 18 Tex. Civ. App. 252.

United States.—Bennett v. Butterworth, 8 How. (U. S.) 128.

Sufficient Certainty.—A verdict in a suit for slaves unlawfully taken and carried away, "for the value of Tom \$400, and for the hire of Tom \$75 per year, from the 17th of November, 1840, up to the present time; and for the value of Ephraim \$300, and for the hire of Ephraim \$56.25 per year up to the present date," is sufficiently certain and not defective on account of the word "hire." Horton v. Reynolds, 8 Tex. 284.

Finding for Defendant.—The administrator of P. brought an action of replevin for crops against C.'s trustee under a deed to secure P. for the advances made for the crops, and the verdict was: "The jury find the amount as below due plaintiff as administrator of P.: 10 bales of cotton at \$37.50 per bale, 250 bushels of corn at 25 cents per bushel, and 240 bushels of cotton seed at 6 cents per bushel; and find, after taking off one bale of cotton, \$37.50, and nine head of cattle, \$48, balance due C. \$113.85." It was held that the legal effect of the verdict was

a finding for the defendant. Cox v. Martin, 75 Miss. 229.

Alabama Statute.—A verdict assessing the value of two mules together is erroneous, under Alabama Code, § 2719, providing that the jury must assess the value of each article separately, if practicable. Southern Warehouse Co. v. Johnson, 85 Ala. 178.

Under the Statute of Colorado providing that, in an action for the recovery of personal property, judgment may be for the possession or the value thereof, in case a delivery cannot be had, a finding of the total aggregate value of all the chattels withheld is sufficient. Stevenson v. Lord, 15 Colo. 131.

Minnesota Statute.—Under Pub. Stat., c. 61, § 38, which provides that in an action for the recovery of personal property the jury must assess the value of the property, the value of each article need not be assessed separately, and a finding of the value in gross is sufficient. Caldwell v. Bruggerman, 4 Minn. 270.

What Are Separate Articles.—Whatever in common understanding is regarded as parts of a whole, may be assessed together, as a carriage and harness; but where the articles are clearly distinct, as carriage and horses, they must be assessed separately. Drane v. Hilzheim, 13 Smed. & M. (Miss.) 336.

Consistency of Finding with Complaint and Evidence.—In an action for a number of hogs, of which the aggregate value only is alleged in the complaint, a finding that each hog was of the value of four dollars is proper, and will be held supported by evidence that they were worth four or five dollars a head. Black v. Black, 74 Cal. 520.

Correction of Verdict—New Trial.—If the jury assess the value of several distinct articles *in solido*, they should be sent back for a verdict assessing the value of each separate article. The defendant, who retains several distinct articles, may return any one of them or its value, and is entitled for this purpose to have the value fixed by the jury, and an alternative judgment accordingly. If this is not done, he may

find the value of each article separately in an action of replevin, is that the court must give an alternative judgment for the return of the property or its value, and where the party in present possession cannot return all of the property he is entitled to return such articles as he can in satisfaction of the judgment *pro tanto* and should hence have the value of the remaining property definitely fixed, so that the portion of judgment unsettled may be satisfied in money.¹

Exceptions to the Rule. — Since "where the reason for the rule fails, the rule itself fails," it is unnecessary to find a separate valuation of each article where both the pleadings and evidence are silent as to such valuation;² where the articles have been disposed of, so that a return is impossible;³ where no value at all of the property was found;⁴ where there was no demand for a separate valuation;⁵ where the property was too intimately associated to be severed;⁶ and, in three jurisdictions, where the rule requiring a separate finding does not obtain.⁷

have a *venire de novo*, but there is no mode of correcting the error except by new trial. *Hanf v. Ford*, 37 Ark. 544. See also *Hickman v. Ford*, 43 Ark. 207.

Stock of Goods. — A verdict in a case where the title to a stock of goods was in issue, is a sufficient compliance with the *Alabama* statute, when it sets out collectively assessed articles of different brands and of different values, each article having been enumerated by itself, and gives the value of the individual article, and then the value of each class together. *Avary v. Perry Stove Mfg. Co.*, 96 Ala. 406.

1. *Hanf v. Ford*, 37 Ark. 544; *Blakely v. Duncan*, 4 Tex. 181; *Hawkins v. Lee*, 22 Tex. 544; *Hoeser v. Kraeka*, 29 Tex. 450; *Bowman v. Weber*, (Tex. Civ. App. 1897) 41 S. W. Rep. 493.

Texas Statute. — A verdict against parties who have replevied property should find the value of the various items of property replevied, as they have the right by the statute to return the entire property in satisfaction of the payment, or a part of it in satisfaction *pro tanto*, and for that purpose may have the value assessed. *Cook v. Halsell*, 65 Tex. 1.

2. *Brenot v. Robinson*, 108 Cal. 143; *Byrne v. Lynn*, 18 Tex. Civ. App. 252.
3. *Brady v. Cook*, 68 Miss. 636. See also *Dillard v. McClure*, 64 Mo. App. 488, 2 Mo. App. Rep. 1042.

4. *Live Oak Ranch Co. v. Ingham*, (Tex. Civ. App. 1898) 44 S. W. Rep. 588.

5. **Separate Valuation Waived.** — The right of defendant in replevin to a

separate valuation in the verdict of each distinct article is waived if he does not demand a separate valuation before the verdict, nor object to a verdict *in solido* before the jury is discharged. *Hobbs v. Clark*, 53 Ark. 411.

Necessity to Demand Separate Valuation. — In an action of replevin brought for the recovery of several articles, if a separate valuation of each article is desired by either party, he should demand such a finding, else he will not be heard to complain of the jury's failure to do so. *Johnson v. Fraser*, 2 Idaho 371.

6. *Drane v. Hilzheim*, 13 Smed. & M. (Miss.) 336.

Illustrations. — In *Henry v. Dillard*, 68 Miss. 538, *Woods, C. J.*, said: "The court, too, correctly refused to vacate the judgment, because, as alleged in appellant's motion for a new trial, there was no separate finding of the value of each article. A mare and her young offspring may, we think, be properly considered, according to common understanding, as so necessarily and intimately connected together as to constitute one whole. In *Drane v. Hilzheim*, 13 Smed. & M. (Miss.) 336, a barouche and harness were regarded as parts of one whole, and the court refused to award a new trial, because but one value was placed by the jury upon both. The union of a dam and her tender offspring must be conceded to be more intimate than that between a vehicle and its harness."

7. *Stevenson v. Lord*, 15 Colo. 131; *Caldwell v. Bruggerman*, 4 Minn. 270.

Exceptions to the Rule of Finding Full Valuation. — Where the property is in the hands of the court, or has been already delivered into the possession of the party for whom the verdict is given, it is unnecessary for the verdict to fix its value, as the judgment should then be for delivery alone.¹

10. Damages. — Where the plaintiff has suffered loss by reason of the taking and detention of the property and claims damages therefor in his petition, the jury should in their verdict find the amount of such damages.²

California. — A defendant who recovers a judgment in an action of replevin, where the property has been delivered to the plaintiff, is entitled to a judgment for a return of all the property, and if it cannot be returned, then to a judgment for the value of the whole. It is not necessary to the validity of the judgment that the separate value of each article sued for be found by the court. *Whetmore v. Rupe*, 65 Cal. 237.

1. *Harris v. Harris*, 43 Ark. 535; *Caruthers v. Hensley*, 90 Cal. 559; *Van Gundy v. Carrigan*, 4 Ind. App. 333; *Busching v. Sunman*, 19 Ind. App. 683; *Williams v. Wilcox*, 66 Iowa 65; *Hanscom v. Burmood*, 35 Neb. 504; *Fischer v. Cohen*, (Supm. Ct. App. T.) 22 Misc. (N. Y.) 117; *Claffin v. Davidson*, 53 N. Y. Super. T. 122, 8 Civ. Pro. (N. Y.) 46; *Woodburn v. Chamberlin*, 17 Barb. (N. Y.) 446; *Prescott v. Heilner*, 13 Oregon 200; *Woodruff v. King*, 47 Wis. 261.

Where the Property Is Taken by Plaintiff under the writ and judgment is rendered in his favor, a failure to assess the value of the property cannot be prejudicial to defendant. *Williams v. Wilcox*, 66 Iowa 65.

Question as to Costs Only. — Where the property is delivered to the plaintiffs and they obtain a verdict, the question of value is of no importance, except as to the costs. *Woodburn v. Chamberlin*, 17 Barb. (N. Y.) 446.

Mortgaged Chattels. — In replevin, where plaintiff, claiming as mortgagee, has acquired and retains possession by giving the statutory bond, a verdict in his favor, finding him entitled to the possession, need not determine the value of his special interest. *Woodruff v. King*, 47 Wis. 261. See also *Thompson v. Greene*, 85 Ala. 240.

Where the Defendants Claim a Special Property only, and the court finds the value of said special property, and the finding is within the value of the goods

as proved at the trial, it is not necessary to find the general value of the property. *Earle v. Burch*, 21 Neb. 702.

2. **Alabama.** — *Johnson v. McLeod*, 80 Ala. 433.

Arkansas. — *Dunnahoe v. Williams*, 24 Ark. 264; *Lesser v. Norman*, 51 Ark. 301.

California. — *Conroy v. Flint*, 5 Cal. 327; *Hisler v. Carr*, 34 Cal. 641; *Thompson v. Corpstein*, 52 Cal. 653; *Ryan v. Fitzgerald*, 87 Cal. 345.

Colorado. — *Sears v. Andrews*, 1 Colo. 88.

Connecticut. — *Gould v. Hayes*, 71 Conn. 86.

Delaware. — *Boyce v. Cannon*, 5 Houst. (Del.) 409.

Idaho. — *Blackfoot Stock Co. v. Delamue*, 2 Idaho 1017.

Indiana. — *Stephens v. Scott*, 13 Ind. 515; *Baldwin v. Burrows*, 95 Ind. 81; *Burket v. Pheister*, 114 Ind. 503; *Farrar v. Eash*, 5 Ind. App. 238. See also *Buck v. Young*, 1 Ind. App. 558.

Kansas. — *Garrett v. Wood*, 3 Kan. 231; *Scott v. Beard*, 5 Kan. App. 560.

Maryland. — *Rogers v. Roberts*, 58 Md. 519.

Michigan. — *Riley v. Littlefield*, 84 Mich. 22.

Minnesota. — *Leonard v. Maginnis*, 34 Minn. 506.

Missouri. — *Dillard v. McClure*, 64 Mo. App. 488, 2 Mo. App. Rep. 1042; *Williams v. Bugg*, 10 Mo. App. 586; *Ascher v. Schaeper*, 25 Mo. App. 1; *Fulkerson v. Dinkins*, 28 Mo. App. 160; *Pope v. Jenkins*, 30 Mo. 528; *Woodburn v. Cogdal*, 39 Mo. 228; *Miller v. Whitson*, 40 Mo. 101; *Chapman v. Kerr*, 80 Mo. 158; *Richey v. Burnes*, 83 Mo. 362.

Montana. — *Morgan v. Reynolds*, 1 Mont. 163.

Nebraska. — *Black v. Winterstein*, 6 Neb. 224; *Baker v. Daily*, 6 Neb. 464; *Connelly v. Edgerton*, 22 Neb. 82.

Specifying Ground of Assessment. — A verdict should in an action of replevin specify the ground on which the assessment of damages is made.¹

New Hampshire. — *Williams v. Beede*, 15 N. H. 483.

New Jersey. — *Williamson v. New Jersey Southern R. Co.*, 29 N. J. Eq. 311.

New Mexico. — *Garland v. Bartels*, 2 N. Mex. 1; *Brannin v. Breman*, 2 N. Mex. 40.

Ohio. — *Thornton v. Sprague*, Wright (Ohio) 645; *Hewson v. Saffin*, 7 Ohio (pt. ii.) 232.

Oklahoma. — *Kuhlman v. Williams*, 1 Okla. 136.

Oregon. — *Coffin v. Taylor*, 16 Oregon 375.

Pennsylvania. — *Easton v. Worthington*, 5 S. & R. (Pa.) 130; *Marsh v. Pier*, 4 Rawle (Pa.) 273; *Huston v. Wilson*, 3 Watts (Pa.) 287; *Kleber v. Bradshaw*, 23 Pittsb. Leg. J. (Pa.) 185; *Warner v. Aughenbaugh*, 15 S. & R. (Pa.) 9; *Moore v. Shenk*, 3 Pa. St. 13.

Texas. — *Avery v. Avery*, 12 Tex. 54; *Bradshaw v. Mayfield*, 24 Tex. 481.

Washington. — *McGraw v. Franklin*, 2 Wash. 17; *Quinn v. Parke*, etc., Machinery Co., 5 Wash. 276; *Meeker v. Johnson*, 3 Wash. 247.

Wisconsin. — *Hill v. Bloomer*, 1 Pin. (Wis.) 463; *Saunderson v. Lace*, 1 Chand. (Wis.) 231; *Donaldson v. Johnson*, 2 Chand. (Wis.) 160; *Wallace v. Hilliard*, 7 Wis. 627; *Bates v. Wilbur*, 10 Wis. 415; *Child v. Child*, 13 Wis. 18; *Farmers' L. & T. Co. v. Commercial Bank*, 15 Wis. 424; *High v. Johnson*, 28 Wis. 72; *Hass v. Prescott*, 38 Wis. 146; *Wegner v. Second Ward Sav. Bank*, 76 Wis. 242.

Statutory Provisions. — *Alabama.* — According to Code Ala. 1876, § 2942 *et seq.*, which provides for the recovery of personal property *in specie*, there should be a separate assessment of the damages, where the recovery of different kinds of property is sought in one action. If the verdict and judgment are for a gross sum of money, where the suit is for "one lot of staves and saw logs," it will be reversed on appeal as erroneous. *Johnson v. McLeod*, 80 Ala. 433.

Indiana. — Rev. Stat. Ind. 1881, § 549, provides: "In actions for the recovery of specific personal property, the jury must assess the value of the property, as also the damages for the taking or detention, whenever, by their verdict,

there will be a judgment for the recovery or return of the property." *Baldwin v. Burrows*, 95 Ind. 81.

Michigan. — How. Stat. Mich., § 8341, provides that if the verdict be in favor of the plaintiff, the jury shall assess the damages which he has sustained by the unlawful taking and detention of the property. *Riley v. Littlefield*, 84 Mich. 22.

Washington. — Under the statute which requires the jury, in an action for the recovery of specific personal property, to "assess the value of the property, if their verdict be in favor of the plaintiff," a verdict which merely finds for the plaintiff and assesses his damages at fifteen hundred dollars is so defective as to justify a reversal of the judgment. *Quinn v. Parke*, etc., Machinery Co., 5 Wash. 276.

Failure to Fix Amount of Damages. — Where the verdict in favor of defendant fixes no amount of damages, a judgment cannot be rendered for any amount whatever. *Black v. Winterstein*, 6 Neb. 224.

Damages for Both Taking and Detention. — Where damages are claimed for both the taking and detention, a verdict for damages in a certain sum is good, though it does not specify whether the damages are for the taking or detention or for both. *Ryan v. Fitzgerald*, 87 Cal. 345.

When Plaintiff Owns Only Part of Chattels. — Where the pleadings raise an issue of property, and the jury find that a part of the chattels belong to the plaintiff, but that the residue do not, damages may be assessed to each party to the suit according to the finding of the jury. *Williams v. Beede*, 15 N. H. 483.

1. *Hewson v. Saffin*, 7 Ohio (pt. ii.) 232.

Value of Use of Property. — The value of the use of the property must be taken into consideration for the purpose of giving compensatory damages. *Yandle v. Kingsbury*, 17 Kan. 195, 22 Am. Rep. 285, note.

Where the evidence shows that the value of the property is from four to five dollars a day, that it was wrongfully taken, and that more than one hundred days intervened between the time of taking and the day of trial, a

Separate Finding for Value and Damages. — The jury should find separately the value of the property and the damages sustained by reason of the detention, and not lump them in a single amount.¹

Nominal Damages. — If pending an action of replevin but before verdict the property is delivered and accepted nominal damages only should be assessed.²

Failure to Assess Damages Not Fatal. — Since a finding for damages is not the primary purpose of the action but only a nominal, incidental issue, a verdict will not be set aside as fatally defective for failure to find damages.³

11. Alternative Verdict. — It is provided in the statutes of some jurisdictions that the verdict, as well as the judgment, must be in the alternative for the possession of the property or its value; but in the absence of such statutory requirements the verdict should nevertheless find all the facts with sufficient clearness and fullness to enable the court to render the usual judgment in the alternative.⁴

verdict for two hundred and four dollars is not excessive damages. *Morgan v. Reynolds*, 1 Mont. 163.

1. *Garland v. Bartels*, 2 N. Mex. 1; *Brannin v. Bremen*, 2 N. Mex. 40; *Quinn v. Parke, etc., Machinery Co.*, 5 Wash. 276. See *Jeffreys v. Greeley*, 20 Fla. 319; *Western Stage Co. v. Walker*, 2 Iowa 504.

Mere Informality. — A verdict that the jury "do assess the damages of the property mentioned in the declaration at \$825, and the actual damages of the defendant at six per cent. per annum to be \$24.75," is not well expressed, in that the word "damages" is used with reference to the property instead of the word "value," but a correct judgment rendered upon it will not be set aside. Such a verdict is not objectionable for nonconformity to the law which requires the value of the property to be assessed. *Brannin v. Bremen*, 2 N. Mex. 40.

Verdict Not in Alternative — Objection Waived. — A verdict for damages only is sufficient without being in the alternative for a return of the property, or for the value thereof in case a return cannot be had, when the point was not raised in the court below. *McGraw v. Franklin*, 2 Wash. 17.

2. *Conroy v. Flint*, 5 Cal. 327; *Kuhlman v. Williams*, 1 Okla. 136. See *Gould v. Hayes*, 71 Conn. 86.

Finding Right of Possession. — In replevin a verdict that plaintiff recover the property with one cent damages

for its detention is a sufficient finding of the right of possession in the plaintiff. *Stephens v. Scott*, 13 Ind. 515.

3. *Buck v. Young*, 1 Ind. App. 558; *Gaines v. White*, 1 S. Dak. 434; *High v. Johnson*, 28 Wis. 72.

Verdict for Plaintiff. — If damages are claimed in an action of replevin, and the plaintiff prevails therein, a verdict is not fatally defective because it fails to find upon that question. *Prescott v. Heilner*, 13 Oregon 200.

Indiana Statute. — Under Rev. Stat. Ind. 1881, § 1550, relating to replevin before justices of the peace, and providing that if the defendant prevail judgment shall be rendered that he may have return of the property; and under § 549, relating to civil procedure, and providing that "in actions for the recovery of specific personal property, the jury must assess the value of the property, as also the damages for the taking or detention, whenever by their verdict there will be a judgment for the recovery or return of the property," where the cause originates before a justice and the verdict is that defendant is entitled to have return of the property, the jury need not assess the value of the property, or the damages. *Burket v. Pheister*, 114 Ind. 503.

4. *Washburn v. Huntington*, 78 Cal. 573; *Poncelor v. Marshall*, 45 Kan. 672; *White v. Graves*, 24 Miss. 166; *Lloyd v. Goodwin*, 12 Smed. & M. (Miss.) 223; *Wheeler v. Jones*, 16

Verdict for Return of Property. — Strictly speaking the question whether there should be a return of the property is one of law which need be passed upon in the judgment only, based upon proper finding in the verdict as to the right of possession, detention, etc., yet in some cases the verdicts have contained findings upon this question. However, such a finding will be required only where a party requests it.¹

Election. — The prevailing party in an action of replevin may upon the trial elect whether he will take the usual alternative verdict, or a verdict for the property alone with damages, or a verdict for its value and damages.²

12. What Parties and Property Affected — What Parties. — The verdict can affect only those parties who are mentioned in the

Mont. 87; *Carson v. Applegarth*, 6 Nev. 187; *Finley v. Cudd*, 42 S. Car. 121; *Rice v. Powell*, Dall. (Tex.) 413; *McGraw v. Franklin*, 2 Wash. 17.

California Statute. — Under Code Civ. Pro. Cal., § 667, providing that in an action brought to recover possession of personalty, judgment for plaintiff may be for the possession of the property, or the value thereof in case a delivery cannot be had, an omission to find whether or not plaintiff is entitled to recover the property sued for, and a judgment simply awarding the plaintiff the value of the property, constitute cause for reversal. *Washburn v. Huntington*, 78 Cal. 573. See also *Ryan v. Fitzgerald*, 87 Cal. 345.

Value of Plaintiff's Life Estate. — In an action by a person having only a life interest in the chattels, against a defendant who took possession at the instance of the remainderman, the alternative value assessed by the jury should be the value of the plaintiff's life interest, and not the value of the fee simple. *Lloyd v. Goodwin*, 12 Smed. & M. (Miss.) 223.

General Verdict — Objections by Plaintiff. — The failure of the jury to find a verdict in the alternative is not a matter of which the plaintiff can complain, since upon a general verdict in such a case an order for the return of the property follows as a matter of course. *Wheeler v. Jones*, 16 Mont. 87.

Objection Waived. — When it appears that the verdict in an action of replevin was for damages only, it is sufficient without being in the alternative for a return of the property, or for the value thereof in case a delivery cannot be had, when the point was not raised in the court below. *McGraw v. Franklin*, 2 Wash. 17.

1. *Johnson v. Fraser*, 2 Idaho 371; *Noble v. Worthy*, (Indian Ter. 1898) 45 S. W. Rep. 137; *Hyde v. Courtwright*, 14 Ind. App. 106; *Burket v. Pheister*, 114 Ind. 503.

Verdict for Return of Property. — In *Indiana*, upon the trial in the Circuit Court of an action of replevin which originated before a justice of the peace, the verdict, if for the defendant, should be merely for the return of the property delivered by the constable to the plaintiff, and an alternative judgment that the defendant recover the value of the property, in case a return cannot be had, is erroneous. *Van Meter v. Barnett*, 119 Ind. 35.

2. *Hudson v. Goff*, 77 Ga. 281; *Wolf v. Kennedy*, 93 Ga. 219; *Clark v. Thompson*, 99 Ga. 221; *Johnson v. Dick*, 69 Mich. 108; *Simper v. White*, 7 Ohio Cir. Ct. 303, 4 Ohio Cir. Dec. 607.

Election — Appearance of Record. — The waiver of the right to have a return of the property need not appear of record. The acceptance of a verdict for its value is in effect an election by the defendant. *Hill v. Fellows*, 25 Ark. 11.

Time of Making Election. — In *Michigan* it has been held that where the plaintiff takes the property and removes it beyond the jurisdiction of the court and submits to a nonsuit, and at a succeeding term the case is noticed for the assessment of damages, the defendant may after the jury has been sworn elect to take the value of the property and that after the jury has been sworn it is too late to object that the case is not in a condition for assessment. *Brown v. Horning*, 76 Mich. 542.

pleadings, so that a finding of property for a person not named therein cannot be sustained.¹

Verdict Affects What Property. — It has been held that, in the absence of any statute to the contrary, where only a portion of the property is found, the inquiry must be confined to such property as is found and taken by the officer.²

XV. JUDGMENT — 1. In General. — In an action of replevin the judgment must conform to all the findings of the verdict or of the court, must settle the rights of the parties to all of the property, and must not embrace any issue, valuation, or property not covered by the findings of the jury or court.³

Adjudication as of What Time. — It is the general nature of replevin

1. *Shelton v. Franklin*, 68 Ill. 333.

Against One Only of Several Defendants.

— Since the action of replevin is substantially *ex delicto*, the verdict may be against one defendant and in favor of another defendant. *Wall v. De Mitkiewicz*, 9 App. Cas. (D. C.) 109.

2. *Burket v. Pheister*, 114 Ind. 503.

Goods Not Taken — New York Statute.

— Where part only of the goods had been found by the sheriff, a verdict in favor of the "plaintiffs for the full value of the goods not returned and assessing their value at the sum of \$1,164.27," was held to be sufficient; a judgment that plaintiffs recover possession of the property seized, and of that not found, and if possession cannot be delivered of the property not found, that plaintiffs recover the value of it as declared by the jury, is a substantial compliance with the statute. *Lewisohn v. Apple*, (Supm. Ct. Gen. T.) 12 Civ. Pro. (N. Y.) 274.

In *Wisconsin*, where only a portion of the property is given to the plaintiff, both in the verdict and judgment, and they are silent as to the residue, they are fatally defective, and it matters not whether there was a failure to seize the omitted property from the defendant and also a failure in the answer to pray for a return. *Carrier v. Carrier*, 71 Wis. 111.

3. *Alabama*. — *Greene v. Lewis*, 85 Ala. 221.

California. — *Waldman v. Broder*, 10 Cal. 378; *Cooke v. Aguirre*, 86 Cal. 479; *Cummings v. Stewart*, 42 Cal. 230.

Colorado. — *Stevenson v. Lord*, 15 Colo. 131.

Florida. — *Holliday v. McKinne*, 22 Fla. 153.

Illinois. — *Kimball v. Citizens' Sav. Bank*, 3 Ill. App. 320; *Hews v. Wall*,

27 Ill. App. 445; *Hanford v. Obrecht*, 38 Ill. 493.

Indiana. — *Buck v. Young*, 1 Ind. App. 558; *White v. Lloyd*, 3 Blackf. (Ind.) 390; *Wolf v. Blue*, 5 Blackf. (Ind.) 153; *McKeal v. Freeman*, 25 Ind. 151.

Iowa. — *Hunt v. Bennett*, 4 Greene (Iowa) 512; *Flanagan v. McWilliams*, 52 Iowa 148.

Kansas. — *Rucker v. Donovan*, 13 Kan. 251; *Arthur v. Wallace*, 8 Kan. 267.

Michigan. — *Moore v. Vrooman*, 32 Mich. 526.

Minnesota. — *Ladd v. Newell*, 34 Minn. 107.

Missouri. — *Gregory v. Tavenner*, 38 Mo. App. 627; *Baldrige v. Dawson*, 39 Mo. App. 527; *Wangler v. Franklin*, 70 Mo. 659.

Nebraska. — *Leighton v. Stuart*, 10 Neb. 224; *Black v. Winterstein*, 6 Neb. 224.

New York. — *Corn Exch. Bank v. Blye*, 54 Hun (N. Y.) 312.

Vermont. — *Poor v. Woodburn*, 25 Vt. 234.

Wisconsin. — *Emmons v. Dowe*, 2 Wis. 322; *Weizen v. McKinney*, 2 Wis. 288; *Ronge v. Dawson*, 9 Wis. 246; *Smith v. Phelps*, 7 Wis. 211; *Child v. Child*, 13 Wis. 17; *Rose v. Tolly*, 15 Wis. 443; *Beemis v. Wylie*, 19 Wis. 318; *Young v. Lego*, 38 Wis. 206; *Riess v. Delles*, 45 Wis. 662.

Nonconformity to Verdict. — Where the verdict finds "for the plaintiff property to the value of \$447.64, and damages to the amount of \$100," a judgment "that the plaintiff recover of the defendant the property mentioned in the declaration, to wit," etc., "of the aggregate value of \$500, and the sum of \$100 for his damages," etc., "and that execution do issue therefor, and that

that the state of things existing at the beginning of the suit will ordinarily control its determination, so that the judgment must be based on this fact.¹

Rendition and Entry of Judgment. — If the court orders a finding for the defendant to be entered by the clerk in the docket, this will not amount to a final judgment, but the court may thereafter order a delivery of the property and assess damages.²

a writ of possession do issue for the said property, as above described," does not conform to the verdict, and is erroneous. *Holliday v. McKinne*, 22 Fla. 153.

Requiring Return of Property. — Where the verdict in replevin against a sheriff finds the property to be in the plaintiff, "except the mare bought," etc., the judgment should have required a return of the mare to the officer. *Pratt v. Tucker*, 67 Ill. 346.

Where the verdict is "for the defendant \$50," judgment should be rendered on the verdict, and not for a return of the property. *Hunt v. Bennett*, 4 Greene (Iowa) 512.

Judgment on General Verdict. — A general verdict for plaintiff finds all these issues in his favor, and the judgment may be entered accordingly. A judgment on such verdict, that the plaintiff "have and recover of said defendant possession of the said goods and chattels in said petition mentioned, or the value thereof in case a delivery thereof cannot be had," is in proper form. *Arthur v. Wallace*, 8 Kan. 267.

Adjustment of Respective Rights of Parties. — Where it appears the parties to the suit have different rights to the property, their respective rights may be adjusted in such suit, and the judgment made to conform to the rights of the parties. *Gregory v. Tavenner*, 38 Mo. App. 627.

Where the Verdict Is for Both Parties in an action of replevin, for one damages and costs as to that portion upon which he maintained his replevin, and for the other for the return of the property improperly taken by the writ, damages for its detention, and costs, the judgment must follow the verdict. *Poor v. Woodburn*, 25 Vt. 234.

A Justice's Judgment in replevin should be as certain and complete, in matters of substance, as one in a court of record, and should include an order for the delivery of the property to the successful party. *Beemis v. Wylie*, 19 Wis. 318. See *Weizen v. McKinney*, 2 Wis. 288.

Statutory Provisions — California. — A judgment in replevin must be in the form prescribed by section 667 of the Code of Civil Procedure. *Berson v. Nunan*, 63 Cal. 550.

North Carolina. — A judgment in an action of replevin, brought under Rev. Code, c. 98, for the penalty of the bond given by the defendant according to the provisions of section 4, without a previous judgment against the defendant, as at common law, is erroneous. *Scott v. Elliott*, 63 N. Car. 215.

Summary Judgment Against Sureties. — In *North Carolina* a summary judgment can be entered against the sureties in an action of claim and delivery at the same time that judgment is rendered against the principal. *Council v. Averett*, 90 N. Car. 168.

1. *Mathews v. Granger*, 71 Ill. App. 467; *Peninsular Stove Co. v. Ellis*, 20 Ind. App. 491; *Cary v. Hewitt*, 26 Mich. 228; *Cass v. Gunnison*, 58 Mich. 108; *Rodman v. Nathan*, 45 Mich. 607.

After-Acquired Title. — Where it appears that the defendant was entitled to the property at the commencement of the action, but his right had ceased and vested in the plaintiff before trial, the judgment should have left the property in plaintiff's possession, but should have awarded costs to the defendant. *O'Connor v. Blake*, 29 Cal. 312; *Wheeler v. Train*, 4 Pick. (Mass.) 168. See also *Barney v. Brannan*, 51 Conn. 175; *Doane v. Lockwood*, 115 Ill. 490; *Ingraham v. Martin*, 15 Me. 373; *Martin v. Bayley*, 1 Allen (Mass.) 381; *Brook v. Bayless*, 6 Okla. 568.

After-Acquired Lien. — The plaintiff cannot have judgment for a return merely on the strength of an after-acquired lien. *Ator v. Rix*, 21 Ill. App. 309.

2. *Ashcroft v. Simmons*, 163 Mass. 437. And see generally article **RENDITION AND ENTRY OF JUDGMENT**, *ante*, p. 427.

Docketing Judgment. — Judgments in replevin for damages and costs, or other sums of money, are entitled to be docketed the same as other personal

Amendments. — Where an error is made in the form of a judgment it may be amended in the lower court, or remanded on appeal with directions to amend, or amended on appeal.¹

2. As Respects Parties Affected. — A judgment in replevin should not attempt to adjudicate the rights of strangers to the action, and no judgment should be entered against the sureties on the replevin bond.²

Against Party in Representative Capacity. — Where replevin is instituted by or against a party in a representative capacity, such as an administrator, the judgment, when against him, should be against him in his representative capacity.³

judgments and with like effect. *Pomroy v. Crocker*, 4 Chand. (Wis.) 174.

Time and Entry of Judgment. — *Starr & Curt. Stat. Ill.*, c. 119, § 22, provides that if plaintiff fails to prosecute his suit with effect, or suffers a nonsuit or discontinuance, judgment shall be given for the return of the property and damages for its use from the time it was taken until a return be made, unless plaintiff shall in the meantime have become entitled to possession, when judgment may be given against him for costs and judgment, etc. Under this statute it was held, where upon the case being called plaintiff dismissed it, and the usual order was entered that the cause be dismissed and that defendant recover his costs and have execution therefor, that the court has no power, after two full statute terms had passed, to enter judgment for a return of the property. *Cammeyer v. Durham House Drainage Co.*, 35 Fed. Rep. 51.

1. See generally article OPENING, AMENDING, AND VACATING JUDGMENTS, vol. 15, p. 202. And see the following cases: *Rowark v. Lee*, 14 Ark. 425; *Levy v. Leatherwood*, (Ariz. 1898) 52 Pac. Rep. 359; *Ryan v. Fitzgerald*, 87 Cal. 345; *Meads v. Lasar*, 92 Cal. 225; *Clark v. Dreyer*, 9 Colo. App. 453; *Ives v. Hulce*, 17 Ill. App. 30; *Sumner v. Cook*, 12 Kan. 162; *Starr v. Hinshaw*, 23 Kan. 532; *Babb v. Aldrich*, 45 Kan. 218; *Lyman v. Becannon*, 29 Mich. 466; *Berthold v. Fox*, 21 Minn. 51; *Hood v. Spaeth*, 51 N. J. L. 129; *Young v. Atwood*, 5 Hun (N. Y.) 234; *Fitzhugh v. Wiman*, 9 N. Y. 559; *Johnson v. Carnley*, 10 N. Y. 570; *Ingersoll v. Bostwick*, 22 N. Y. 425; *Wolf v. Farley*, (C. Pl. Gen. T.) 40 N. Y. St. Rep. 808. See *North Star Boot, etc., Co. v. Braithwaite*, 4 Dak. 454.

Amendment on Appeal. — If defendant has asked for return of the property

replevied, and it does not appear that he has given proper bond and sureties for the return, it must be presumed that the whole of the property claimed has been delivered to the plaintiff; and if the plaintiff's verdict and judgment are limited to the recovery of a part only of the property, and no relief is awarded to the defendant, the judgment will be modified on appeal so as to require the return of the residue to the defendant. *Ryan v. Fitzgerald*, 87 Cal. 345.

Lack of Data. — Where a judgment unauthorized by the pleadings is rendered, it must be reversed and a new trial granted, in the absence of a sufficiency of data to enable the court to modify it correctly. *Putnam v. Lamphier*, 36 Cal. 151.

2. *Edwards v. McCurdy*, 13 Ill. 496; *Hurd v. Gallaher*, 14 Iowa 394; *Eidson v. Woolery*, 10 Wash. 225.

Substituted Party. — Where a party has himself substituted for the sheriff in an action of replevin, the plaintiff, if entitled to a judgment against the original defendant, is entitled to a judgment against such substituted defendant for costs. *Romick v. Perry*, 61 Iowa 238.

Remedy of Stranger Whose Property Is Affected. — If a judgment in an action of replevin does include the property of a stranger, his remedy is by an independent action and not a summary proceeding affecting the judgment. *Veeder v. Fiske*, 6 N. Mex. 288.

Judgment Against Interpleader. — On the trial of an interpleader in replevin no judgment for either property or money may be rendered against the interpleader, if the property has never been delivered to him; a judgment for costs only is authorized. *Chandler v. Smith*, 34 Ark. 527.

3. *Ranney v. Thomas*, 45 Mo. 111; *State v. Dailey*, 7 Mo. App. 548.

Joint Judgment. — Where the parties sue or defend jointly, having a joint property in the goods, the judgment for or against them should be joint.¹

Separate Judgment. — A joint judgment should not be entered against two or more defendants where some of them are found not to be interested, or where their interests are found not to be joint.²

Judgment for Both Plaintiff and Defendant. — If the right to a part of the property is found in plaintiff, and the residue is found in defendant, the judgment may accordingly be in favor of each party for his portion.³

Against Husband and Wife. — A general judgment against husband and wife for damages and costs in replevin is improper. The judgment for damages and costs must be against the husband alone. *Steinwender v. Outley*, 5 Mo. App. 589. And see generally article HUSBAND AND WIFE.

Replevin by Married Woman. — Where replevin is brought by a married woman without joining her husband, no personal judgment can be rendered against her. *Long v. Cockrell*, 55 Mo. 93.

1. *Sweetzer v. Mead*, 5 Mich. 107; *West Michigan Sav. Bank v. Howard*, 52 Mich. 423; *Watson v. Buckler*, 29 Oregon 235.

Against Defendants Who Answer Separately. — In an action of claim and delivery against defendants, who are sued jointly, a joint judgment in their favor is not erroneous, although each of the defendants answered separately. *Myers v. Moulton*, 71 Cal. 498.

If One Defendant Claimed No Interest in the property, nor asked for a return, a joint judgment is erroneous which was in favor of several defendants. *Jandt v. Potthast*, 102 Iowa 223.

Against Officer and Plaintiff in Execution. — In an action of replevin against an officer for property seized by him on execution, the plaintiff in the execution is afterwards made a party defendant, but not in lieu of nor substituted for the officer, and the petition is not amended so as to allege anything against said new party, and said new party does not in his answer set up any ground for nor ask any affirmative relief. The court held that a judgment rendered jointly against said officer and said new party for \$225 and costs is erroneous as against said new party. *Furrow v. Chapin*, 13 Kan. 107. See also *Palmer v. Meiners*, 17 Kan. 478.

2. *Steele v. Matteson*, 50 Mich. 313; *Redpath v. Brown*, 71 Mich. 258; *Adamson v. Sundby*, 51 Minn. 460.

Judgment For and Against Separate Plaintiffs. — There may be judgment for one plaintiff and against another in a joint replevin suit. *Hamilton v. Browning*, 94 Ind. 242.

For Defendants Having Separate Liens. — Where in replevin against two the court finds that each of the defendants has an independent lien to a specified amount on the property in controversy, it is erroneous to render a joint judgment in their favor for the value of the property. *Sweetzer v. Mead*, 5 Mich. 107.

Disclaimer by One Defendant. — Upon a verdict for defendants in replevin, where one of three defendants disclaims, the judgment may be for the other two. *Fischer v. Johnson*, 74 Mo. App. 64.

Award of Parts of Property to Several Defendants. — Where there are two or more defendants in replevin, the judgment may award a part of the property to each. *Pilger v. Marder*, 55 Neb. 113.

3. *Bates v. Stanley*, 51 Neb. 252; *Phipps v. Taylor*, 15 Oregon 484; *Johnston v. Gray*, 19 Pittsb. Leg. J. (Pa.) 123; *Lanyon v. Woodward*, 65 Wis. 543.

Failure to Dispose of All of Property. — If the plaintiff got possession of the property under the writ, a judgment is erroneous which gives him a part of the property, leaving "the defendant to his remedy on the bond" as to the residue, with reference to which the court finds that it cannot determine the rights of the parties on account of a lack of evidence. *Jandt v. South*, 2 Dak. 46.

Where Defendant Retains Possession. — Where the verdict is in favor of the plaintiff for some of the articles

3. Affects What Property. — A judgment for the return of property can be for no more than was replevied.¹

4. Description of Property. — The judgment, like the verdict, must describe the property to be recovered with a reasonable degree of certainty or it will be void for uncertainty; if it follows the description in the declaration, or otherwise refers to the same with reasonable definiteness, it will be sufficient.²

5. Alternative Judgment — General Rule. — Since in the action of replevin a double remedy is presented, either in a return of the property or the recovery of its value, the judgment should, as a rule, be in the alternative for such return, or in case a delivery cannot be made, then for its value.³

claimed, and in favor of the defendant for the remainder, and it does not appear that defendant's possession of any has been disturbed, the defendant is entitled to no judgment and is not prejudiced by a failure to assess the value of the articles found to be his, or damages for taking and withholding them. *Ward v. Masterson*, 10 Kan. 77.

1. *Mattingly v. Crowley*, 42 Ill. 300.

In Missouri the action of replevin before a justice of the peace is purely statutory. The plaintiff is bound to describe in this statement the articles claimed by him, and the judgment can affect only the property thus described, and the justice can acquire no jurisdiction over a different article taken by the constable. *Standard Foundry Co. v. Schloss*, 43 Mo. App. 304.

Part of Property Not Found. — It is erroneous to order a return of all that is described in the writ, where the officer's return states that a part of the property could not be found. *Mattingly v. Crowley*, 42 Ill. 300.

2. *Campbell v. Jones*, 38 Cal. 507; *Welch v. Smith*, 45 Cal. 230; *Hogue v. Fanning*, 73 Cal. 54; *Holliday v. McKinne*, 22 Fla. 153; *Wolf v. Kennedy*, 93 Ga. 219; *Lammers v. Meyer*, 59 Ill. 214; *Merrimac Paper Co. v. Illinois Trust, etc., Bank*, 129 Ill. 296; *Coleman v. Reel*, 75 Iowa 304; *Herring v. Corder*, 49 Mo. App. 378; *Harris v. Austell*, 2 Baxt. (Tenn.) 148; *Carrier v. Carrier*, 71 Wis. 111. See *Clafin v. Beaver*, 41 Fed. Rep. 204.

Insufficient Descriptions. — In replevin where the judgment for the plaintiff describes the property to be restored as "buckwheat, valued at three hundred and sixty-five dollars and seventy-five cents," the description is insufficient to sustain a judgment, unless the judgment refers for a fuller description

to the complaint, and there is a more definite description in the complaint. *Welch v. Smith*, 45 Cal. 230.

Uncertainty. — A judgment for the possession of personal property, which merely describes it as "two stallion horses," and does not refer to any pleadings or other paper for further description, is bad for uncertainty, and will be reversed. *Cooke v. Aguirre*, 86 Cal. 479.

Sufficient Descriptions. — A judgment that plaintiff recover "the property in controversy," or, in default, a sum fixed as its value, will not be reversed for uncertainty where the petition claims several articles, but the record shows that the controversy was reduced to two of them. *Coleman v. Reel*, 75 Iowa 304.

In replevin to recover a gray mare and a sorrel mare, the fact that the record reveals the word "gray" in one place instead of the word "sorrel" will not invalidate the judgment, where the record recites that judgment was rendered for plaintiff for the return of a gray mare and a sorrel mare, or the value thereof. *Mullaney v. Humes*, 48 Kan. 368.

Substantial Compliance with the Statute. — A judgment in replevin that defendant recover "the said ninety-one hogs and three calves, or at his election take judgment for \$442, the value of said property so adjudged to be returned to him," is a substantial compliance with the statute, and when taken in this connection is not so vague as to invalidate the judgment. *Herring v. Corder*, 49 Mo. App. 378.

3. *Arkansas.* — *Town v. Evans*, 11 Ark. 9; *Rowark v. Lee*, 14 Ark. 425; *Jetton v. Smead*, 29 Ark. 372; *Hanf v. Ford*, 37 Ark. 544; *Swantz v. Pillow*, 50 Ark. 300.

Exceptions — When Alternative Judgments Unnecessary. — The purpose of the alternative judgment being to give the unsuccessful party the

California.—Nickerson *v.* Chatterton, 7 Cal. 568; Cummings *v.* Stewart, 42 Cal. 230; Whetmore *v.* Rupe, 65 Cal. 237; McCue *v.* Tunstead, 66 Cal. 486; Brichman *v.* Ross, 67 Cal. 601; Stewart *v.* Taylor, 68 Cal. 5; Myers *v.* Moulton, 71 Cal. 498; Burke *v.* Koch, 75 Cal. 356; Hogue *v.* Fanning, 73 Cal. 54; Kneebone *v.* Kneebone, 83 Cal. 645; Cooke *v.* Aguirre, 86 Cal. 479; Etchepare *v.* Aguirre, 91 Cal. 288; Thompson *v.* Laughlin, 91 Cal. 313; Claudius *v.* Aguirre, 89 Cal. 501.

Colorado.—Stevenson *v.* Lord, 15 Colo. 131; Horn *v.* Citizens Sav., etc., Bank, 8 Colo. App. 535.

Idaho.—Johnson *v.* Fraser, 2 Idaho 371.

Illinois.—Woodbury *v.* Tuttle, 26 Ill. App. 211; MacLachlan *v.* Pease, 171 Ill. 527; Janes *v.* Gilbert, 168 Ill. 627.

Indiana.—Bales *v.* Scott, 26 Ind. 202; Thompson *v.* Eagleton, 33 Ind. 300; Farrar *v.* Eash, 5 Ind. App. 238.

Iowa.—Funk *v.* Israel, 5 Iowa 438; McClellan *v.* Marshall, 19 Iowa 561; Clark *v.* Warner, 32 Iowa 219; Knudson *v.* Gieson, 38 Iowa 234; Marshall *v.* Bunker, 40 Iowa 121; Coleman *v.* Reel, 75 Iowa 304.

Kansas.—Garrett *v.* Wood, 3 Kan. 231; Hall *v.* Jenness, 6 Kan. 356; Arthur *v.* Wallace, 8 Kan. 267; Copeland *v.* Majors, 9 Kan. 104; Ward *v.* Masterson, 10 Kan. 77; Wolfley *v.* Rising, 12 Kan. 535; Higbee *v.* McMillan, 18 Kan. 133; Mills *v.* Kansas Lumber Co., 26 Kan. 575; Armel *v.* Layton, 33 Kan. 41; Boyd *v.* Huffaker, 40 Kan. 634; Friend *v.* Green, 43 Kan. 167; Poncelor *v.* Marshall, 45 Kan. 672; Clouston *v.* Gray, 48 Kan. 31; Chase County Nat. Bank *v.* Thompson, 54 Kan. 307; Moore *v.* Shaw, 1 Kan. App. 103; Burton *v.* Cochran, 5 Kan. App. 508; Scott *v.* Beard, 5 Kan. App. 560.

Kentucky.—Rogers *v.* Bradford, 8 Bush (Ky.) 163; Reid *v.* King, 89 Ky. 388.

Minnesota.—Eaton *v.* Caldwell, 3 Minn. 134; Kates *v.* Thomas, 14 Minn. 460; Sherman *v.* Clark, 24 Minn. 37; Leonard *v.* Maginnis, 34 Minn. 566; Daley *v.* Mead, 40 Minn. 382; French *v.* Ginsburg, 57 Minn. 264; Pabst Brewing Co. *v.* Butchart, 68 Minn. 303.

Mississippi.—Anderson *v.* Tyson,

6 Smed. & M. (Miss.) 244; Harvey *v.* Edington, 25 Miss. 22; Bond *v.* Griffin, 74 Miss. 599.

Missouri.—Gulath *v.* Waldstein, 7 Mo. App. 66; Baird *v.* Taylor, 30 Mo. App. 580; Peters *v.* Lowenstein, 44 Mo. App. 406; Herring *v.* Corder, 49 Mo. App. 378; Fowler *v.* Carr, 55 Mo. App. 145.

Nebraska.—Hooker *v.* Hammil, 7 Neb. 231; Search *v.* Miller, 9 Neb. 26; Goodman *v.* Kennedy, 10 Neb. 270; Lee *v.* Hastings, 13 Neb. 508; Singer Mfg. Co. *v.* Dunham, 33 Neb. 686; Manker *v.* Sine, 35 Neb. 746; Hanscom *v.* Burmood, 35 Neb. 504; Roberson *v.* Reiter, 38 Neb. 198; Goodwin *v.* Potter, 40 Neb. 553; Scott *v.* Burrill, 44 Neb. 755; Martin *v.* Foltz, 54 Neb. 162.

Nevada.—Lambert *v.* McFarland, 2 Nev. 58.

New York.—Wolf *v.* Farley, (C. Pl. Gen. T.) 16 N. Y. Supp. 168; Lewisohn *v.* Apple, (Supm. Ct. Gen. T.) 12 Civ. Pro. (N. Y.) 274; McNamara *v.* Eisenleff, (Buffalo Super. Ct. Gen. T.) 14 Abb. Pr. N. S. (N. Y.) 25; Stauff *v.* Maher, 2 Daly (N. Y.) 142; Cochran *v.* Gottwald, 41 N. Y. Super. Ct. 317; Dwight *v.* Enos, 9 N. Y. 470; Fitzhugh *v.* Wiman, 9 N. Y. 559; Russell *v.* Allen, 13 N. Y. 173; Allen *v.* Judson, 71 N. Y. 77; Walker *v.* Spring, 5 Hun (N. Y.) 107; Seaman *v.* Luce, 23 Barb. (N. Y.) 240; Glann *v.* Younglove, 27 Barb. (N. Y.) 480; Dows *v.* Rush, 28 Barb. (N. Y.) 157; Dows *v.* Greene, 32 Barb. (N. Y.) 490; Phillips *v.* Melville, 10 Hun (N. Y.) 112; Young *v.* Atwood, 5 Hun (N. Y.) 234; Ingersoll *v.* Bostwick, 22 N. Y. 425.

North Carolina.—Jarman *v.* Ward, 67 N. Car. 32; Horton *v.* Horne, 99 N. Car. 219.

Oklahoma.—Jackson *v.* Glaze, 3 Okla. 143.

Oregon.—Dean *v.* Lawham, 7 Oregon 422; Capital Lumbering Co. *v.* Hall, 10 Oregon 202; Phipps *v.* Taylor, 15 Oregon 484; Smith *v.* Smith, 17 Oregon 446; Putnam *v.* Webb, 15 Oregon 440; Coos Bay, etc., R., etc., Co. *v.* Siglin, (Oregon 1898) 53 Pac. Rep. 504.

South Carolina.—Robbins *v.* Slatery, 30 S. Car. 328, note 1; Thompson *v.* Lee, 19 S. Car. 489.

South Dakota.—Pitts Agricultural Works *v.* Young, 6 S. Dak. 557. See Rudolph *v.* North, 6 Dak. 79.

privilege of returning the property in satisfaction thereof with the costs, it follows that such a judgment is unnecessary when

Texas. — *Rice v. Powell*, Dall. (Tex.) 413; *Hill v. M'Dermott*, Dall. (Tex.) 419; *Cheatham v. Riddle*, 8 Tex. 162; *Horton v. Reynolds*, 8 Tex. 284; *Davis v. Calhoun*, 41 Tex. 554; *Morris v. Coburn*, 71 Tex. 406; *Lang v. Daugherty*, 74 Tex. 226; *Jackson v. Phillips*, (Tex. Civ. App. 1896) 35 S. W. Rep. 745; *Childs v. Wilkinson*, 15 Tex. Civ. App. 687.

Washington. — *Liebmann v. McGraw*, 3 Wash. 520; *Bowman v. McGregor*, 6 Wash. 118; *Seattle Nat. Bank v. Meerwaldt*, 8 Wash. 630; *Eidson v. Woolery*, 10 Wash. 225.

Wisconsin. — *Heeron v. Beckwith*, 1 Wis. 17; *Smith v. Phelps*, 7 Wis. 211; *Rose v. Tolly*, 15 Wis. 443; *Smith v. Coolbaugh*, 19 Wis. 109; *Ashley v. Peterson*, 25 Wis. 621; *Smith v. Phillips*, 47 Wis. 202; *Fugina v. Brownlie*, 65 Wis. 628; *Baxter v. Berg*, 88 Wis. 399; *Bleiler v. Moore*, 88 Wis. 438; *Gaynor v. Blewitt*, 69 Wis. 582.

United States. — *Hanchett v. Humphreys*, 34 Fed. Rep. 862. See also *Boley v. Griswold*, 20 Wall. (U. S.) 486.

Omitting Words, "in Case a Return Cannot Be Had." — A judgment for the return of the property or the value thereof, but which omits from the judgment of value the clause "in case a return cannot be had," is not sufficient in form or substance, under section 667 of the Code of Civil Procedure, and upon appeal therefrom the court below will be directed to set it aside and enter an alternative judgment in conformity with the statute, where the verdict is sufficient to authorize it. *Etchepare v. Aguirre*, 91 Cal. 288.

Tender of Property. — Where the judgment was for a return of the property, and in default thereof, that plaintiff recover of the defendant a certain sum as the value of the same, it was held that defendant could elect to tender the property within a reasonable time, and that when a tender was made within such time the plaintiff might be enjoined from enforcing by execution the alternative judgment for the money value. *McClellan v. Marshall*, 19 Iowa 561.

Justice Need Not Inquire Whether Return Is Possible. — The judgment may be in the alternative, and before the rendition the justice is not required to ascertain whether the property can be

returned. *Gairrett v. Wood*, 3 Kan. 231.

Judgment Where Value Is Not Found. — In an action of replevin the defendant claimed a return of the property and \$50 damages for its detention. The jury assessed his damages at \$75, but did not find as to the value of the property, and judgment was entered for a return of the property, or, on failure to return, for \$75 as the value thereof. It was held that the jury not having found the value, such judgment was irregular. *Eaton v. Caldwell*, 3 Minn. 134.

Should Not Blend Damages and Assessed Value. — A judgment in replevin is erroneous if it blend the assessed value of the property and the damages for its detention in one amount, and be for money alone, and not for a return of the property if to be had, and if not, for its assessed value. *Harvey v. Edington*, 25 Miss. 22.

When Plaintiff Cannot Insist upon Alternative Judgment. — The plaintiff cannot object that the verdict for the defendant was not in the alternative, unless he can show that he has the property in a suitable condition to return. *Goodman v. Kennedy*, 10 Neb. 270.

Sufficient Compliance with Statute of New York. — Where part only of the goods had been found by the sheriff, a verdict in favor of the "plaintiffs for the full value of the goods not returned, and assessing their value at the sum of \$1,164.27," was held to be sufficient; a judgment that plaintiffs recover possession of the property seized and of that not found, and if possession cannot be delivered of the property not found, the plaintiffs recover the value of it as declared by the jury, is a substantial compliance with the statute. *Lewisohn v. Apple*, (Supm. Ct. Gen. T.) 12 Civ. Pro. (N. Y.) 274.

In Replevin for Property Seized on Execution, where the plaintiff makes the issue of ownership in herself, and that the property is not subject to execution, she cannot ask for a reversal in the appellate court on the ground that the judgment should have been in the alternative. *Woodbury v. Tuttle*, 26 Ill. App. 211.

Replevin for Sequestered Property — *Texas*. — In a suit for specific property

the property in question is already in the possession of the successful party, when a return is not demanded, and when from special circumstances a return is manifestly impossible.¹

taken under a writ of sequestration and replevied by the defendant, it is not error that the judgment was rendered for the value of the property against the defendant and his sureties, with privilege to the defendant to discharge the judgment by a surrender of the property. *Davis v. Calhoun*, 41 Tex. 554.

1. *Kirby v. Tompkins*, 48 Ark. 273; *Harris v. Harris*, 43 Ark. 535; *Brown v. Johnson*, 45 Cal. 76; *Seligman v. Armando*, 94 Cal. 314; *Meyer v. White*, 4 Colo. App. 342; *McCarthy v. Strait*, 7 Colo. App. 59; *Horn v. Citizens' Sav., etc., Bank*, 8 Colo. App. 535; *Prentiss v. Moore*, 3 Ill. App. 539; *Paxton v. Schick*, 3 Ill. App. 542; *Johnson v. Fraser*, 2 Idaho 371; *Mills v. Kansas Lumber Co.*, 26 Kan. 575; *Babb v. Aldrich*, 45 Kan. 218; *Clouston v. Gray*, 48 Kan. 31; *Hursh v. Starr*, 6 Kan. App. 8; *Baird v. Taylor*, 30 Mo. App. 580; *Lee v. Hastings*, 13 Neb. 508; *Philleo v. McDonald*, 27 Neb. 142; *Hanscom v. Burmood*, 35 Neb. 504; *Aldrich v. Thiel*, (Supm. Ct. Spec. T.) 3 Code Rep. (N. Y.) 91; *Phipps v. Taylor*, 15 Oregon 484; *Summer v. Kelly*, 38 S. Car. 507; *National Bank of Commerce v. Feeney*, 9 S. Dak. 550; *Pratt v. Donovan*, 10 Wis. 378; *Morrison v. Auston*, 14 Wis. 601; *Farmers' L. & T. Co. v. Commercial Bank*, 15 Wis. 424; *Hackett v. Bonnell*, 16 Wis. 471; *Evans v. Graham*, 50 Wis. 450; *Boley v. Griswold*, 20 Wall. (U. S.) 486. See also *Deal v. Osborne*, 42 Minn. 102; *Lang v. Dougherty*, 74 Tex. 226.

Nebraska Statute. — A judgment in an action of replevin, under the Act of 1873, must be in the alternative, for a return of the property, or, in case a return cannot be had, the value thereof, unless it is shown by the record that a return could not have been had. *Lee v. Hastings*, 13 Neb. 508.

Delivery Impossible. — If the court is satisfied that the delivery of the property cannot be made, it may render absolute judgment for the value of the property. *Boley v. Griswold*, 20 Wall. (U. S.) 486.

Subject-matter under Control of Court. — Where the subject-matter of the suit is within the control of the court, the judgment should be for a delivery

only. An assessment of value and alternative judgment are unnecessary. *Harris v. Harris*, 43 Ark. 535.

Goods Mixed and Not Distinguishable. — In an action of claim and delivery, where the evidence shows that the goods were confused and mixed with other goods belonging to the defendant, so that they were not distinguishable, it is not necessary that a judgment for the plaintiff should be in the alternative form. *Seligman v. Armando*, 94 Cal. 314.

Destroyed Property. — If on the trial of an action of replevin it appears that the personal property in controversy has been destroyed, so that a judgment for its delivery would be unavailing, the rendition of judgment for damages alone, without awarding a return, is at most a technical error which does not warrant a reversal. *Brown v. Johnson*, 45 Cal. 76.

Plaintiff Already in Possession. — In an action of replevin before a justice of the peace, where the plaintiff obtains possession of the property and retains the same, and is in possession of the property at the time the judgment is rendered, it was held that it is not necessary or proper to render a judgment in favor of the plaintiff for the value of the property in case a return thereof cannot be had. *Mills v. Kansas Lumber Co.*, 26 Kan. 575.

Delivery to Plaintiff Pending Action. — In an action of replevin the plaintiff is only entitled to an alternative judgment upon a verdict in his favor, if the property has not been delivered to him. If during the progress of the action the property has been delivered to him, a judgment in his favor settles his right to it, and it then being in his possession, the alternative judgment is unauthorized. *Phipps v. Taylor*, 15 Oregon 484.

Where Defendant Has Disposed of Property. — Where the defendant retains the property or a portion thereof, the judgment for the plaintiff should be in the alternative, for a return of the property held by the defendant, or for its value in case a return could not be had. But where it is shown on the trial that the defendant sold the property and placed it beyond his control and deprived himself of the power to return

Election. — While the losing party in an action of replevin may as a matter of right and law satisfy the judgment against himself *pro tanto* by a partial delivery of the property in question, when the remainder cannot be restored, yet he has not, nor can the judgment give him, the right to retain at his option the entire property on payment of the assessed value, in instances where delivery is possible.¹

By Whom Election Exercised. — The right of election is one to be exercised by the prevailing party in the suit, whether he is the plaintiff or defendant. In some of the states this right is granted, and it consists in waiving a judgment for the return of the property and electing a money judgment for the value in lieu thereof, or *vice versa*.²

it, a judgment rendered for the value of the property only will not be held to be materially erroneous. *Clouston v. Gray*, 48 Kan. 31.

1. *Cummings v. Stewart*, 42 Cal. 230, in which case it was held that the judgment erroneously gave the defendant the option to retain the property by paying a named sum. See also *Swantz v. Pillow*, 50 Ark. 300.

2. *Arkansas*. — *Hill v. Fellows*, 25 Ark. 11.

Arizona. — *Billups v. Freeman*, (Ariz. 1898) 52 Pac. Rep. 367.

Iowa. — *McNorton v. Akers*, 24 Iowa 369; *Davis v. Bayliss*, 51 Iowa 435; *Williams v. Chapman*, 60 Iowa 57; *Oskaloosa Steam-Engine Works v. Nelson*, 54 Iowa 519; *Lillie v. McMillan*, 52 Iowa 463; *Ormsby v. Nolan*, 69 Iowa 130; *Nichols v. Sheldon Bank*, 98 Iowa 603.

Michigan. — *Adams v. Champion*, 31 Mich. 233; *Humphrey v. Bayn*, 45 Mich. 565; *Kline v. Kline*, 49 Mich. 419; *Stack v. Smith*, 54 Mich. 238; *Brown v. Horning*, 76 Mich. 542; *Dewey v. Hastings*, 79 Mich. 263; *Bateman v. Blake*, 81 Mich. 227; *Joseph v. Brandy*, 112 Mich. 579.

Minnesota. — *Caldwell v. Bruggerman*, 4 Minn. 270; *Stevens v. McMillin*, 37 Minn. 509; *Thompson v. Scheid*, 39 Minn. 102. See *French v. Ginsburg*, 57 Minn. 264.

Missouri. — *Munley v. King*, 40 Mo. App. 531; *Hanlon v. O'Keefe*, 55 Mo. App. 528; *Harris v. Hitt*, 58 Mo. App. 459; *White v. Graves*, 68 Mo. 218; *Wooldridge v. Quinn*, 70 Mo. 370.

Nebraska. — *Frey v. Drahos*, 10 Neb. 594; *Otto v. Burch*, 50 Neb. 894.

North Carolina. — *Council v. Averett*, 90 N. Car. 168.

Rhode Island. — *Wright v. Card*, 16 R. I. 719.

Wisconsin. — *Saunderson v. Lace*, 1 Chand. (Wis.) 231; *Pratt v. Donovan*, 10 Wis. 378; *Morrison v. Austin*, 14 Wis. 601; *Farmers' L. & T. Co. v. Commercial Bank*, 15 Wis. 424; *Kloety v. Delles*, 45 Wis. 484; *Riess v. Delles*, 45 Wis. 662; *Tuckwood v. Hanthorn*, 67 Wis. 326. See *Mayhew v. Mather*, 82 Wis. 355.

Election Wholly Optional. — The exercise of election is a voluntary matter, which the successful party cannot be compelled to make. *Wooldridge v. Quinn*, 70 Mo. 370.

Statutory Provisions — *Arkansas*. — Under the forty-fourth section of the replevin act, the defendant, upon a finding in his favor, is entitled to a judgment for return of the property replevied; but under the forty-fifth section, he may waive that right and take judgment for the value of the property, and in such case it is the duty of the jury to find its value for which the judgment is given in damages. *Hill v. Fellows*, 25 Ark. 11.

Iowa. — Section 3241 of the Iowa statute, which provides that the person found to be entitled to the possession of the property may, at his option, have execution for the specific delivery of the property or for the value thereof, as determined by the jury, applies only to those cases which are decided on their merits, and not to those which are decided on demurrer for want of jurisdiction. *Williams v. Chapman*, 60 Iowa 57.

Michigan. — Under How. Stat. Michigan, providing that the defendant may have judgment for a return of the goods and damages for their detention.

Time of Election. — A party may exercise the option given by statute in choosing his judgment for a return, or the value when the judgment is rendered, and need not do so before the finding is made.¹

Election Must Appear of Record. — It is essential to a judgment in replevin for the value of property that the record should show

or, if he waives a return, judgment for the value of the goods, where a third person takes the goods under another writ, and returns them to defendant, and defendant waives judgment for a return of the property or for value, a judgment that plaintiff take nothing and that defendant recover a sum of money as his damages is unauthorized. *Bateman v. Blake*, 81 Mich. 227.

Wisconsin. — Under section 2888 Rev. Stat., the plaintiff in replevin cannot waive recovery of the property and take merely a money judgment, except when the property has been delivered to the defendant under section 2722. *Mayhew v. Mather*, 82 Wis. 355.

In New Jersey, if the defendant retains the goods, giving a bond and making a claim of property, the plaintiff may have the value of the goods embraced in the damages, and such judgment for damages will be absolute and cannot be discharged by a return of the property. *Field v. Post*, 38 N. J. L. 346.

But he can have such judgment only when defendant retains the property. *Lindauer v. Teeter*, 41 N. J. L. 255.

In New York it has been held that the defendant cannot elect to take a judgment for money. *Seaman v. Luce*, 23 Barb. (N. Y.) 240; *McKnight v. Dunlop*, 4 Barb. (N. Y.) 36; *Glann v. Younglove*, 27 Barb. (N. Y.) 480.

Where the Plaintiff Obtains Possession pending the action, and a finding is made for the defendant, giving the value of the property, the defendant cannot at his election take a money judgment for value only, instead of the usual alternative judgment. *French v. Ginsburg*, 57 Minn. 264.

Right to Elect Waived. — Where on a general verdict a judgment is entered merely for the return of the property, and no objection is made thereto, the error will be deemed waived. *Watts v. Green*, 30 Ind. 98.

The Plaintiff Cannot Object to the waiver of personal judgment by the defendant. *Morrison v. Austin*, 14 Wis. 601.

Consent or Stipulation of Parties. —

The judgment for claim and delivery should be in the alternative, but by consent of parties the judgment may be for a sum certain, without the alternative judgment for the return of the property. Such a judgment is binding upon the sureties of the party against whom it is rendered. *Council v. Averett*, 90 N. Car. 168.

Objection by Surety to Parties' Stipulation. — Where the plaintiff and defendant stipulate that judgment may be entered for the value of the property, and it is so entered, the surety in the undertaking when sued upon it cannot object that the judgment should have been in the alternative. *Robertson v. Davidson*, 14 Minn. 554.

1. *White v. Graves*, 68 Mo. 218; *Riess v. Delles*, 45 Wis. 662; *Kline v. Kline*, 49 Mich. 419.

Within Reasonable Time. — Where the judgment was for a return of the property, and in default thereof that plaintiff recover of the defendant a certain sum as the value of the same, it was held that defendant could elect to return the property within a reasonable time, and that when a tender was made within such time, the plaintiff might be enjoined from enforcing by execution the alternative judgment for the money value. *McClellan v. Marshall*, 19 Iowa 561.

When Property Is Tendered by Defendant. — In *Iowa* it has been held that where the judgment provides that the plaintiff shall have the immediate possession of the property and in default thereof recover its value, such judgment constitutes an election by the plaintiff to take the property, and that when it is tendered by the defendant the plaintiff cannot refuse to receive it and demand its value in money. *Oskaloosa Steam-Engine Works v. Nelson*, 54 Iowa 521.

After an Adjourned Day. — Election to take judgment for value in replevin before a justice cannot be exercised, as matter of right, after an adjourned day on which the plaintiff discontinued and defendant did not appear. *Stack v. Smith*, 54 Mich. 238.

affirmatively and distinctly the election to take the value instead of a return of the property.¹

6. For Return of Property. — Since the original and primary purpose of the action of replevin is the recovery of the possession of the specific property in question, the judgment should always direct a return thereof to be made to the successful party,² unless

1. *Adams v. Champion*, 31 Mich. 233.

Need Not Be in Writing — Entry. — Waiver of a return in an action of replevin is not, in practice, required to be made before trial or in writing, and no entry of it need be made beyond the proper recital in the judgment. *Kline v. Kline*, 49 Mich. 419; *Brown v. Horning*, 76 Mich. 542.

2. *Arkansas.* — *Hartgraves v. Duval*, 6 Ark. 506; *Neis v. Gillen*, 27 Ark. 184.

California. — *Waldman v. Broder*, 10 Cal. 378; *Campbell v. Jones*, 38 Cal. 507; *Pico v. Pico*, 56 Cal. 453; *Kneebone v. Kneebone*, 83 Cal. 645; *Etchepare v. Aguirre*, 91 Cal. 288.

Connecticut. — *Fleet v. Lockwood*, 17 Conn. 233; *McNamara v. Lyon*, 69 Conn. 447; *Walko v. Walko*, 64 Conn. 74.

Delaware. — *Clark v. Adair*, 3 Harr. (Del.) 113.

Dakota. — *Jandt v. South*, 2 Dak. 46; *Rudolph v. North*, 6 Dak. 79.

Illinois. — *King v. Ramsay*, 13 Ill. 619; *Lochnitt v. Stockon*, 31 Ill. App. 217; *Fowler v. Richardson*, 32 Ill. App. 252; *McCrary v. Hamilton*, 39 Ill. App. 490; *Luthy v. Kline*, 56 Ill. App. 314; *MacLachlan v. Pease*, 66 Ill. App. 634; *Bourk v. Riggs*, 38 Ill. 320; *Underwood v. White*, 45 Ill. 437; *Pratt v. Tucker*, 67 Ill. 346.

Indiana. — *Conner v. Comstock*, 17 Ind. 90; *Matlock v. Straughn*, 21 Ind. 128; *Roberts v. Norris*, 67 Ind. 386; *Smith v. Mosby*, 98 Ind. 445; *June v. Payne*, 107 Ind. 307; *Van Meter v. Barnett*, 119 Ind. 35; *Woodward v. Myers*, 15 Ind. App. 42. See also *Fromlet v. Poor*, 3 Ind. App. 425.

Iowa. — *Chadwick v. Miller*, 6 Iowa 34; *Mason v. Richards*, 12 Iowa 73; *Jansen v. Effey*, 10 Iowa 227; *Balm v. Nunn*, 63 Iowa 641.

Kansas. — *Sumner v. Cook*, 12 Kan. 162.

Kentucky. — *Tuley v. Mauzey*, 4 B. Mon. (Ky.) 5; *Bates v. Buchanan*, 2 Bush (Ky.) 117. See *Saffell v. Wash*, 4 B. Mon. (Ky.) 92.

Maine. — *McArthur v. Lane*, 15 Me. 245; *Moulton v. Bird*, 31 Me. 296; *Tuck v. Moses*, 58 Me. 461.

Massachusetts. — *Bartlett v. Brickett*, 98 Mass. 521; *Gould v. Barnard*, 3 Mass. 199; *Quincy v. Hall*, 1 Pick. Mass. 357; *Hoffman v. Noble*, 6 Met. (Mass.) 68; *Dawson v. Wetherbee*, 2 Allen (Mass.) 461; *Stanley v. Neale*, 98 Mass. 343; *Giroux v. Wheeler*, 163 Mass. 48.

Michigan. — *Kelso v. Saxton*, 40 Mich. 666; *Alderman v. Manchester*, 49 Mich. 48; *Frederick v. Mecosta Circuit Judge*, 52 Mich. 529.

Minnesota. — See *Oleson v. Newell*, 12 Minn. 186; *Stein v. Hastings*, 45 Minn. 196.

Missouri. — *Norman v. Robinson*, 47 Mo. App. 655; *Clarkson v. Jenkins*, 48 Mo. App. 221; *State v. Dunn*, 60 Mo. 64.

Montana. — *Dahler v. Steele*, 1 Mont. 206; *Anderson v. O'Laughlin*, 1 Mont. 81; *Lavelle v. Lowry*, 5 Mont. 498.

Nebraska. — *Goodman v. Kennedy*, 10 Neb. 270.

New York. — *Niagara Elevating Co. v. McNamara*, 2 Hun (N. Y.) 416; *Eckhardt v. Epstein*, 58 N. Y. Super. Ct. 288; *Bailey v. Clafin*, (N. Y. Super. Ct. Gen. T.) 36 N. Y. St. Rep. 82.

Ohio. — *Wellman v. Wellman*, 30 Cinc. L. Bul. 19, 11 Ohio Dec. (Reprint) 815.

Oklahoma. — *Kuhlman v. Williams*, 1 Okla. 136.

Pennsylvania. — *Williams v. Smith*, 10 S. & R. (Pa.) 202; *Weidel v. Roseberry*, 13 S. & R. (Pa.) 178; *Howard v. Johnson*, 1 Ashm. (Pa.) 58; *Harker v. Addis*, 4 Pa. St. 515; *Weil v. Frauenthal*, 2 Luz. L. Reg. (Pa.) 96; *Hefner v. Reed*, 3 Grant Cas. (Pa.) 245; *Easton v. Worthington*, 5 S. & R. (Pa.) 130; *Marsh v. Pier*, 4 Rawle (Pa.) 273; *Kessler v. M'Conachy*, 1 Rawle (Pa.) 435; *Smith v. Aurand*, 10 S. & R. (Pa.) 92.

Tennessee. — *Fugate v. Stapleton*, 6 Baxt. (Tenn.) 321.

Vermont. — *Collamer v. Page*, 35 Vt. 387; *Hotchkiss v. Ashley*, 44 Vt. 195; *Farnham v. Chapman*, 60 Vt. 338.

Wisconsin. — *Beemis v. Wylie*, 19 Wis. 318; *Timp v. Dockham*, 32 Wis. 146; *Delaney v. Canning*, 52 Wis. 266; *Kaehler v. Dobberpuhl*, 60 Wis. 256.

United States. — *Greenwell v. Botelore*.

'because of some particular circumstances or facts revealed in the pleadings or at the trial a return will either be impossible, unnecessary, or unjustifiable.¹

At Common Law. — On a plea of property in himself or a stranger,

3 Cranch (C. C.) 7. See *Burdett v. Doty*, 38 Fed. Rep. 491.

Conditional Judgment. — A judgment that the property be returned to the plaintiff, provided the mortgage thereon be not fully satisfied in ten days, is unauthorized and cannot be sustained. *Rose v. Tolly*, 15 Wis. 443. But see *Bassett v. Haren*, 61 Minn. 346.

Surplusage. — Where the judgment contains a provision for a writ of possession, should defendant fail to pay the mortgage debt, such a provision is mere surplusage, unharmed to defendant. *Thompson v. Greene*, 85 Ala. 240.

The Power of the Court to Refuse a Return, where the defendant has lost his right to it pending the suit, does not depend upon allegations of the answer, but is employed upon equitable principles, and because it would not be advisable to return the property to the defendant, merely that it might again be replevied by the plaintiff. *Pico v. Pico*, 56 Cal. 453.

Form of Judgment. — The judgment for defendant on a plea of property in replevin is *pro retorno habendo*; but if he cannot have a return (on account of the goods perishing, etc.), he may have judgment for damages to the value of the goods. *Clark v. Adair*, 3 Harr. (Del.) 113.

Return Whether Prayed or Not. — Where the right of property is put in issue by a defendant, and the finding is in his favor, the award of a *retorno habendo* is a matter of course, whether prayed for or not. *King v. Ramsay*, 13 Ill. 619.

After-acquired Lien. — The plaintiff cannot have judgment for a return merely on the strength of an after-acquired lien. *Ator v. Rix*, 21 Ill. App. 309.

Correction of Mistake of Clerk. — Upon a verdict for defendant in a replevin suit in which the property has been delivered to the plaintiff, a judgment should be entered for the return of the property. And if through the mistake or omission of the clerk it is entered simply for costs, the court may on motion modify it. *Sumner v. Cook*, 12 Kan. 162.

Verdict Not Warranting Judgment for Return. — Where the defendant answers, denying all the allegations of the complaint except as to the value of the property, if no findings are made upon the issues as to whether the plaintiff is entitled to the possession of the property, or whether he was damaged by the taking, a judgment for the return of the property is improper. *Cooke v. Aguirre*, 86 Cal. 479.

1. *Hartgraves v. Duval*, 6 Ark. 506; *Dickinson v. Noland*, 7 Ark. 25; *Cooke v. Aguirre*, 86 Cal. 479; *Clark v. Adair*, 3 Harr. (Del.) 113; *Bourk v. Riggs*, 38 Ill. 320; *Conner v. Comstock*, 17 Ind. 90; *Wiseman v. Lynn*, 39 Ind. 250; *Hulman v. Benighof*, 125 Ind. 481; *Hursh v. Starr*, 6 Kan. App. 8; *Davis v. Harding*, 3 Allen (Mass.) 302; *Martin v. Bayley*, 1 Allen (Mass.) 381; *Ware River R. Co. v. Vibbard*, 114 Mass. 458; *Smith v. Dodge*, 37 Mich. 354; *Farrar v. Bursley*, 100 Mich. 547; *Goodman v. Kennedy*, 10 Neb. 270; *Chambers v. Hunt*, 18 N. J. L. 339; *Oppenheim v. Lewis*, 20 N. Y. App. Div. 332; *Cain v. Cain*, (Supm. Ct. Spec. T.) 28 Abb. N. Cas. (N. Y.) 423; *Marrinan v. Knight*, 7 Okla. 419.

Refusal to Direct Return. — Upon the question whether the court will order a return to defendant in replevin, upon his attaining a verdict, the state of facts then existing will be inquired into; and if it appears that the return would be of no benefit to him, or that the right of property has, by some change of circumstances since the commencement of the action, become vested absolutely in the plaintiff, the court will refuse to direct a return. *Davis v. Harding*, 3 Allen (Mass.) 302.

Title of Plaintiff. — A *retorno habendo* cannot be awarded unless upon the issue and verdict it appears that the plaintiff is not the owner. *Bourk v. Riggs*, 38 Ill. 320.

Objection Not Available to Plaintiff. — Where defendant obtained a judgment in replevin, the property having been taken from him, a failure of the judgment to award him the return of the property is not a matter of complaint by plaintiff. *Clarkson v. Jenkins*, 48 Mo. App. 221.

the defendant, if he prevails, is entitled to a judgment *de retorno habendo*.¹

Defendant's Pleas. — Without a further plea of property in himself or in a stranger, the defendant is not entitled to a judgment for a return either upon a plea of *non cepit*² or of *non detinet*.³

Necessity of a Prayer for Return. — In a number of cases it has been held that where the evidence authorizes a return, the award of a *retorno habendo* is a matter of course, whether prayed for in the pleadings or not.⁴

Effect of Admitting Property in Plaintiff. — Where the effect of defendant's pleas is to admit property in the plaintiff, and the latter fails to sustain his case, it is error to award a return to the defendant.⁵

7. Confirmation of Party's Possession. — Where the property is already in the possession of the successful party, the proper judgment should be that he is entitled to the possession thereof, together with costs and damages if any.⁶

Where Possession Has Not Changed. — Where there has never been a change of possession, a judgment for return is unnecessary. *Ware River R. Co. v. Vibbard*, 114 Mass. 458.

Nor is it necessary to render judgment for a return where the successful party is already in possession. *Marri-man v. Knight*, 7 Okla. 419.

1. *Hartgraves v. Duval*, 6 Ark. 506.

2. *Hopkins v. Burney*, 2 Fla. 42; *Gould v. Barnard*, 3 Mass. 199; *Quincy v. Hall*, 1 Pick. (Mass.) 357; *Hoffman v. Noble*, 6 Met. (Mass.) 68; *Bartlett v. Brickett*, 98 Mass. 521; *People v. Niagara C. Pl.*, 4 Wend. (N. Y.) 217.

On a Plea in Abatement no such judgment can be awarded. *Hartgraves v. Duval*, 6 Ark. 506; *Dickinson v. No-land*, 7 Ark. 25. But see *McArthur v. Lane*, 15 Me. 245.

3. *Brown v. Stanford*, 22 Ark. 76; *Pierce v. Van Dyke*, 6 Hill (N. Y.) 613.

Arkansas. — Where the plaintiff fails to prove title and detention of property on trial, the defendant will not be entitled to a judgment for return of the property or damages on the plea of *non detinet*, unless he pleads with the general issue or gives notice of matter which, if properly pleaded, would be a bar to the action. *Neis v. Gillen*, 27 Ark. 184.

4. *King v. Ramsay*, 13 Ill. 619; *Conner v. Comstock*, 17 Ind. 90; *Matlock v. Straughn*, 21 Ind. 128; *Fleet v. Lockwood*, 17 Conn. 233; *Bates v. Buchanan*, 2 Bush (Ky.) 117; *Tuley v. Mauzey*, 4 B. Mon. (Ky.) 5. See also *Timp v. Dockham*, 32 Wis. 146; *Kirby v. Tompkins*, 48 Ark. 273.

Montana. — In an action of claim and delivery of personal property, where there is an issue as to the title and right of possession, and a finding in favor of the defendant, a judgment for the return of the property follows as a matter of course, even if the complaint does not contain a formal prayer for the return thereof. In such case a finding that at the commencement of the action the property was delivered to the plaintiff is immaterial and will not vitiate the judgment. *Lavelle v. Lowry*, 5 Mont. 498.

After Dismissal for Want of Bond. — After the dismissal of an action of replevin, for want of a sufficient bond, the court has jurisdiction to order a return of the goods although no answer has been filed. *Lowe v. Brigham*, 3 Allen (Mass.) 429.

5. *Mattson v. Hanisch*, 5 Ill. App. 102. See *Hursh v. Starr*, 6 Kan. App. 8; *Highnote v. White*, 67 Ind. 596; *McFadden v. Ross*, 108 Ind. 512.

Verdict Contrary to Answer. — When the answer of the defendant in replevin admits the plaintiff's right to recover, and does not claim a return of the property replevied, it is error to render judgment of return to him, though the jury find that he is entitled to the possession of the property. *Kirby v. Tompkins*, 48 Ark. 273.

6. *Ames Iron Works v. Rea*, 56 Ark. 450; *O'Connor v. Blake*, 29 Cal. 312; *Caruthers v. Hensley*, 90 Cal. 559; *Claudius v. Aguirre*, 89 Cal. 501; *Chis-som v. Lamcool*, 9 Ind. 530; *Puller v. Thomas*, 36 Mo. App. 105; *Swope v. Burnham*, 6 Okla. 736; *Gramm v.*

8. Judgment for Value — General Rule. — A judgment in replevin should contain a valuation of the goods in question, and the court should not direct the entry of a final judgment if there is no finding of value in the verdict that will justify such a judgment.¹

Fisher, 3 Wyo. 595; Everit v. Walworth County Bank, 13 Wis. 419. See also Ingals v. Ferguson, 138 Mo. 358; Phipps v. Taylor, 15 Oregon 484.

Title Acquired Pending Action. — If the plaintiff takes the property at the commencement of the action, and the defendant prays a return of it, and the defendant was entitled to the property at the commencement of the action, but his right had ceased and vested in plaintiff before trial, the judgment should leave the property in plaintiff's possession, but award costs to defendant. O'Connor v. Blake, 29 Cal. 312.

1. *California.* — Thompson v. Corbstein, 52 Cal. 653; Burke v. Koch, 75 Cal. 356.

Indiana. — State v. Forry, 64 Ind. 260; Grubaugh v. Jones, 78 Ind. 350; Foster v. Bringham, 99 Ind. 505.

Iowa. — McNorton v. Akers, 24 Iowa 369; Armel v. Lendrum, 47 Iowa 535; Hardy v. Moore, 62 Iowa 65; Jandt v. Potthast, 102 Iowa 223.

Kansas. — Ward v. Masterson, 10 Kan. 77; Babb v. Aldrich, 45 Kan. 218; Clouston v. Gray, 48 Kan. 31.

Maryland. — Benesch v. Weil, 69 Md. 276.

Michigan. — Hill v. Wright, 49 Mich. 229; Mueller v. Provo, 80 Mich. 475; Upham v. Caldwell, 100 Mich. 264; Olin v. Lockwood, 102 Mich. 443.

Minnesota. — Robertson v. Davidson, 14 Minn. 554.

Missouri. — Wm. S. Merrill Chemical Co. v. Nickells, 66 Mo. App. 678. See Carroll v. Hancock, 57 Mo. App. 228.

Nebraska. — Lininger, etc., Co. v. Mills, 29 Neb. 297; Philleo v. McDonald, 27 Neb. 142; Foss v. Marr, 40 Neb. 559; Jameson v. Kent, 42 Neb. 412; Citizens Nat. Bank v. Wedgwood, 45 Neb. 143; Bates v. Stanley, 51 Neb. 252.

New Mexico. — Ward v. Broadwell, 1 N. Mex. 75; Garland v. Bartels, 2 N. Mex. 1; Brannin v. Bremen, 2 N. Mex. 40.

New York. — M'Curdy v. Brown, 1 Duer (N. Y.) 101; Redman v. Hendricks, 1 Sandf. (N. Y.) 32.

North Carolina. — Spencer v. Bell, 109 N. Car. 39; Hall v. Tillman, 115 N. Car. 500.

Ohio. — Heyns v. Norton, 5 Ohio Cir.

Ct. 452, 3 Ohio Cir. Dec. 222; Munding v. Michael, 10 Ohio Cir. Ct. 165, 6 Ohio Cir. Dec. 76.

Tennessee. — Nashville Ins., etc., Co. v. Alexander, 10 Humph. (Tenn.) 378.

Wisconsin. — Fitzpatrick v. Warren, 1 Pin. (Wis.) 541; Kloety v. Delles, 45 Wis. 484; Pranke v. Herman, 76 Wis. 428.

United States. — Boley v. Griswold, 20 Wall. (U. S.) 486; Cyclone Steam Snowplow Co. v. Vulcan Iron Works, 52 Fed. Rep. 920; Wise v. Jefferis, 51 Fed. Rep. 645; Burton v. Platter, 53 Fed. Rep. 901.

Where a Portion of the Property Has Been Disposed of by the defendant so that a return of all cannot be had, it is not necessary, in support of a judgment for the plaintiff, that the court should find the character or value of the articles which can be returned, or that the judgment should be entered in the alternative. In such a case a judgment for the value of the entire property is proper. Burke v. Koch, 75 Cal. 356.

Inability of Officer to Take Property. — In *Illinois* judgment under the statute for the value of the property, as in trover, can be rendered only where it appears from the return that the officer was unable to obtain the property under the writ. The plaintiff's affidavit of that fact will not avail; if the writ has been lost it should be restored by copy. Kehoe v. Rounds, 69 Ill. 351.

Where There Is No Judgment for Return. — In *Indiana*, where there is no judgment rendered for a return of the property there can be no judgment for its value. Foster v. Bringham, 99 Ind. 505.

Limited by Claim in Petition. — Where the verdict assesses the value of articles replevied at a greater sum than that alleged in the petition, and no amendment of the petition is made or asked, the judgment should be entered only for the sum stated in the petition. Ward v. Masterson, 10 Kan. 77.

Where Answer Does Not Demand Return. — In *Missouri*, where the answer does not demand the return of the property, judgment against plaintiff for

Especially is it indispensable that the judgment should be rendered for value in those instances where a return is made impossible by particular facts and circumstances connected with the case, as otherwise no judgment whatever would avail.¹

Judgment for Value Improper. — In some cases under special circumstances which do not entitle the prevailing party to recover the value of the property a judgment for its value is improper.²

Valuation of Special Interests. — If in an action of replevin the successful party has only a special or limited interest in the property in controversy, the judgment for value should not be for the total value of such property, but only for the amount of such special or limited interest.³

its assessed valuation is erroneous. *Wm. S. Merrill Chemical Co. v. Nickells*, 66 Mo. App. 678, 2 Mo. App. Rep. 1378.

Excess of Jurisdiction. — In an action for replevin, where the property has been delivered to the plaintiff, but the finding is for the defendant, the judgment for the value thereof may be rendered by the county court, even if such value is above \$1,000, which is the limit of the court's jurisdiction. *Bates v. Stanley*, 51 Neb. 252.

Writ of Inquiry. — In *New York* it has been held that where the judgment is such as would entitle the defendant to a return of the property, he cannot, if it was taken as a distress, take the alternative judgment for its value, and have the same ascertained on a writ of inquiry; his only course is to have a valuation thereof by the jury trying the cause. *Redman v. Hendricks*, 1 Sandf. (N. Y.) 32.

Value Alleged in Writ. — The plaintiff in replevin and his sureties on the bond are bound by the valuation put on the property in the writ and bond, in the absence of evidence that plaintiff, in making that valuation, was misled as to the actual condition and value of the property. *Cyclone Steam Snowplow Co. v. Vulcan Iron Works*, 52 Fed. Rep. 920.

1. *Babb v. Aldrich*, 45 Kan. 218; *Clouston v. Gray*, 48 Kan. 31; *Benesch v. Weil*, 69 Md. 276; *Lininger, etc., Co. v. Mills*, 29 Neb. 297; *Pranke v. Herman*, 76 Wis. 428; *Boley v. Griswold*, 20 Wall. (U. S.) 486; *Cyclone Steam Snowplow Co. v. Vulcan Iron Works*, 52 Fed. Rep. 920; *Burton v. Platter*, 53 Fed. Rep. 901; *Wise v. Jefferis*, 51 Fed. Rep. 645.

When Property Cannot Be Delivered. — If the court is satisfied that the deliv-

ery of the property cannot be made, it may render absolute judgment for the value of the property. *Boley v. Griswold*, 20 Wall. (U. S.) 486.

Where Property Has Been Eloigned. — Where the declaration is in the *detinet*, the plaintiff, if he recovers, has adjudged to him the right of possession of the goods and chattels and damages for their detention only. But when the goods and chattels have been eloigned, or otherwise withheld from the execution of the writ by the defendant, and the declaration is in the *detinet*, the plaintiff recovering is entitled to have awarded to him the value of the goods and damages for their detention. *Benesch v. Weil*, 69 Md. 276.

2. *Cox v. McGuire*, 26 Ill. App. 315; *Jandt v. Potthast*, 102 Iowa 223; *Garrett v. Wood*, 3 Kan. 231; *Reid v. King*, 89 Ky. 388; *Tignor v. Toney*, 13 Tex. Civ. App. 518.

Where the Property Has Been Taken by the Plaintiff, not under the writ, but by other means, and plaintiff had them in possession at the time of levy, it is improper for the court to render judgment in defendant's favor for the value of such goods. *Jandt v. Potthast*, 102 Iowa 223.

Kansas Statute. — Under section 141 (Comp. L. 641) there is no authority to render judgment for the value and damages for detention. *Garrett v. Wood*, 3 Kan. 231.

3. *Guy v. Doak*, 47 Kan. 236, 366; *Moore v. Vrooman*, 32 Mich. 526; *Alderman v. Manchester*, 49 Mich. 48; *New Home Sewing Mach. Co. v. Bothane*, 70 Mich. 443; *Williams v. Bresnahan*, 66 Mich. 634; *Hickman v. Dill*, 32 Mo. App. 509; *Burt v. Mears*, 41 Mo. App. 231; *Gentry v. Templeton*, 47 Mo. App. 55; *Smith v. Keyes*, 2 Thomp. & C. (N. Y.) 650; *Townsend*

Judgment for Debt in Avowry. — Judgment on avowry in replevin is for the sum found due as debt, and the value of the property distrained need not be found.¹

Valuation of Separate Articles. — Where several articles are embraced in an action of replevin, the judgment, following the verdict, should show the separate value of each article, so that by the return of any one or more articles the judgment may be satisfied *pro tanto*.²

v. Bargo, 57 N. Y. 665; *Fowler v. Haynes*, 91 N. Y. 346; *Fitzpatrick v. Warren*, 1 Pin. (Wis.) 541; *Battis v. Hamlin*, 22 Wis. 669; *Kloety v. Delles*, 45 Wis. 484; *Clark v. Lamoreux*, 70 Wis. 508; *Farwell v. Warren*, 76 Wis. 527.

Judgment for Defendant. — Where the plaintiff in an action of replevin is the general owner of the property in controversy, and the defendant has a special interest therein, the judgment, if it be for the defendant, and the plaintiff has taken and holds the property, must ascertain and be for the value of such special interest, and not the full value of the property. *Gentry v. Templeton*, 47 Mo. App. 55.

Judgment for Officer. — A judgment in favor of an officer in replevin against him for property held by him only by virtue of an attachment or execution, should be limited to the amount of such attachment or execution, with interest and costs. *Clark v. Lamoreux*, 70 Wis. 508.

Amount of Lien. — A finding in replevin that defendant did not unlawfully detain the property, that he had a lien on or special property in the same to an amount named, and that plaintiff was the general owner, subject to defendant's lien, authorizes a judgment in defendant's favor for the amount of the lien as found. *Moore v. Vrooman*, 32 Mich. 526.

Where the plaintiff to whom the property is delivered is the general owner and the defendant who prevails in the action has only a lien, the judgment must be limited to the amount of such lien. *Fowler v. Haynes*, 91 N. Y. 346.

Insufficient Verdict. — Where the jury finds that defendant in replevin has a special lien, but does not find what the property is worth, there is nothing on which to base a personal judgment against the plaintiff for the amount of the lien. *Alderman v. Manchester*, 49 Mich. 48.

1. *Donely v. McGrann*, 1 Harr. (Del.) 453; *Clark v. Adair*, 3 Harr. (Del.) 113.

On Demurrer. — A judgment for the defendant on demurrer will be entered for the sum claimed in the avowry. *Saltzman v. Hacker*, 1 W. N. C. (Pa.) 6.

2. *Goldsmith v. Willson*, 67 Iowa 662; *Hallowell v. Milne*, 16 Kan. 65; *Whitfield v. Whitfield*, 40 Miss. 352; *Milliken v. Greer*, 5 Mo. 489; *Blankenship v. Berry*, 28 Tex. 448; *Rowlett v. Fulton*, 5 Tex. 458; *Carrier v. Carrier*, 71 Wis. 111.

Failure to Return the Separate Value.

The provision requiring the jury to return the value of the property and the value of each article, when required so to do by either party, is intended to enable the court by its judgment to afford the party entitled to the property a complete remedy in case the property cannot be obtained on execution, or the party elects to take execution for its value; and the failure to return the value of each article will not prevent the party entitled to the property from having judgment for the aggregate value. Therefore a failure of plaintiff to prove the value of particular articles, a recovery of which is sought in the action, will not be a ground for taking the case from the jury. *Goldsmith v. Willson*, 67 Iowa 662.

Should Fix Separate Value of Each Article. — When the verdict was for the plaintiff for the recovery of property sued for (two slaves), assessing the separate value of each, it was held that the judgment should have conformed to the verdict by fixing the separate value of each slave, so that execution could properly issue in case of a failure to deliver one of them. *Blankenship v. Berry*, 28 Tex. 448; *Rowlett v. Fulton*, 5 Tex. 458.

Aggregate Judgment Not Severable. — Where in an action of replevin for the possession of several separate chattels, tried before a jury, a general verdict is returned and judgment rendered in

9. Awarding Damages. — At common law damages were recovered only for the wrongful detention, but under statutes they are recoverable for both the taking and detention. The question of value and that of damages must not be confused, but the judgment should be rendered for each separately and distinctly.¹

Judgment for Interest. — A judgment in favor of the defendant may

favor of the plaintiff for the possession of all the chattels, and it appears that the District Court erred in its instructions as to the validity of plaintiff's title to one, but committed no other error, the higher court must set aside the entire verdict and judgment and remand the case for a new trial; it cannot divide the judgment, and, reversing as to the one chattel concerning which the error was made, sustain it as to the others. *Hallowell v. Milne*, 16 Kan. 65.

Several Articles Considered as Whole. — Where neither the verdict nor the judgment showed a separate valuation, but the property, such as a mare and colt, was so closely associated as to constitute one single whole, it is sufficient and will not be reversed for this cause. *Henry v. Dillard*, 68 Miss. 536.

Separate Valuation Unnecessary. — If the action is brought to recover several articles and the plaintiff fails to allege that they are of special value to him, the judgment need not fix the separate value of each article. *Byrne v. Lynn*, 18 Tex. Civ. App. 252.

1. *Arkansas.* — *Gray v. Nations*, 1 Ark. 557; *Town v. Wilson*, 8 Ark. 464; *Rowark v. Lee*, 14 Ark. 425.

California. — *Coghill v. Boring*, 15 Cal. 213; *Brown v. Johnson*, 45 Cal. 76.

Colorado. — *Witcher v. Watkins*, 11 Colo. 548.

Delaware. — *Williams v. Connaway*, 3 Houst. (Del.) 63; *Taylor v. Richardson*, 4 Houst. (Del.) 300; *Truitt v. Revill*, 4 Harr. (Del.) 71.

Florida. — *Anderson v. Carlin*, 24 Fla. 199.

Illinois. — *Butler v. Mehrling*, 15 Ill. 488.

Indiana. — *Chissom v. Lamcool*, 9 Ind. 530; *Bales v. Scott*, 26 Ind. 202; *Thompson v. Eagleton*, 33 Ind. 300; *Farrar v. Eash*, 5 Ind. App. 238.

Iowa. — *Hayden v. Anderson*, 17 Iowa 158; *Harrow v. Ryan*, 31 Iowa 156.

Kansas. — *Garrett v. Wood*, 3 Kan. 231; *Higbee v. McMillan*, 18 Kan. 133.

Maryland. — *Benesch v. Weil*, 69 Md. 276.

Minnesota. — *Oleson v. Newell*, 12

Minn. 186; *Deal v. Osborne*, 42 Minn. 102.

Missouri. — *Steinwender v. Outley*, 5 Mo. App. 589; *Baird v. Taylor*, 30 Mo. App. 580; *Lawrence v. Lawrence*, 24 Mo. 269; *Beale v. Dale*, 25 Mo. 301; *Collins v. Hough*, 26 Mo. 149; *Lewis v. Mason*, 94 Mo. 551.

Montana. — *Chauvin v. Valiton*, 8 Mont. 451; *Dutro v. Kennedy*, 9 Mont. 101.

Nebraska. — *Hooker v. Hammill*, 7 Neb. 231; *Search v. Miller*, 9 Neb. 26; *Philleo v. McDonald*, 27 Neb. 142; *Scott v. Burrill*, 44 Neb. 755.

Nevada. — *Lambert v. McFarland*, 2 Nev. 58.

New Mexico. — *Ward v. Broadwell*, 1 N. Mex. 75; *Garland v. Bartels*, 2 N. Mex. 1; *Brannin v. Bremen*, 2 N. Mex. 40.

New York. — *Niagara Elevating Co. v. McNamara*, 2 Hun (N. Y.) 416; *Dows v. Rush*, 28 Barb. (N. Y.) 157; *Dows v. Greene*, 32 Barb. (N. Y.) 490; *Seaman v. Luce*, 23 Barb. (N. Y.) 240; *Rhoads v. Woods*, 41 Barb. (N. Y.) 471; *Weaver v. Darby*, 42 Barb. (N. Y.) 411.

Ohio. — *Green v. Farrin*, 11 Ohio Cir. Ct. 294, 5 Ohio Cir. Dec. 181.

Oklahoma. — *Kuhlman v. Williams*, 1 Okla. 136; *Jackson v. Glaze*, 3 Okla. 143.

Oregon. — *Phipps v. Taylor*, 15 Oregon 484.

Pennsylvania. — *Lewis v. Bonnert*, 2 Pa. Dist. 698.

Tennessee. — *Nashville Ins., etc., Co. v. Alexander*, 10 Humph. (Tenn.) 378.

Texas. — *Hill v. M'Dermot*, Dall. (Tex.) 419.

Utah. — *Ryan, etc., Cattle Co. v. Slaughter*, 6 Utah 278.

Vermont. — *Poor v. Woodburn*, 25 Vt. 234; *Starkey v. Waite*, 69 Vt. 193.

Wisconsin. — *Fitzpatrick v. Warren*, 1 Pin. (Wis.) 541; *Douglass v. Garrett*, 5 Wis. 85; *Everit v. Walworth County Bank*, 13 Wis. 419; *Beemis v. Wylie*, 19 Wis. 318; *Hass v. Prescott*, 38 Wis. 146.

Nominal Damages Only. — Where the goods have been replevied, judgment for plaintiff in replevin will be for nom-

include interest on the value of the property from the time it was taken by the plaintiff.¹

10. Dismissal, Discontinuance, and Nonsuit — Voluntary Dismissal. — After the plaintiff has obtained possession of the property under the writ, he cannot of his own accord dismiss the suit without the consent of the defendant and a return of the property.²

inal damages merely. *Williams v. Connaway*, 3 *Houst. (Del.)* 63.

Judgment for More than Value. — The judgment may be for more than the value alleged in the complaint, where there is a prayer for damages for the detention of the property, if the judgment is within the *ad damnum* of the writ. The value of the property is only one predicate of the recovery. *Coghill v. Boring*, 15 *Cal.* 213. See also *Brook v. Bayless*, 6 *Okl.* 568.

Technical Error. — If on the trial of an action of replevin it appears that the property has been hopelessly lost, or has been destroyed, so that a judgment for its delivery would be unavailing, judgment for damages alone, without judgment for its possession, is at most a technical error, for which the judgment will not be reversed. *Brown v. Johnson*, 45 *Cal.* 76.

Form of Justice's Judgment. — The form of a judgment of a justice of the peace in an action of replevin, when for the defendant, should be that he have return of the property and the damages found by the jury for the detention, if return can be had, and if return cannot be had then for value and costs in either case. *Garrett v. Wood*, 3 *Kan.* 231.

A General Judgment Against Husband and Wife for damages and costs in a replevin suit is improper. The judgment for damages and costs must be against husband alone. *Steinwender v. Outley*, 5 *Mo. App.* 589.

Judgment for Damages Only — Nebraska Statute. — Under the Nebraska Code Civ. Pro., § 193, which provides that in replevin, when the property has been returned for want of the undertaking required by section 186, the action may proceed as one for damages only, the action then becomes in substance an action in trover for the value of the goods, and the judgment when in favor of the plaintiff should be for the amount of damages found due and not for the return of the property. *Philleo v. McDonald*, 27 *Neb.* 142.

Assessment of Damages by Clerk. — When the writ of attachment in re-

plevin has been quashed, it is not in the power of the clerk to assess damages on the penal bond, which confesses a judgment for the penalty, and issue execution therefor. *Lewis v. Bonnett*, 2 *Pa. Dist.* 698.

Judgment in Favor of a Pledgee, where property has been returned to the defendant, may be simply for damages to the amount of his interest and not for a return. *Hass v. Prescott*, 38 *Wis.* 146.

1. *Hurd v. Gallaher*, 14 *Iowa* 394. See also *Garcia v. Gunn*, 119 *Cal.* 315.

2. See generally article DISMISSAL, DISCONTINUANCE, AND NONSUIT, vol. 6, p. 823; and see the following cases:

District of Columbia. — *Corbett v. Pond*, 10 *App. Cas. (D. C.)* 17.

Iowa. — *Hall v. Smith*, 10 *Iowa* 45; *Crist v. Francis*, 50 *Iowa* 257.

Kansas. — *McVey v. Burns*, 14 *Kan.* 291; *McKey v. Lauffin*, 48 *Kan.* 581.

Michigan. — *Casper v. Kent Circuit Judge*, 45 *Mich.* 251; *Saunders v. Closs*, (*Mich.* 1898) 75 *N. W. Rep.* 295.

Missouri. — *Rhoades v. McNulty*, 52 *Mo. App.* 301; *Collins v. Hough*, 26 *Mo.* 149; *Barghuff v. Heckwolf*, 26 *Mo.* 511;

Ranney v. Thomas, 45 *Mo.* 111.

Nebraska. — *Ahlman v. Meyer*, 19 *Neb.* 63; *Wilcox v. Brown*, 20 *Neb.* 355; *Kinkaid v. Hiatt*, 24 *Neb.* 562;

Garber v. Palmer, 47 *Neb.* 699; *Vose v. Muller*, 48 *Neb.* 602; *Houck v. Linn*, 56 *Neb.* 743.

New Jersey. — *Broderick v. Ames*, 18 *N. J. L.* 297.

New Mexico. — *Elsberg v. Frietze*, (*N. Mex.* 1867) 43 *Pac. Rep.* 690.

New York. — *Rosenberg v. Flack*, (*Supm. Ct. Gen. T.*) 10 *N. Y. Supp.* 759, 57 *Hun (N. Y.)* 587; *Sheehan v. Golden*, 85 *Hun (N. Y.)* 462.

Washington. — *Liebmann v. McGraw*, 3 *Wash.* 520.

Wisconsin. — *Morris v. Baker*, 5 *Wis.* 389; *Hackett v. Bonnell*, 16 *Wis.* 471.

United States. — *Davison v. Gibson*, 76 *Fed. Rep.* 717.

Under the Arkansas Statute providing that dismissals by plaintiff may be without prejudice, where an action of

Inquiry into Defendant's Right of Property. — If the original action has been dismissed or discontinued by plaintiff without a restoration of the property to the defendant, the cause will be retained for the purpose of inquiring into defendant's rights of property and possession. Such also is the case where the plaintiff fails to prosecute.¹

Nonsuit. — In replevin as in other actions the plaintiff may be nonsuited for sufficient cause, but it is proper for the defendant to have the value of the property assessed by the jury in the cause, if no return has been made.²

Return of Property. — Where a party who obtains possession of the property thereafter submits to a nonsuit, or discontinues or defaults, according to the weight of authority a judgment should be rendered awarding to the other party a return of the property or its value.³

replevin is dismissed by plaintiff and the property delivered to defendant, the dismissal does not prejudice plaintiff's right to maintain a subsequent action for the same chattels. *Martin v. Hodge*, 47 Ark. 378.

Effect of Arbitration. — Arbitration of a replevin suit operates as a discontinuance and not as a nonsuit. *Perrigo Gold Min., etc., Co. v. Grimes*, 2 Colo. 651.

Motion Based on Affidavits. — It is erroneous to dismiss a replevin suit on motion based upon affidavits, on the ground that defendant was a deputy sheriff and that the writ was directed to the sheriff and served by another deputy, that the writ was issued without authority of law, and that the service was unlawful and irregular and gave the court no jurisdiction; such questions are not properly triable on affidavits, but should in some way be brought to trial on evidence upon an issue of fact. Whether they are triable under the general issue or should be made the subject of a plea in abatement, *quære*. *Jewell v. Lamoreaux*, 30 Mich. 155.

Consent in Writing — Minnesota Statute. — In replevin where the property is taken by the plaintiff and returned to defendant on the proper bond, plaintiff cannot dismiss by a notice served on defendant's attorneys, even though they retain such notice, as Gen. Stat. Minn. 1866, c. 66, § 242, subd. 2, requires a consent in writing. *Williams v. McGrade*, 18 Minn. 82.

On Motion of One of Several Defendants. — A dismissal of a suit on motion of one of several defendants is of neces-

sity a dismissal as to all. *Morris v. Baker*, 5 Wis. 389.

1. *Hall v. Smith*, 10 Iowa 45; *Crist v. Francis*, 50 Iowa 257; *McVey v. Burns*, 14 Kan. 291; *Ahlman v. Meyer*, 19 Neb. 63; *Garber v. Palmer*, 47 Neb. 699; *Vose v. Muller*, 48 Neb. 602; *Gordon v. Williamson*, 20 N. J. L. 77; *Elsberg v. Fietze*, (N. Mex. 1867) 43 Pac. Rep. 690.

2. *Gale v. Hoysratt*, 7 Hill (N. Y.) 179, 1 How. Pr. (N. Y.) 19, 72; *Van Alstine v. Kittle*, 18 Wend. (N. Y.) 524; *Murphy v. Jenkins*, 1 Den. (N. Y.) 669; *Singer Mfg. Co. v. Hackett*, 7 W. N. C. (Pa.) 45; *Gaynor v. Blewitt*, 69 Wis. 582.

After Jury Is Sworn. — The court will not in replevin order a *non pros.* at the motion of the defendant, after the jury is sworn. *Walker v. Hunter*, 5 Cranch (C. C.) 462.

In **Nebraska** the court should in no case grant a nonsuit; but in case of plaintiff's failing to prove his cause of action, the court should retain the cause for the purpose of taking proper proofs and rendering the appropriate judgments. *Ahlman v. Meyer*, 19 Neb. 63.

3. See generally article DISMISSAL, DISCONTINUANCE AND NONSUIT, vol. 6, p. 823; and see the following cases:

Arkansas. — *Town v. Evans*, 11 Ark. 9.

California. — *Kneebone v. Kneebone*, 83 Cal. 645.

Connecticut. — *Fleet v. Lockwood*, 17 Conn. 233.

Illinois. — *Fowler v. Richardson*, 32 Ill. App. 252.

Iowa. — *Funk v. Israel*, 5 Iowa 438;

When Return of Property Improper. — It has been held, however, that the judgment should not require a return of the property where

Chadwick *v.* Miller, 6 Iowa 34; Marshall *v.* Bunker, 40 Iowa 121.

Kentucky. — Kerley *v.* Hume, 3 T. B. Mon. (Ky.) 181.

Maine. — Hoeffner *v.* Stratton, 57 Me. 360.

Massachusetts. — Lowe *v.* Brigham, 3 Allen (Mass.) 429; Stanley *v.* Neale, 98 Mass. 343; Barry *v.* O'Brien, 103 Mass. 520.

Michigan. — People *v.* Tripp, 15 Mich. 518; Forbes *v.* Washtenaw Circuit Judge, 23 Mich. 497; Humphrey *v.* Bayn, 45 Mich. 565; Soper *v.* Hawkins, 56 Mich. 527.

Missouri. — Smith *v.* Winston, 10 Mo. 299; Berghoff *v.* Heckwolf, 26 Mo. 511; Munley *v.* King, 40 Mo. App. 531.

Montana. — Dahler *v.* Steele, 1 Mont. 206.

Nebraska. — Miller *v.* Daly, 55 Neb. 771.

North Carolina. — Pannell *v.* Hampton, 10 Ired. L. (N. Car.) 463.

Oregon. — Capital Lumbering Co. *v.* Hall, 10 Oregon 202.

Rhode Island. — Wright *v.* Card, 16 R. I. 719.

South Carolina. — See Younger *v.* Massey, 41 S. Car. 50.

Vermont. — Collamer *v.* Page, 35 Vt. 387; Thurber *v.* Richmond, 46 Vt. 395; Farnham *v.* Chapman, 60 Vt. 338.

Washington. — Liebmman *v.* McGraw, 3 Wash. 520.

Wisconsin. — Graves *v.* Sittig, 5 Wis. 219; Morris *v.* Baker, 5 Wis. 389; Booth *v.* Ableman, 16 Wis. 460, 18 Wis. 495; Timp *v.* Dockham, 32 Wis. 146; Fugina *v.* Brownlie, 65 Wis. 628; Gaynor *v.* Blewitt, 69 Wis. 582.

Wyoming. — Bath *v.* Ingersoll, 1 Wyo. 280.

Contra. — McIlvaine *v.* Holland, 5 Harr. (Del.) 226; Wiseman *v.* Lynn, 39 Ind. 250; Hulman *v.* Benighof, 125 Ind. 481; Rosenberg *v.* Flack, 57 Hun (N. Y.) 587, 10 N. Y. Supp. 759; Oppenheim *v.* Lewis, 20 N. Y. App. Div. 332; Lapp *v.* Ritter, 88 Fed. Rep. 108.

In Pennsylvania a judgment cannot be entered in replevin for want of an appearance. Ogilbe *v.* Bennett, 2 Montg. Co. Rep. (Pa.) 89; Crofut *v.* Chichester, 3 Phila. (Pa.) 457, 16 Leg. Int. (Pa.) 308.

Want of Prosecution. — In Harwood *v.* Smethurst, 30 N. J. L. 230, it was

held that where the plaintiff is noticed for trial and does not appear the regular course is to enter a nonsuit "and then proceed to assess the damages by means of the jury in the box or by a writ of inquiry, in pursuance of the statute."

Failure to File Declaration. — A judgment for defendant in replevin without a declaration is irregular, and will on motion be set aside, even at a subsequent term. Ringgold *v.* Elliot, 2 Cranch (C. C.) 462.

Pennsylvania. — A judgment of *non pros.* may be entered in Luzerne County, under the rule of court, for want of a declaration. Tufts *v.* Cole, 4 Kulp (Pa.) 243.

Where the Answer Is Stricken from the files and no other answer is filed, judgment by default should be entered against the defendant and an inquest of damages taken. Jetton *v.* Smead, 29 Ark. 372.

Dismissal for Insufficiency of Bond — Kansas. — It is error to dismiss an action of replevin and render judgment against a plaintiff who cannot give additional security, where his bond is deemed insufficient, since he is entitled still to a trial of the issues irrespective of the possession of the property. Varner *v.* Bowling, 54 Kan. 380.

Massachusetts. — After dismissal of the action for want of a sufficient bond, a judge has power to order a judgment for return, although no answer has been filed. Lowe *v.* Brigham, 3 Allen (Mass.) 429.

Rhode Island Statute. — Under Pub. Stat., c. 235, § 5, providing that whenever any plaintiff in replevin shall neglect to enter and prosecute the suit, defendant on complaint, shall have judgment, it has been held that where plaintiff enters and prosecutes the suit, no formal or written complaint is necessary to authorize judgment for defendant. Wright *v.* Card, 16 R. I. 719.

Upon the Abatement of the Action in *Vermont* there is judgment for a return merely. Such judgment is only a decision that the property has been irregularly taken, and that the possession shall be restored, leaving matters *in statu quo*, with the question of title undecided. Collamer *v.* Page, 35 Vt. 387.

the action is dismissed for want of jurisdiction,¹ or where the plaintiff is nonsuited on the ground that the property never was in the defendant's possession.²

11. Execution.—The usual writ of execution in an action of replevin is the writ *de retorno habendo*.³ It should direct the officer to return the property and make the damages, and, in case he shall not be able to find the property, to make the amount of the value as found.⁴

Impanelling New Jury.—In *Wisconsin* it has been held under a territorial statute making the proceedings on a nonsuit in replevin the same as where there is a judgment for the defendant on demurrer, that where the defendant has obtained a nonsuit, he may impanel a new jury in the same cause and have his damages assessed. *Bath v. Ingersoll*, 1 Wyo. 280. See also *Hill v. Bloomer*, 1 Pin. (Wis.) 463.

Disclaimer of Possession.—Where plaintiff, after getting possession of the property under the statute, submits to nonsuit, a return of property and damages may be adjudged, though the defendant by answer disclaimed both property and right of possession. *Timp v. Dockham*, 32 Wis. 146.

Judgment of Dismissal Not Final.—Ordinarily a judgment dismissing a suit is a final judgment, but an action of replevin is an extraordinary remedy, and in such action a judgment dismissing the suit is not final, and error cannot be assigned thereon till after final judgment. *Branch v. Branch*, 5 Fla. 447.

Judgment on Demurrer for Want of Jurisdiction Final.—A judgment of the circuit court on demurrer, vacating and quashing a writ of replevin for want of jurisdiction, is a final judgment. *Ex p. Baltimore*, etc., R. Co., 108 U. S. 566.

Officer Not Entitled to a Return.—An action of replevin was brought to recover from an officer property attached by him, and no answer was filed, and the attachment creditors were made parties defendant; afterwards the complaint was dismissed as to them, but they were not entitled to have a judgment rendered directing a return of the property to the officer. *Oppenheim v. Lewis*, 20 N. Y. App. Div. 332.

1. *Gray v. Dean*, 136 Mass. 128; *Burdett v. Doty*, 38 Fed. Rep. 491. *Contra*, *Booth v. Ableman*, 16 Wis. 460, 18 Wis. 495.

2. *Gallagher v. Bishop*, 15 Wis. 276; *Gidday v. Witherspoon*, 35 Mich. 368.

Return Impossible.—Of course no return can be made to the defendant of property whereof the plaintiff never obtained possession under the writ. *Prentiss v. Moore*, 3 Ill. App. 539; *Paxton v. Schick*, 3 Ill. App. 542.

Where the Property Has Been Redelivered to the defendant upon his giving bond, no judgment in his favor for a return is necessary to entitle him to retain possession of the property, where the action has been discontinued by the plaintiff. *Hackett v. Bonnell*, 16 Wis. 471.

No Judgment for Return of Property Restored.—Where it appears by the officer's return in replevin that he has restored the property replevied, it is error not to be cured by remittitur of the damages, to render a judgment *retorno habendo*. *Harrod v. Hill*, 2 Dana (Ky.) 165.

3. *Black. Com.* 150-413; *Bailey v. Ralph*, 4 Ark. 591; *Harris v. McCasland*, 29 Ill. App. 430; *Fowler v. Richardson*, 32 Ill. App. 252; *Hackett v. Jones*, 34 Ill. App. 562; *Suppiger v. Gruaz*, 137 Ill. 216; *State v. Carrick*, 70 Md. 586. And see generally articles *EXECUTIONS AGAINST PROPERTY*, vol. 8, p. 303; *EXECUTIONS AGAINST THE BODY AND ARREST IN CIVIL CASES*, vol. 8, p. 584.

The Term De Retorno Habendo has also been applied to the judgment for a return of the property in an action of replevin. *Phillips v. Hyde*, 1 Dall. (Pa.) 439; *Harris v. McCasland*, 29 Ill. App. 430.

Execution Directed to Whom.—In *Michigan* it has been held that the writ of return cannot run to the sheriff of any county other than that in which the judgment was rendered. *Rathbun v. Ranney*, 14 Mich. 382.

4. *Bales v. Scott*, 26 Ind. 202; *Garett v. Wood*, 3 Kan. 231; *State v. Carrick*, 70 Md. 586.

Fieri Facias.—In *Pennsylvania* a *fieri facias* in one jurisdiction is considered the proper writ of execution upon a judgment in avowry for the defendant,

12. Satisfaction of Judgment. — Where judgment is in the alternative, the party against whom it is rendered makes a sufficient compliance with it by tendering the property in controversy in satisfaction thereof, or by paying the money value when it is out of his power to deliver the property.¹

entered upon a verdict finding the rent in arrear and the value of the goods. *Klein v. McGeogh*, 12 W. N. C. (Pa.) 128.

The plaintiff may, after a recovery, seize and sell the property under a *fi. fa.*, without affecting his right to proceed on the replevin bond; but the defendant is entitled to a credit for the proceeds of the sale. *Shell v. Hummel*, 1 Pearson (Pa.) 19.

Executions on Justices' Judgments. — While executions on justices' judgments may issue, yet an appeal avoids them. *Tomlin v. Fisher*, 27 Mich. 524.

Execution for Damages Awarded on Dismissal. — Where damages are assessed on dismissal of the action, an execution may issue. *Shepard v. Butterfield*, 41 Ill. 76.

Execution for Value of Unfound Portions of Property. — Where a judgment is rendered in favor of the plaintiff for the return of the property, or for its value in case a delivery cannot be had, and the sheriff returns such part only of the property as he is able to find, an execution for the value of the property not returned may be enforced against the defendant. *Black v. Black*, 74 Cal. 520.

Execution Against Plaintiff. — Where a judgment in an action of replevin has been rendered against the plaintiff, who has the possession of the property, it becomes his affirmative duty to return the property. On his failure to do so the usual execution to enforce the alternative judgment may issue at the instance of the defendant, but such execution need not itself be in the alternative. *Eickhoff v. Eikenbary*, 52 Neb. 332.

Proceedings for Contempt. — Where the jury has not assessed any damages, or found the value of the property, a judgment for the plaintiff can only be enforced by execution, and not by punishment for contempt. *Hammond v. Morgan*, 101 N. Y. 179, 3 How. Pr. N. S. (N. Y.) 438.

Executions Against the Body. — In *Michigan* an execution against the body cannot be issued by a circuit court on a judgment in replevin. *Fuller*

v. Bowker, 11 Mich. 204; *Tomlin v. Fisher*, 27 Mich. 524.

Order of Sale of Property Should Not Be Made. — A sale of mortgaged property recovered by a mortgagee in an action of replevin should not be ordered, the proceeding being merely to recover possession and not to foreclose. *Marks v. McGehee*, 35 Ark. 217.

Setting Aside Execution. — Where in replevin the property is delivered to the plaintiff and the defendant recovers judgment for its return, or, if a return cannot be had, for its value, and issues execution thereon, such execution should not be recalled and set aside on motion of the plaintiff, and the judgment be declared satisfied, except upon satisfactory proof that it had been satisfied by the return of all the property, or an offer to return the same made to the defendant personally and kept good. *Irvin v. Smith*, 66 Wis. 113.

1. *De Thomas v. Witherby*, 61 Cal. 92; *Thompson v. Laughlin*, 91 Cal. 313; *Frey v. Drahos*, 10 Neb. 594; *Reavis v. Horner*, 11 Neb. 479; *White v. Woodruff*, 25 Neb. 797; *Manker v. Sine*, 47 Neb. 736; *Eickhoff v. Eikenbary*, 52 Neb. 332; *Carson v. Applegarth*, 6 Nev. 187; *Kingsley v. Sauer*, (County Ct.) 17 Misc. (N. Y.) 544; *Davis v. Calhoun*, 41 Tex. 554; *Jackson v. Nelson*, (Tex. Civ. App. 1897) 39 S. W. Rep. 315.

Must Return the Identical Property. — No property need be accepted in satisfaction of a judgment for a return, except the identical property taken under the replevin writ. *Irvin v. Smith*, 68 Wis. 227; *Eickhoff v. Eikenbary*, 52 Neb. 332.

Satisfaction Pro Tanto. — The judgment in an action of replevin should permit of a return of a part of the property in satisfaction *pro tanto*, where the property can be severed. *Jackson v. Nelson*, (Tex. Civ. App. 1897) 39 S. W. Rep. 315.

But where the judgment is for a certain quantity of hay, or a certain sum on failure to return property, plaintiff cannot be forced to take a part of the hay and the balance in money. *Kings-*

Effect of Satisfaction in Money. — Where a money judgment for the value of property is paid, it vests the title to the property in the party against whom the judgment was rendered.¹

XVI. COSTS — **Security for Costs.** — Where the usual bond is given in an action of replevin, the security for costs is in such bond, so that no recognizance need be entered upon the writ.²

Taxation of Costs. — In awarding costs in an action of replevin the general rule is that they follow the judgment and are given to the prevailing party.³

ley v. Sauer, (County Ct.) 17 Misc. (N. Y.) 544.

Sufficient Tender. — When plaintiff paid the costs and damages awarded against him in an action of replevin and then made to defendant a tender of the property, this was held to be a sufficient discharge of the judgment in the alternative. *Manker v. Sine*, 47 Neb. 736.

1. *Marix v. Franke*, 9 Kan. 132. See also *Hunt v. Bennett*, 4 Greene (Iowa) 512.

2. *Larson v. Laird*, 36 Ill. App. 402; *Phillips v. Cooper*, 59 Miss. 17; *Moore v. Herron*, 17 Neb. 697; *Tibbles v. O'Connor*, 28 Barb. (N. Y.) 538; *Leighton v. Brown*, 98 Mass. 515; *Dunshee v. Stearns*, 1 Aik. (Vt.) 149; *Stoddard v. Gilman*, 22 Vt. 568. See *Brabon v. Pierce*, 34 Mich. 39; *Monroe v. Heintzman*, 46 Mich. 12; *Carlton v. Dixon*, 14 Oregon 293; *Jordan v. La Vine*, 15 Oregon 329. *Contra*, *Brock v. Bolton*, 37 S. Car. 40.

Liability of Surety. — The sureties on such replevin bond are jointly with their principal liable for the costs and the judgment runs against them all. *Morrill v. Daniel*, 47 Ark. 316; *Billups v. Freeman*, (Ariz. 1898) 52 Pac. Rep. 367; *Rhodes v. Burkart*, 28 S. Car. 154; *McLeod Artesian Well Co. v. Craig*, (Tex. Civ. App. 1897) 43 S. W. Rep. 934.

Mississippi Statute. — Under Code of 1871, c. 16, sureties upon the bond of an unsuccessful defendant in replevin, who retains the property, are subject to costs, and it appears that his surrender thereof does not affect their liability. *Phillips v. Cooper*, 59 Miss. 17.

3. See generally article Costs, vol. 5, p. 100; and for the application of general rules to actions of replevin the following cases:

Arizona. — *Billups v. Freeman*, (Ariz. 1898) 52 Pac. Rep. 367.

Arkansas. — *Rowark v. Lee*, 14 Ark. 425; *Morrill v. Daniel*, 47 Ark. 316.

California. — *Edgar v. Gray*, 5 Cal. 267; *Rohr v. McCaig*, 33 Cal. 309; *Wheatland Mill Co. v. Pirrie*, 89 Cal. 459; *Meads v. Lasar*, 92 Cal. 221, 93 Cal. 530.

Colorado. — *Clark v. Dreyer*, 9 Colo. App. 453.

Delaware. — *McIlvaine v. Holland*, 5 Harr. (Del.) 226.

Florida. — *McGriff v. Ried*, 37 Fla. 51; *Webster v. Brunswick-Balke-Calender Co.*, 37 Fla. 433.

Illinois. — *Farwell v. Hanchett*, 19 Ill. App. 620; *Butler v. Mehrling*, 15 Ill. 488; *Lill v. Stookey*, 72 Ill. 495.

Indiana. — *Chissom v. Lamcool*, 9 Ind. 530; *Polk v. Nickens*, 63 Ind. 439.

Iowa. — *Harvey v. Pinkerton*, 101 Iowa 246.

Kansas. — *Garrett v. Wood*, 3 Kan. 231; *Furrow v. Chapin*, 13 Kan. 107; *Smith v. Woodleaf*, 21 Kan. 717; *Sims v. Mead*, 29 Kan. 124; *Cowling v. Greenleaf*, 32 Kan. 392; *Armell v. Layton*, 33 Kan. 41.

Kentucky. — *Asbell v. Tipton*, 1 B. Mon. (Ky.) 300.

Maine. — *Harding v. Harris*, 2 Me. 162; *Ridlon v. Emery*, 6 Me. 261; *Brewer v. Curtis*, 12 Me. 51; *Dodge v. Reed*, 40 Me. 331; *Lewis v. Warren*, 49 Me. 322; *Washington Ice Co. v. Webster*, 62 Me. 341, 68 Me. 449.

Massachusetts. — *Davis v. Hastings*, 8 Cush. (Mass.) 313.

Michigan. — *Merrill v. Butler*, 18 Mich. 294; *Hinchman v. Doak*, 48 Mich. 168; *Caldwell v. Bowen*, 80 Mich. 382; *Kirby Carpenter Co. v. Trombley*, 101 Mich. 447. See *Byrnes v. Palmer*, 113 Mich. 17.

Minnesota. — *Oleson v. Newell*, 12 Minn. 186; *Coit v. Waples*, 1 Minn. 134.

Mississippi. — *Dearing v. Ford*, 13 Smed. & M. (Miss.) 269.

Missouri. — *Steinwender v. Outley*, 5 Mo. App. 589; *Ingals v. Ferguson*, 59 Mo. App. 299.

Nebraska. — *Tilden v. Stilson*, 49

Expenses as Costs. — The expenses of taking and removing the

Neb. 382; *Rodgers v. Graham*, 36 Neb. 730; *Scott v. Burrill*, 44 Neb. 755; *Hooker v. Hammill*, 7 Neb. 231; *Search v. Miller*, 9 Neb. 26.

Nevada. — *Lambert v. McFarland*, 2 Nev. 58.

New Jersey. — *Chambers v. Hunt*, 20 N. J. L. 109.

New Mexico. — *Ward v. Broadwell*, 1 N. Mex. 75; *Bannin v. Bremen*, 2 N. Mex. 40.

New York. — *Rogers v. Arnold*, 12 Wend. (N. Y.) 31; *Hawley v. Green*, 18 Wend. (N. Y.) 654; *Johnson v. Fellows*, 6 Hill (N. Y.) 353; *Minks v. Wolf*, (Supm. Ct. Spec. T.) 8 How. Pr. (N. Y.) 238; *Vowles v. Murray*, (Brooklyn City Ct. Gen. T.) 50 How. Pr. (N. Y.) 159; *Hoag v. Moss*, (Marine Ct. Spec. T.) 1 City Ct. (N. Y.) 174; *Davis v. Newcomb*, 1 Den. (N. Y.) 661; *Wilkins v. Williams*, (Supm. Ct. Gen. T.) 15 Civ. Pro. (N. Y.) 168; *Clafin v. Davidson*, 53 N. Y. Super. Ct. 122, 8 Civ. Pro. (N. Y.) 46; *Lockwood v. Waldorf*, 91 Hun (N. Y.) 281; *Herman v. Girvin*, 8 N. Y. App. Div. 418; *Rapid Safety Filter Co. v. Wyckoff*, (N. Y. City Ct. Gen. T.) 19 Misc. (N. Y.) 351, 20 Misc. (N. Y.) 429; *Young v. Atwood*, 5 Hun (N. Y.) 234; *Kilburn v. Lowe*, 37 Hun (N. Y.) 237; *Mertens v. Fitzwater*, 53 Hun (N. Y.) 597; *Newell Universal Mill Co. v. Muxlow*, 115 N. Y. 170.

North Carolina. — *Horton v. Horne*, 99 N. Car. 219.

Ohio. — *Rowan v. Johnson*, 2 West. L. Month. 155, 2 Ohio Dec. (Reprint) 254.

Oklahoma. — *Kuhlman v. Williams*, 1 Okla. 136.

Oregon. — *Phipps v. Taylor*, 15 Oregon 484.

Pennsylvania. — *Shoemaker v. Shoemaker*, 7 Kulp (Pa.) 528.

Tennessee. — *Parham v. Riley*, 4 Coldw. (Tenn.) 5.

Texas. — *Hill v. M'Dermot*, Dall. (Tex.) 419; *Avery v. Avery*, 12 Tex. 54.

Utah. — *Ryan, etc., Cattle Co. v. Slaughter*, 6 Utah 278.

Vermont. — *Holden v. Torrey*, 31 Vt. 690; *Starkey v. Waite*, 69 Vt. 193.

Wisconsin. — *Hill v. Bloomer*, 1 Pin. (Wis.) 463; *Everit v. Walworth County Bank*, 13 Wis. 419; *McCutchin v. Platt*, 22 Wis. 561; *Lanyon v. Woodward*, 65 Wis. 543; *Clark v. Lamoreaux*, 70 Wis. 508.

Failure of Jury to Find Value. — In *California* a defendant in replevin who recovers judgment is entitled to his costs although the jury fails to find that the value of the property is such as to give the court jurisdiction where the plaintiff's complaint states its value at a sum exceeding that amount. *Edgar v. Gray*, 5 Cal. 267.

In *New York* a recovery by the plaintiff in replevin of nominal damages does not carry costs, unless the value be assessed by the jury. *Hawley v. Green*, 18 Wend. (N. Y.) 654.

Judgment for Defendant — Property Not Returned. — Where it is found that the plaintiff is not entitled to the possession of the property, and it has been taken from the defendant under an order of delivery, the failure of the defendant to claim a return of the property replevied, and have judgment for its return, does not bar him from his right to a judgment for costs. *Cowling v. Greenleaf*, 32 Kan. 392.

No Unlawful Detainer. — Where a defendant in replevin sets up no right or claim to the property, but denies having it in possession when the writ was issued and served, and defends on that ground, and has verdict in his favor that he did not unlawfully detain, etc., he has no claim to a judgment for the return of the property or for its value, and is entitled to a judgment for costs only. *Hinchman v. Doak*, 48 Mich. 168.

Amount of Plaintiff's Recovery. — In *Oregon* costs are allowed, of course, to the plaintiff upon a judgment in his favor, but if in such action he recover property, or the value as established on the trial, and damages for detention, in all less than fifty dollars, he shall recover no more costs and disbursements than the sum of such value and damages. *Phipps v. Taylor*, 15 Oregon 484.

Costs of Writ De Retorno Habendo. — The costs of the writ *de retorno habendo* are no part of the costs to be recovered with the judgment. *Langdoc v. Parkinson*, 2 Ill. App. 136.

Where Plaintiff Acquires Right After Action Brought. — In an action of replevin where the plaintiff took the property at the commencement of the action and the defendant prayed a return of it, and the defendant was entitled to the property at the commence-

property by the sheriff constitute a part of the disbursements in the action and should be added to the costs.¹

Attorney's Fees. — Neither the fees of the attorney of the successful party in replevin, nor his expenses incident to the action, are recoverable at the cost of the losing party.²

Division of Costs. — Where the judgment is apportioned and the property divided between the parties, each party will be required to pay his own costs.³

Costs on Dismissal. — Where for lack of jurisdiction or failure to

ment of the action, but his right had ceased and vested in plaintiff before trial, the judgment should have awarded costs to defendant. *O'Connor v. Blake*, 29 Cal. 312; *Wheeler v. Train*, 4 Pick. (Mass.) 168. See also *Doane v. Lockwood*, 115 Ill. 490; *Barney v. Brannan*, 51 Conn. 175; *Martin v. Bayley*, 1 Allen (Mass.) 381; *Ingraham v. Martin*, 15 Me. 373.

1. *Young v. Atwood*, 5 Hun (N. Y.) 234. See *Alexander v. Thomas*, 1 Cranch (C. C.) 92.

Restoration of Building Removed from Land. — Where a building has been wrongfully removed by the defendant from the land of the plaintiff, the writ does not authorize the officer to restore to its original place, and hence expenses so incurred are not recoverable as proper costs. *Byrnes v. Palmer*, 113 Mich. 17.

Premium Paid for Replevin Bond. — A plaintiff in replevin cannot upon final recovery tax as a disbursement a sum paid to a surety company for furnishing the undertaking upon which the goods were seized. *Bick v. Reese*, 52 Hun (N. Y.) 125.

No Witness Fees for the Owner. — Where a defendant in replevin pleads property in another, the latter is not entitled to costs as a witness on the trial. *McDowell v. Windle*, 2 Chest. Co. Rep. (Pa.) 479.

2. *Carroway v. Wallace*, (Miss. 1895) 17 So. Rep. 930; *Trimble v. Keer*, 56 Mo. App. 683; *Wright v. Broome*, 67 Mo. App. 32; *Ryan, etc., Cattle Co. v. Slaughter*, 6 Utah 278. See *Consolidated Tank Line Co. v. Bronson*, 2 Ind. App. 1; *Jones v. Findley*, 84 Ga. 52.

Rule in Illinois. — Reasonable attorney's fees expended by a successful defendant in a replevin suit may be subsequently recovered in an action of debt on the replevin bond. *Siegel v. Hanchett*, 33 Ill. App. 634; *Scott v. Rogers*, 56 Ill. App. 571; *Edwin v. Cox*, 61 Ill. App. 567.

3. *Connecticut.* — Seeley v. Gwillim, 40 Conn. 111.

Indiana. — Chinn v. Russell, 2 Blackf. (Ind.) 171.

Kansas. — Dresher v. Corson, 23 Kan. 313; *Friend v. Green*, 43 Kan. 167.

Maine. — McLarren v. Thompson, 40 Me. 284.

Massachusetts. — Powell v. Hinsdale, 5 Mass. 343; *Arnold v. Brackett*, 5 Mass. 344, note.

New Hampshire. — Brown v. Smith, 1 N. H. 36.

New Jersey. — Field v. Post, 38 N. J. L. 346.

New York. — Seymour v. Billings, 12 Wend. (N. Y.) 285; *Wright v. Williams*, 2 Wend. (N. Y.) 632; *Small v. Bixley*, 18 Wend. (N. Y.) 514; *Rogers v. Arnold*, 12 Wend. (N. Y.) 288, note a, 31; *Johnson v. Fellows*, 6 Hill (N. Y.) 353; *Hull v. Halsted*, (Supm. Ct. Spec. T.) 1 How. Pr. (N. Y.) 174; *Porter v. Willet*, (N. Y. Super. Ct.) 14 Abb. Pr. (N. Y.) 319; *Summers v. Jarvis*, (Supm. Ct.) 14 Abb. Pr. (N. Y.) 322, note.

Ohio. — Clark v. Keith, 9 Ohio 72.

Vermont. — Poor v. Woodburn, 25 Vt. 234.

Wisconsin. — Lanyon v. Woodward, 65 Wis. 543.

Amounts to an Offset. — Where in an action of replevin each party is found to be entitled to part of the property, but no costs are awarded to either, the judgment will not be disturbed if the court is unable to say that either party is prejudiced thereby, such failure to award costs being virtually an offset of the costs of one party against those of another. *Lanyon v. Woodward*, 65 Wis. 543.

Apportioned According to Equity. — Where the verdict in an action of replevin is for both parties, the judgment must follow the verdict, and the costs must be apportioned according to equity. *Poor v. Woodburn*, 25 Vt. 234.

file a declaration the cause is dismissed, or where plaintiff discontinues the same, the costs should be taxed against him, and usually no other judgment can be rendered.¹

On Appeal. — If in replevin the defendant takes an appeal or resorts to other methods of review, and reduces the damages recovered against him, he is the prevailing party and is entitled to the cost of review.²

Costs in Action on Bond. — In an action on a replevin bond the plaintiff may recover the costs made by him and for which he is liable, but not other costs; but the defendant in such action may recover the costs incurred in defending the replevin suit.³

XVII. APPEAL. — The usual mode of reviewing the proceedings in an action of replevin is by appeal, and this method may be employed by the aggrieved party freely and liberally as a matter of right, as in other civil actions, in the absence of statutory limitations or special circumstances destroying the right.⁴

1. *McIlvaine v. Holland*, 5 Harr. (Del.) 226; *Lill v. Stookey*, 72 Ill. 495; *Davis v. Hastings*, 8 Cush. (Mass.) 313; *Dahler v. Steele*, 1 Mont. 206; *Brannin v. Bremen*, 2 N. Mex. 40; *Jacobs v. Parker*, 7 Baxt. (Tenn.) 434; *Hill v. Bloomer*, 1 Pin. (Wis.) 463; *Burdett v. Doiy*, 38 Fed. Rep. 491; *Lapp v. Ritter*, 88 Fed. Rep. 108.

Separate Costs for Each Defendant. — Two or more defendants who sever in their pleadings and severally move to dismiss, are upon dismissal entitled to separate costs. *Davis v. Hastings*, 8 Cush. (Mass.) 313.

Abatement of the Action. — A judgment abating the action or an order quashing the writ and dismissing the proceedings is not one of discontinuance or nonsuit, and does not entitle the defendant to a return or damages, but only to costs. *Hill v. Bloomer*, 1 Pin. (Wis.) 463.

Voluntary Dismissal. — Under the Indiana Code of 1881, when a plaintiff in replevin, after obtaining possession of the property, voluntarily dismisses the suit, the only judgment that can be entered is for costs, and a return of the property cannot be directed. *Lapp v. Ritter*, 88 Fed. Rep. 108.

2. *Dodge v. Reed*, 40 Me. 331.

On Appeal from Justice's Court. — In Indiana if on appeal from a judgment rendered by a justice of the peace the judgment for damages is reduced \$500 or more, the defendant will be entitled to recover costs in the Circuit Court. *Polk v. Nickens*, 63 Ind. 439.

Power of Clerk on Appeal in California. — A decision on appeal, in an action

of claim and delivery, directing the trial court to correct its judgment so as to make it in the alternative, is a clear and important modification of the judgment within the meaning of rule 24 of the Supreme Court, and, if the decision contains no direction as to costs of appeal, the clerk may properly enter upon the record and insert in the remittitur a judgment for such costs in favor of the appellant, in compliance with that rule. *Meads v. Lasar*, 93 Cal. 530.

3. *Kellar v. Carr*, 119 Ind. 127. See *Schweer v. Schwabacher*, 17 Ill. App. 78; *Webber v. Mackey*, 31 Ill. App. 369; *Morrill v. Daniel*, 47 Ark. 316.

In Maine in an action on a replevin bond in which the penalty is more than \$20, if the damages assessed be less than that sum the plaintiff will recover full costs, although the action was not commenced before a justice of the peace. *Lewis v. Warren*, 49 Me. 322.

Costs of Writ Retorno Habendo. — The costs of a writ of *retorno habendo* are not the recovered costs in a judgment, but the costs accruing afterwards in enforcing the judgment, and they are recoverable under a breach of condition in a replevin bond to make return of the property if return be awarded. *Langdoc v. Parkinson*, 2 Ill. App. 136.

4. See generally articles APPEALS, vol. 2, p. 1; ERROR, WRIT OF, vol. 7, p. 817; EXCEPTIONS AND OBJECTIONS, vol. 8, p. 153; and in support of the text and for applications of general rules to actions of replevin, see the following cases:

Errors Not Assignable. — In accordance with well-settled rules of appellate practice, where it is sought by appeal or writ of error to have a review of a judgment in replevin the court will not con-

Arkansas. — Hanf *v.* Ford, 37 Ark. 544.

Georgia. — Frick Co. *v.* Horne, 97 Ga. 353.

Illinois. — Kirkpatrick *v.* Cooper, 77 Ill. 565.

Indian Territory. — Eddings *v.* Boner, (Indian Ter. 1897) 38 S. W. Rep. 1110.

Indiana. — Hall *v.* Durham, 113 Ind. 327; Everman *v.* Hyman, 3 Ind. App. 459.

Kansas. — Babb *v.* Aldrich, 45 Kan. 218.

Maine. — Johnson *v.* Richards, 11 Me. 49.

Mississippi. — Porter *v.* Fooshee, 41 Miss. 337; Richardson *v.* Davis, 59 Miss. 15; May *v.* Blum, (Miss. 1897) 21 So. Rep. 528.

Missouri. — Hall *v.* Goodnight, 138 Mo. 576; Munley *v.* King, 40 Mo. App. 531; Clarkson *v.* Jenkins, 48 Mo. App. 221; Jackson *v.* Dummit, 62 Mo. App. 426.

Nebraska. — Otto *v.* Burch, 50 Neb. 894; Bates *v.* Stanley, 51 Neb. 252.

New Mexico. — Strauss *v.* Smith, 8 N. Mex. 391.

New York. — Corn Exch. Bank *v.* Blye, 54 Hun (N. Y.) 312; Devoe *v.* Selig, (N. Y. City Ct. Gen. T.) 25 Misc. (N. Y.) 411.

Ohio. — Reed *v.* Carpenter, 2 Ohio 79; Martin *v.* Armstrong, 12 Ohio St. 548; Gaiser *v.* Heim, 8 Ohio Cir. Ct. 120, 4 Ohio Cir. Dec. 378; White *v.* Coates, 1 Cleve. L. Rep. 43, 4 Ohio Dec. (Reprint) 119; Rollston *v.* Osenbaugh, 2 West. L. Month. 138, 2 Ohio Dec. (Reprint) 242. See Ohio, etc., R. Co. *v.* Bates, 26 Ohio St. 32.

Oklahoma. — Scott *v.* Jones, 7 Okla. 42.

Virginia. — Leftwich *v.* Stovall, 1 Wash. (Va.) 306.

Washington. — Bowman *v.* McGregor, 6 Wash. 118.

The Surety on the Bond cannot appeal from a judgment against his principal in a justice's court, and relitigate his principal's claim to the property; he is bound by the judgment. Crites *v.* Littleton, 23 Iowa 205.

Writ of Error. — It has been held that a writ of error is the proper remedy by which to review the decision of a Circuit Court dismissing a writ of replevin and quashing all proceedings with costs

on a motion. Jewell *v.* Lamoreaux, 30 Mich. 155. See Corn Exch. Bank *v.* Blye, 54 Hun (N. Y.) 312.

Review of Order Vacating Order of Seizure. — A Circuit Court of the United States after seizure of the property vacates the order of seizure; the Supreme Court on a writ of error may reverse the order vacating the order of seizure. U. S. *v.* Bryant, 111 U. S. 499.

Amount in Controversy. — In *Indiana* an appeal may be taken to the Supreme Court in actions originating before mayors and justices of the peace for the recovery of chattels, without reference to the value of the property. Hall *v.* Durham, 113 Ind. 327.

Remedy by Appeal, Not by Injunction. — Although a judgment in replevin for the value of the property where a return cannot be had may be erroneous because defendant had only a special property in the goods taken, and because the amount thereof was not shown, it must be remedied by appeal and not by injunction. Bowman *v.* McGregor, 6 Wash. 118.

Remedy by Motion. — Where the plaintiff obtains judgment for an unauthorized allowance of damages besides the sum fixed by the jury, the proper mode to correct the error is by motion; nor does defendant lose his right to such correction where an appeal is taken on the question of possession without any consideration of the unwarranted damages. Corn Exch. Bank *v.* Blye, 54 Hun (N. Y.) 312.

Appeals from Justices' Courts. — In *Maine* there is no appeal in an action of replevin, originally commenced before a justice of the peace and carried by appeal to the District Court. Seiders *v.* Creamer, 22 Me. 558.

In *Ohio* an appeal may be taken to the Court of Common Pleas of the proper county, from a judgment in replevin of property, rendered by a justice of the peace upon a verdict of a jury under section 111 of the act regulating "the jurisdiction and procedure before justices of the peace," Martin *v.* Armstrong, 12 Ohio St. 548.

Trial de Novo. — It is error for the Circuit Court to dismiss an appeal from the judgment of the justice's

sider objections that were not presented to the trial court, nor will it reverse the judgment for immaterial and harmless errors.¹

XVIII. PLAINTIFF'S BOND — 1. Necessity for, Nature and Sufficiency of Bond. — At Common Law the sheriff was required to take from the plaintiff pledges to prosecute, and afterwards, by the statute of Westminster, pledges not only to prosecute the suit, but also to return the goods in case a return should be adjudged.²

court in an action of replevin under the Act of 1863, for informality in the verdict in assessing the value of several articles sued for in one aggregate sum. It is the duty of the court on such appeal to try the case *de novo* upon its merits. *Porter v. Fooshee*, 41 Miss. 337.

Statutes Governing Justices Inapplicable. — If an appeal is taken to the Circuit Court from the judgment of a justice in an action of replevin, the judgment in the Circuit Court must conform to the rules of practice obtaining in actions of replevin instituted in that court, and need not comply with the statute prescribing the form of the judgment of the justice. *Clarkson v. Jenkins*, 48 Mo. App. 221.

New Replevin Bond. — In replevin before a justice of the peace the plaintiff cannot be required, on appeal by the defendant, to give a new replevin bond, where the defendant has retained possession of the property by giving a delivery bond. *Jackson v. Dummit*, 62 Mo. App. 426.

Dismissal. — Where the justice was without jurisdiction the cause should be dismissed on appeal. *Richardson v. Davis*, 59 Miss. 15.

If an appeal be taken in an action of replevin from a justice of the peace to the Circuit Court by the party who holds the possession of the property sued for, whether he be plaintiff or defendant, the appellant has not the right to dismiss his appeal. *Munley v. King*, 40 Mo. App. 531. See also *Strauss v. Smith*, 8 N. Mex. 391.

Award of Possession. — Where in an action of replevin the Superior Court reverses the judgment of a justice, it is empowered to award the possession of the property to the party entitled thereto. *Peebles v. Morris*, 77 Ga. 536.

1. *Wolf v. Kennedy*, 93 Ga. 219; *Frick Co. v. Horne*, 97 Ga. 353; *Carr v. Huffman*, 47 Kan. 188; *Webber v. Read*, 65 Me. 564; *Johnson v. Richards*, 11 Me. 49; *Keen v. Munger*, 52 Mo. App. 660; *Jackson v. Dummit*, 62 Mo. App. 426; *Hall v. Goodnight*, 138 Mo. 576;

Scott v. Jones, 7 Okla. 42; *Riess v. Delles*, 45 Wis. 662; *Williams v. Hoehle*, 95 Wis. 510.

Errors Cured by Special Findings. — The accuracy of a ruling in replevin upon a point of law will not be examined on exceptions, when the special findings of the jury upon the facts are such as to render the ruling immaterial. *Webber v. Read*, 65 Me. 564.

Ministerial Acts. — Errors in the execution or replevy bond will not be noticed. They are merely ministerial acts, and must be corrected in the same court upon motion; and if the court give an erroneous opinion upon that motion, the party injured may then appeal and have it corrected. *Leftwitch v. Stovall*, 1 Wash. (Va.) 306.

Amendment on Appeal. — It has been held frequently that an amendment may be made even after appeal in a proper case for amendment, and the fact that leave to amend was granted before the justice but the amendment was not made, is immaterial. *Hanf v. Ford*, 37 Ark. 544; *Kirkpatrick v. Cooper*, 77 Ill. 565; *South Missouri Land Co. v. Jeffries*, 40 Mo. App. 360; *Aultman, etc., Co. v. O'Dowd*, (Neb. 1898) 75 N. W. Rep. 756; *Gaiser v. Heim*, 8 Ohio Cir. Ct. 120, 4 Ohio Cfr. Dec. 378. See also *Babb v. Aldrich*, 45 Kan. 218.

Defective Affidavit. — If the affidavit in a justice's court fails to state that the property has not been seized under any process, etc., against the plaintiff, such defect cannot be amended in the Circuit Court. *Madkins v. Trice*, 65 Mo. 656. See *Turner v. Bondalier*, 31 Mo. App. 582.

Where the appeal papers did not show that an amendment of the affidavit was asked for on the argument of a motion to set aside a writ, such amendment will not be permitted on an appeal from the order overruling the motion. *Devoe v. Selig*, (N. Y. City Ct. Gen. T.) 25 Misc. (N. Y.) 411.

2. *Caldwell v. West*, 21 N. J. L. 411. See also *Dorrington v. Edwin*, 3 Mod. 56.

Statutes Requiring Bond. — Under the statutory provisions of the various states, a bond with sufficient sureties is required instead of the pledges required by the common law.¹

Deposit in Lieu of Bond. — The payment of money into court cannot be substituted for a bond with sureties unless it is allowed by statute.²

Condition Precedent. — The bond required by the statute to be given in an action of replevin is, as a rule, a prerequisite to the execution of the writ, and the officer who proceeds without such bonds does so at his peril and without authority and becomes thereby a trespasser.³

1. *Caldwell v. West*, 21 N. J. L. 411.

Replevin Bail. — In *Indiana* it is provided that bail may be entered for the stay of execution in an action of replevin, and the effect of such bail is a confession of judgment, nor need the party becoming bail file an affidavit. *Ensley v. McCorkle*, 74 Ind. 240; *Hardenbrook v. Sherwood*, 72 Ind. 403.

Entry of Bail on Docket of Justice. — An entry of replevin bail on an execution in the hands of the constable is not effective for any purpose, bail being required to be entered on the docket of the justice of the peace. *McCormick v. Cassell*, 16 Ind. 408.

Insufficient Entry. — Writing an undertaking of replevin bail on a separate paper and attaching it to the docket of the justice is not valid as an entry of bail. *Lockwood v. Dills*, 74 Ind. 56.

Need Not Be Attested on Record by Clerk. — The entry of replevin bail need not be attested on the record by the clerk, the entry of bail being presumed to have been made with his consent and approval. *Ensley v. McCorkle*, 74 Ind. 240.

Informalities of Entry Cured. — Mere informalities of the entry of bail are cured by the statute. *Hawes v. Pritchard*, 71 Ind. 166; *Croy v. Busenbark*, 72 Ind. 48.

Attestation. — An undertaking of replevin bail upon the docket of a justice of the peace is not void because not attested by the justice overruling. *Miller v. McAllister*, 59 Ind. 491, *overruling Houghland v. State*, 43 Ind. 537, and *Fentriss v. State*, 44 Ind. 271. See also *Eltzroth v. Voris*, 74 Ind. 459.

Computing Time of Issuing Execution. — In computing the time when an execution may issue after the entry of replevin bail, the day on which bail is entered should be counted. *Tucker v. White*, 19 Ind. 253

Levy on the Bail. — The property of the principal should first be levied on before levying on that of the bail. *Elson v. O'Dowd*, 40 Ind. 300.

2. *Cummings v. Gann*, 52 Pa. St. 484.

3. See the statutory provisions of the various states, and the following cases: *Arkansas*. — *Pirani v. Barden*, 5 Ark. 81; *Pool v. Loomis*, 5 Ark. 110; *Nunn v. Goodlett*, 10 Ark. 89; *State v. Stephens*, 14 Ark. 264; *Wilson v. Williams*, 52 Ark. 360.

Connecticut. — *Fleet v. Lockwood*, 17 Conn. 233; *Singer Mfg. Co. v. Rhodes*, 54 Conn. 48.

Georgia. — *Bush v. Rawlins*, 80 Ga. 583.

Illinois. — *Petrie v. Fisher*, 43 Ill. 442; *People v. Core*, 85 Ill. 248; *Robinson v. People*, 8 Ill. App. 279. See also *People v. Robinson*, 89 Ill. 159.

Iowa. — *McGuffie v. Dervine*, 1 Greene (Iowa) 251.

Kansas. — *Hannum v. Norris*, 21 Kan. 114.

Maine. — *Baldwin v. Whittier*, 16 Me. 33; *Harriman v. Wilkins*, 20 Me. 93; *Garlin v. Strickland*, 27 Me. 443; *Shorey v. Hussey*, 32 Me. 579; *Kimball v. True*, 34 Me. 84; *Greely v. Currier*, 39 Me. 516.

Mississippi. — *Weathersby v. Sleeper*, 42 Miss. 732.

Missouri. — *State v. Boislimiere*, 40 Mo. 566.

New Hampshire. — *State v. Beasom*, 40 N. H. 367.

New York. — *Smith v. McFall*, 18 Wend. (N. Y.) 521; *Wilson v. Williams*, 18 Wend. (N. Y.) 581; *Morris v. Van Voast*, 19 Wend. (N. Y.) 283; *Milliken v. Selye*, 6 Hill (N. Y.) 623.

Pennsylvania. — *Taylor v. Adams Express Co.*, 9 Phila. (Pa.) 272, 30 Leg. Int. (Pa.) 46.

In Some Jurisdictions the bond need not be given before the issuance and execution of the writ, but the officer may proceed to

South Carolina. — *Luther v. Arnold*, 7 Rich. L. (S. Car.) 397.

Vermont. — *Bent v. Bent*, 43 Vt. 42; *Tripp v. Howe*, 45 Vt. 523; *Thurber v. Richmond*, 46 Vt. 395.

Wisconsin. — *Whitney v. Jenkinson*, 3 Wis. 407; *Graves v. Sittig*, 5 Wis. 219; *Morris v. Baker*, 5 Wis. 389; *Williams v. Phelps*, 16 Wis. 80.

In Forma Pauperis. — The action of replevin cannot be prosecuted *in forma pauperis*; but if bond is given for double the value of the property, and the costs accumulate to a larger amount, on a rule for further security the plaintiff may take the pauper's oath. *Horton v. Vowel*, 4 Heisk. (Tenn.) 622.

Order for Arrest of Defendant. — Where the plaintiff has not given the required statutory bond, an order for the arrest of defendant is invalid. *Eddings v. Boner*, (Indian Ter. 1897) 38 S. W. Rep. 1110.

New Bond for Alias Writ. — Where a sheriff's term of office expires after he has taken a replevin bond, but before he has executed the writ, and he returns the writ unexecuted, an alias writ may be executed by his successor in office without any new bond being given. *Petrie v. Fisher*, 43 Ill. 442.

Delay in Filing Not Available to Plaintiff. — The statute requires the sheriff before he executes a writ of replevin to take bond of the plaintiff, but a bond executed after the property is replevied and delivered to the plaintiff is nevertheless valid. It is the duty of the plaintiff to give the bond before the writ is executed; but if he does it afterward, he cannot avail himself of his own wrong to avoid the bond. *Nunn v. Goodlett*, 10 Ark. 89.

Lack of Bond Does Not Avoid Proceedings. — The statute of *Mississippi* clearly contemplates that the officer executing the writ shall take from the plaintiff or defendant a bond for the forthcoming of the property, and shall return the same to court; but the failure to take the bond will not render the proceedings void, but will be ground for a motion to dismiss. *Weathersby v. Sleeper*, 42 Miss. 732.

Replevin Without Sufficient Bond Not a Trespass. — The plaintiff in replevin is not a trespasser in taking the goods replevied, if he offers something satis-

factory to the officer, though in fact insufficient. *Harriman v. Wilkins*, 20 Me. 93.

Recital in Return as to Bond. — It is presumed that an officer who served a writ of replevin took the requisite bond, although his return does not expressly state the fact. *Shorey v. Hussey*, 32 Me. 579; *McGuffie v. Dervine*, 1 Greene (Iowa) 251. See *Smith v. Smith*, 24 Me. 555.

The bond constitutes no part of the record, nor is it made such by the sheriff's return. *Pirani v. Barden*, 5 Ark. 81.

Recital in Writ as to Bond. — It is not essential, however, to the regularity of the process, that the bond required by statute should appear on the face of the writ. *Watson v. Watson*, 9 Conn. 140.

Vermont Statute. — The provisions of the Vermont statutes, relating to the replevin of liquor seized by an officer as intoxicating, does not dispense with the necessity of a replevin bond in such cases. *Thurber v. Richmond*, 46 Vt. 395.

Additional Security for Costs — Connecticut Statute. — Gen. Stat. Conn., p. 484, § 2, requires a bond to be given by the plaintiff in all replevin suits to prosecute the suit to effect and pay any judgment that the defendant may recover in the suit. Gen. Stat., p. 397, § 3, requires bonds for costs in all suits brought by nonresident plaintiffs. It was held that the special bond required in replevin suits necessarily covered the costs that might be recovered by the defendant as a part of the judgment that might be rendered in his favor, and that it was not necessary for a nonresident plaintiff in such suit to give the ordinary bond for costs. *Singer Mfg. Co. v. Rhodes*, 54 Conn. 48. See also *Fleet v. Lockwood*, 17 Conn. 233.

United States Plaintiff. — When the United States sues as plaintiff, no bond is necessary. U. S. Rev. Stat., § 1001; U. S. v. Bryant, 111 U. S. 499.

Failure to Give Bond — Restoration to Defendant. — The bond required by the statute is a necessary prerequisite to the execution of the writ; and if the sheriff takes the property into possession without the bond, he is not bound to deliver it to the plaintiff, but should

execute the writ and seize the property, holding it, however, in his own possession until the proper indemnity bond is given.¹

Circumstances Dispensing with Bond. — Where the plaintiff waives the return of the property into his possession and elects to proceed for damages, the reason for the bond fails and the action may be prosecuted without giving the same.²

Filing Bond. — Ordinarily the bond should be filed before the issuance of the writ, especially where immediate delivery is desired; but where the sheriff has gained possession of the property he should allow a reasonable time both to the plaintiff for the filing of his bond to secure the property, and to the defendant, should the latter desire to furnish a forthcoming or delivery bond.³

restore it to the defendant. *State v. Stephens*, 14 Ark. 264.

1. *Cady v. Eggleston*, 11 Mass. 282; *Wolcott v. Mead*, 12 Met. (Mass.) 516; *Smith v. Whiting*, 97 Mass. 316; *Fletcher v. Lee*, 65 Mich. 557; *McBrien v. Morrison*, 55 Mich. 351; *Laird v. Upton*, 8 N. Mex. 409. See also *Morris v. Baker*, 5 Wis. 389.

Defective Bond. — In *Michigan* the fact that the bond given in an action before a justice is defective is not ground for dismissal of the action, since it may be prosecuted without bond. *South Missouri Land Co. v. Jeffries*, 40 Mo. App. 360.

In *New Mexico* bond is not required before the issuance of the writ, except when the action is against the sheriff, and then the bond is given to the clerk who performs the service, etc., but even in this case the bond is not jurisdictional; and the question whether a bond was given at the time set by statute is not deemed a jurisdictional one. *Laird v. Upton*, 8 N. Mex. 409.

Bond Made Before Appraisal. — In *Michigan*, where the defendant in an action of replevin for beasts distrained for unlawfully running at large, which has been appealed from a justice of the peace, pleads issuably in the Circuit Court, and goes to trial on the merits, after his special appeal, raising jurisdictional questions, has been decided against him, he cannot object to the regularity of the proceedings because the bond on which the property was delivered to plaintiff was given before the appraisal of the property. *Pistorius v. Swarthout*, 67 Mich. 186.

In *Massachusetts* the officer properly commences the service of the writ, before taking a bond from his plaintiff, doing only so much, however, as is

necessary to effect an appraisal of the value, preparatory to taking the bond. *Wolcott v. Mead*, 12 Met. (Mass.) 516. See also *Smith v. Whiting*, 97 Mass. 316.

Reasonable Time to Give Bond. — In *Wisconsin* the officer is authorized to seize the property and hold it a reasonable time for the plaintiff to give the bond required by statute, and if the plaintiff neglect or refuse to give the replevin bond required by statute, the officer should redeliver the property to the person from whose possession it was taken. *Morris v. Baker*, 5 Wis. 389.

Waiver of Bond. — Where an order of arrest is erroneously made before the plaintiff has given the statutory bond, the defendant does not waive such error by answering and giving bail. *Eddings v. Boner*, (Indian Ter. 1897) 38 S. W. Rep. 1110.

2. *Greenwade v. Fisher*, 5 B. Mon. (Ky.) 167; *McBrien v. Morrison*, 55 Mich. 351; *McGuire v. Galligan*, 57 Mich. 39; *Zimmerman v. Downey*, 66 Mo. App. 106, 2 Mo. App. Rep. 1315; *Hamilton v. Clark*, 25 Mo. App. 428; *South Missouri Land Co. v. Jeffries*, 40 Mo. App. 360; *Dillard v. Samuels*, 25 S. Car. 318; *Whitney v. Jenkinson*, 3 Wis. 407; *Graves v. Sittig*, 5 Wis. 219; *Williams v. Phelps*, 16 Wis. 80. See also *Vaiden v. Bell*, 3 Rand. (Va.) 448.

South Carolina Statute. — Under the Code, § 71, providing that the plaintiff shall give bond where he demands immediate possession of the property, a bond is not necessary unless there is a demand for immediate possession. *Dillard v. Samuels*, 25 S. Car. 318.

3. *Hocker v. Stricker*, 1 Dall. (Pa.) 225.

2. Execution, Requisites, and Approval of Bond. — The bond is executed by the sureties attaching their signatures thereto, and is sufficient where it is signed by the sureties alone, it not being deemed generally necessary for the principal to sign or that it should appear that the bond was given in his behalf.¹

Date of Bond. — In an action of replevin before a justice of the peace the bond was indorsed as filed at a date after the writ was issued, and this was held immaterial where the bond was executed at a prior date and where it was further stated in the writ that a bond had been filed before the former was issued. *Hook v. Fenner*, 18 Colo. 283.

Notice of Filing Bond. — Where in an action of replevin a bond to indemnify a constable as nominal defendant is executed by order of the court, no duty devolves upon the plaintiff to give notice of the filing to such defendant, there being no direction to that effect in the order. *Carter v. Stevens*, (Supm. Ct. Gen. T.) 15 N. Y. Supp. 42.

1. *Philippi Christian Church v. Harbaugh*, 64 Ind. 240; *Cooper v. Brown*, 7 Dana (Ky.) 333; *Howe v. Handley*, 28 Me. 241; *Matter of Cahill*, 48 Mich. 616; *Green v. Kindy*, 43 Mich. 279; *South Missouri Land Co. v. Jeffries*, 40 Mo. App. 360; *Hedderick v. Pontet*, 6 Mont. 345; *Wood v. Forrest*, 2 Cranch (C. C.) 303.

Unauthorized Signature of Plaintiff. — If the name of the plaintiff in a replevin suit is put upon a bond by one having no authority for the purpose from the plaintiff, is not such a bond as the statute requires, although signed by two sureties. *Garlin v. Strickland*, 27 Me. 443.

By and to Whom Executed. — In *Alabama* it has been held that the bond authorized by statute can be executed only by the defendant, his agent, attorney, or factor. If it is executed by a stranger, or if it is made payable to the plaintiff instead of to the sheriff, it is void both as a statutory and a common-law obligation. *Cummins v. Gray*, 4 Stew. & P. (Ala.) 397; *Sewall v. Franklin*, 2 Port. (Ala.) 493.

Without Principal's Signature. — A replevin bond containing the principal's name in the body of it, but not signed by him, is nevertheless valid as against the surety, if delivered by the latter with the intention that it shall be effective and binding without the principal's signature. *Matter of Cahill*, 48 Mich. 616.

The right to give a replevy bond, under the statute regulating sequestration, is limited to the parties to the suit. *Haile v. Oliver*, 52 Tex. 443.

Surety's Name in Body of Bond. — If the bond is signed by the surety his name need not appear in the bond, provided it is in the first person plural. *Clarke v. Bell*, 2 Litt. (Ky.) 164; *Affeld v. People*, 12 Ill. App. 502.

Signing Approved Bond. — A surety who signs a bond after it has been approved by the sheriff does so without consideration. *Anderson v. Bellenger*, 87 Ala. 334.

Surety and Principal Signing at Different Times. — In an action on a bond conditioned to prosecute a suit in replevin the evidence was that the bond was executed by the surety before the service of the writ, but not by the principal until after the return of the writ and the entry of the action, and it was holden good against them both. *Cady v. Eggleston*, 11 Mass. 282.

Where neither the Principal nor Sureties Signed the bond, but the sureties signed the justification therein, showing under oath their qualifications above liabilities and exemptions, the bond was held sufficient under the Code N. Car., § 325, which provides that where no exceptions are taken, as there were not in this case, within three days after the service of the affidavit and undertaking, defects will be deemed waived. *Spencer v. Bell*, 109 N. Car. 39.

Amount of Bond. — The sheriff must ascertain the value of the property independent of the affidavit of the plaintiff, and fix the amount of the bond accordingly. *People v. Core*, 85 Ill. 248.

Jurisdictional Defect. — Where the bond is less than double the value of the goods as stated in the complaint, the justice has no jurisdiction. *Dear-dorff v. Ulmer*, 34 Ind. 353.

Bond in Excessive Amount. — The fact that the officer took a bond in a larger sum than necessary is no cause for quashing the writ. *Clap v. Guild*, 8 Mass. 153.

Surplusage. — Where an officer's name

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Name of Defendant. — It is essential to the validity of the bond that the name of the defendant appear therein; and an omission in this respect cannot be supplied by averment or otherwise.¹

Common-law Bond. — A bond may be good as a common-law obligation, even where it fails to comply fully with all statutory formalities, and an action may be maintained thereon for its breach, unless specially prohibited by statute.²

A Bond Substantially Conforming to Statutory Requirements will as a rule be held sufficient, especially where the defects are cured by laches or waiver. A bond will not usually be rendered void by a mere "want of form, substance, recital, or condition." With reference to the principal and sureties the rule of construction is strict in holding them firmly to their contract.³

is improperly inserted in the bond, it will be treated as surplusage if the bond is left sufficient by striking it out. *Eickhoff v. Eikenbary*, 52 Neb. 332.

Recital as to Date of Writ. — The fact that a replevin bond does not correctly state the date of the writ is not ground for dismissing a replevin suit. *Graves v. Shoefelt*, 60 Ill. 462.

1. *Arter v. People*, 54 Ill. 228; *Matthews v. Storms*, 72 Ill. 316; *Titus v. Berry*, 73 Me. 127.

Clerical Error. — In *Green v. Walker*, 37 Me. 25, a replevin bond was held good, though by clerical error the name of the plaintiff had been inserted where that of the defendant should have been.

2. *Mitchell v. Ingram*, 38 Ala. 395; *Russell v. Locke*, 57 Ala. 420; *Nunn v. Goodlett*, 10 Ark. 89; *Persse v. Watrous*, 30 Conn. 139; *Branch v. Branch*, 6 Fla. 314; *Tuck v. Moses*, 54 Me. 115; *Hedderick v. Pontet*, 6 Mont. 345; *Claggett v. Richards*, 45 N. H. 360; *Colorado City Nat. Bank v. Lester*, 73 Tex. 542.

Omission of Condition for Payment of Costs and Damages. — If a replevin bond is a good obligation at common law, the fact that it fails to contain a further condition for the payment of costs and damages occasioned by wrongfully suing out the writ, as required by statute, does not render the bond void. *Hotz v. Bollman Bros. Co.*, 47 Ill. App. 378.

Statutory Bond May Be Insisted Upon. — Though a replevin bond which does not conform to the statute may be good at common law, yet the defendant in replevin is entitled, if he require it in season, to a bond such as is prescribed

by statute. *Clafin v. Thayer*, 13 Gray (Mass.) 459.

3. *Rich v. Lowenthal*, 99 Ala. 487; *Lambden v. Conoway*, 5 Harr. (Del.) 1; *Hotz v. Bollman Bros. Co.*, 47 Ill. App. 378; *Bugle v. Myers*, 59 Ind. 73; *Yeakle v. Winters*, 60 Ind. 554; *Fawcner v. Baden*, 89 Ind. 587; *Philippi Christian Church v. Harbaugh*, 64 Ind. 240; *Lemert v. Shaffer*, 5 Ind. App. 468; *Arthur v. Wallace*, 8 Kan. 267; *Baker v. Harper*, 1 J. J. Marsh. (Ky.) 104; *Greenwade v. Fisher*, 5 B. Mon. (Ky.) 168; *Hicks v. Stull*, 11 B. Mon. (Ky.) 53; *Parrott v. Scott*, 6 Mont. 340; *Gill v. Tolan*, 18 W. N. C. (Pa.) 50.

Affidavit, Writ, and Bond Considered Together. — For the purpose of correcting unessential recitals to identify the bond with the suit, though not to supply essential conditions of the bond, the affidavit, writ, and bond may all be considered together. *Hotz v. Bollman Bros. Co.*, 47 Ill. App. 378.

Omissions. — An undertaking in replevin otherwise conforming to the statute, and omitting only the clause "if the property be delivered to him" is sufficient. *Arthur v. Wallace*, 8 Kan. 267.

Reciting Wrong Date. — A replevin bond is not vitiated by the fact that it recites a wrong date as the beginning of the suit. *Hotz v. Bollman Bros. Co.*, 47 Ill. App. 378.

Variance from Statutory Time. — A bond in replevin of property levied on under an attachment writ, providing that the property be returned within twenty days after judgment in the attachment suit, is not a good statutory bond, under the Code Ala. 1886, § 3341, which requires such return within ten days, nor can such bond be

Terms and Conditions of Bond. — The bond must be conditioned for the prosecution of the action, for the return of the chattel to the defendant if possession thereof is not adjudged to the plaintiff, and for the payment of damages and costs to the defendant if the judgment be in his favor.¹

summarily forfeited. *Cobb v. Thompson*, 87 Ala. 381.

Variance from Statutory Requirement.

— A replevin bond conditioned to appear and prosecute the suit with effect, and to indemnify the sheriff, will be held good, though the statutory condition is to prosecute the suit with effect and satisfy any judgment that shall be given against the plaintiff in replevin. *Lambden v. Conoway*, 5 Harr. (Del.) 1.

More Onerous than Statute Requires.

— Art. 170 of the Rev. Stat. Tex. requires a replevin bond in attachment to be conditioned "that, should the defendant be condemned in the action, he shall satisfy the judgment which may be rendered therein." In an action of replevin where the debt was smaller than the value of the goods attached, and the bond was conditioned "that, if the defendants are condemned in the above-entitled action, they or some other person will return the above described property, or its value," this was held more onerous than the statute requires and hence void as a statutory bond. *Colorado City Nat. Bank v. Lester*, 73 Tex. 542.

Both Recognizors Principals. — Under Gen. Stat. Conn., § 1326, providing that the replevin writ shall not issue until some person known to be of sufficient responsibility has entered into a recognizance with at least one sufficient surety, it was held that a joint and several bond is not insufficient on the ground that plaintiff is described as surety and a third person as principal, since both recognizors are in legal effect principals. *Dorus v. Somers*, 57 Conn. 192.

1. *Connecticut.* — *Persse v. Watrous*, 30 Conn. 139.

Delaware. — *Clark v. Adair*, 3 Harr. (Del.) 113.

Georgia. — *Smith v. Adams*, 79 Ga. 802.

Illinois. — *Langdoc v. Parkinson*, 2 Ill. App. 136; *Humphrey v. Taggart*, 38 Ill. 228.

Maryland. — *Doogan v. Tyson*, 6 Gill & J. (Md.) 453.

Mississippi. — Rev. Code Miss. 1880, § 2617.

New Hampshire. — *Whittemore v. Jones*, 5 N. H. 362; *Chadwick v. Badger*, 9 N. H. 450.

Montana. — *Lomme v. Sweeney*, 1 Mont. 584; *Parrott v. Scott*, 6 Mont. 340.

New Jersey. — *West v. Caldwell*, 23 N. J. L. 736, 21 N. J. L. 411.

New York. — N. Y. Code Civ. Pro., § 1699.

Texas. — *Corley v. Rountree*, (Tex. Civ. App. 1896) 37 S. W. Rep. 475.

United States. — *Sweeney v. Lomme*, 22 Wall. (U. S.) 208.

In Connecticut, where the condition of the bond was to prosecute to effect before A B, justice of the peace, and the justice had not final jurisdiction, it was held that the bond sufficiently complied with the statute which requires a condition to prosecute to effect generally. *Persse v. Watrous*, 30 Conn. 139.

In Delaware, in cases of distress for rent, the condition of the replevin bond is (Dig. 364) to prosecute the suit with effect, and to satisfy the judgment. In other cases the condition is to prosecute the suit with effect and to return the goods if a return be awarded. *Clark v. Adair*, 3 Harr. (Del.) 113.

In Missouri, if the bond is conditioned for the delivery of the property to the sheriff, instead of the plaintiff, it does not conform to the statute, and does not authorize a summary judgment; and if such judgment is rendered, a motion to set it aside, or to quash the execution, should be sustained. *Woolbridge v. Quinn*, 49 Mo. 425.

In Montana, under section 157 of the Civil Code, requiring an undertaking in replevin to be conditioned "for the prosecution of the action without delay and with effect," an undertaking is sufficient which provides "for the prosecution of the action," omitting the words "without delay and with effect." *Parrott v. Scott*, 6 Mont. 340.

In Nebraska, where a bond containing all other statutory requirements omitted the provision "to return the property to the defendant, in case judgment for a return of such property is rendered against him," the bond was

To Whom Payable. — The bond should be made payable to the sheriff, his representatives or assigns.¹

Description of the Property, Court, and Action. — In an action of replevin it is unnecessary for the bond to contain a description of the property in question;² nor will an erroneous description of the court where the action is pending invalidate the bond.³ The bond should, however, contain a description of the action.⁴

not thereby made voidable by the parties signing it. *Hicklin v. Nebraska City Nat. Bank*, 8 Neb. 463.

In New Hampshire the bond does not extend to a judgment for the defendant in replevin, on a review of the action. *Bell v. Bartlett*, 7 N. H. 178.

In New Jersey a replevin bond with a condition "to prosecute the suit, and to return the same goods and chattels if return thereof shall be adjudged," is not void or defective, although the condition directed by the statute be "to prosecute the suit with effect and without delay, and to return the goods and chattels distrained" in case return shall be awarded. *West v. Caldwell*, 23 N. J. L. 736, *affirming* 21 N. J. L. 411.

For Costs Only. — A replevin bond for costs only does not comply with the statute. *Creamer v. Ford*, 1 Heisk. (Tenn.) 307.

Warrant to Confess Judgment. — The sheriff may take a replevin bond containing a warrant to confess judgment, if the same is voluntarily offered. *Clark v. Morss*, 142 Pa. St. 311.

Conditioned to Indemnify Sheriff. — It is no objection to the validity of a replevin bond, that it is conditioned to indemnify the sheriff. *Lambden v. Conoway*, 5 Harr. (Del.) 1; *Whittemore v. Jones*, 5 N. H. 362.

Adding a Covenant. — It is competent, in giving a statutory replevin bond, to add to the condition a covenant of the same tenor, and to bring action upon it in case of a breach. In such an action damages should be recovered instead of the penalty of the bond. *Prentiss v. Spalding*, 2 Dougl. (Mich.) 84.

1. *Alabama*. — *Shute v. McMahon*, 10 Ala. 76; *Adkins v. Allen*, 1 Stew. (Ala.) 130; *Sartin v. Weir*, 3 Stew. & P. (Ala.) 421; *Sewall v. Franklin*, 10 Port. (Ala.) 493; *Nunn v. Goodlett*, 10 Ark. 89.

Kansas. — *Norton v. Lawrence*, 39 Kan. 458.

New Hampshire. — *Sumner v. Steward*, 2 N. H. 39; *Claggett v. Richards*,

45 N. H. 360; *Whittemore v. Jones*, 5 N. H. 362.

Pennsylvania. — *Weaver v. Lawrence*, 1 Dall. (Pa.) 156.

South Carolina. — *Bofil v. Russ*, 3 Strobb. L. (S. Car.) 98.

To Deputy Sheriff. — A bond in replevin taken by the deputy sheriff in his own name is in substantial compliance with the statute. *Wheeler v. Wilkins*, 19 Mich. 78.

To Coroner. — A statute naming the sheriff as the party to whom a replevin bond shall be given means only that it shall be given to the party serving the writ, and a bond given to the coroner may therefore be valid. *Speer v. Skinner*, 35 Ill. 282.

Alabama Statute. — The statute of 1837 authorized the execution of a replevy bond by a stranger, and the bond was properly payable to the plaintiff in attachment. *Kinney v. Mallory*, 3 Ala. 626.

Indemnity of Sheriff. — It is not invalid because it contains a provision for the indemnity of the sheriff; such a provision will be understood to mean that the sheriff shall be indemnified so far as he is entitled by law to an indemnity. *Whittemore v. Jones*, 5 N. H. 363.

2. *Collins v. Mitchell*, 5 Fla. 364; *Branch v. Branch*, 6 Fla. 314. See also *Rich v. Lowenthal*, 99 Ala. 487; *Kellogg v. Boyden*, 126 Ill. 378; *Rouse v. Haas*, 26 N. Y. App. Div. 171; *Martin v. Gilbert*, 119 N. Y. 298.

3. *Fuller v. Wright*, 59 Ind. 333; *Chadwick v. Badger*, 9 N. H. 450.

4. **Sufficient Description of Action.** — The condition of a bond which described the action of replevin as one "to be heard and tried before William M. Richardson, Esq., at Gilford, in our said county of Strafford, on the third Tuesday of August next," was held to describe the action sufficiently, William Richardson being at that time chief justice of the Superior Court of Judicature. *Chadwick v. Badger*, 9 N. H. 450.

Amount of the Bond. — The penalty fixed in the bond should be in a sum double the value of the property to be replevied, in many states the matter being the subject of statutory regulation.¹

Must Be for a Definite Amount. — While a bond which is not for an amount double the value of the property is not necessarily invalid,² yet it has been held that the penalty of the bond must be clearly stated in a definite amount. A statement of the penalty as "double the value of the goods to be replevied" is insufficient and fatal on seasonable objection.³

Number of Sureties. — As a rule the bond should be executed by at least two good and sufficient sureties.⁴ But under the statutes

1. *Kimball v. True*, 34 Me. 84; *Greely v. Currier*, 39 Me. 516; *Douglass v. Gardner*, 63 Me. 462; *Briggs v. Wiswell*, 56 N. H. 319; *Whitney v. Jenkinson*, 3 Wis. 407.

Double True Value. — In *Maine* the penalty must be in an amount double the true value, and therefore cannot be rated according to the valuation given in the writ. *Kimball v. True*, 34 Me. 84.

Value Stated in Affidavit. — When the plaintiff's affidavit states the value of the property, the court has no power to require an additional undertaking on the ground that the value of the property stated in the affidavit is too small. *U. S. Land, etc., Co. v. Bussey*, 53 Hun (N. Y.) 516; *Lawrence v. Featherston*, 10 Smed. & M. (Miss.) 345.

The Plaintiff May File a New Bond, or an additional one, by leave of court, so that the security will be double the actual value of the property replevied. *Briggs v. Wiswell*, 56 N. H. 319.

In *Briggs v. Wiswell*, 56 N. H. 319, the plaintiff alleged in his writ that the value of the property replevied was \$5,000, and filed a bond in the sum of \$8,000, and it was held that he might show that the value did not exceed \$4,000, or that he might file an additional bond for \$2,000, or a new bond for \$10,000. See also *Treman v. Morris*, 9 Ill. App. 237; *Moore v. Lewis*, 76 Mich. 300.

Wisconsin Statute. — In *Whitney v. Jenkinson*, 3 Wis. 407, it was held that under the Act of 1853 the sureties must justify in amounts which together will equal the penalty of the bond "over and above all debts and exemptions," otherwise the officer will not be justified in delivering the property to the plaintiff.

Plea in Abatement. — The objection that the replevin bond is not for double the value of the property replevied must be pleaded in abatement, or it

cannot defeat the action; even though the defendant first learned the fact from evidence elicited at the trial. *Douglass v. Gardner*, 63 Me. 462.

In Replevin for Goods Taken on Attachment the penalty of the bond should be governed by the value of the goods attached, and not merely by the amount of the attaching creditor's claim, and an officer will be liable for taking bond for an insufficient amount. *Plunkett v. Moore*, 4 Harr. (Del.) 379.

Sheriff's Return Conclusive. — The sheriff's return of the taking of a bond in double the value of the property is for the purposes of the suit conclusive upon the parties, and the officer is not bound by the statement of value in the writ. *Cushing, C. J.*, in *Briggs v. Wiswell*, 56 N. H. 319.

Effect of Clerk's Valuation. — Neither a party nor the sureties are bound by the valuation of the clerk in fixing the bond. *Muhling v. Ganeman*, 4 Baxt. (Tenn.) 88.

2. *Trueblood v. Knox*, 73 Ind. 310; *Carver v. Carver*, 77 Ind. 498; *Fawcner v. Baden*, 89 Ind. 587; *Briggs v. Wiswell*, 56 N. H. 319.

3. *Case v. Pettee*, 5 Gray (Mass.) 27; *Clark v. Connecticut River R. Co.*, 6 Gray (Mass.) 363; *Bennett v. Allen*, 30 Vt. 684.

At Common Law a replevin bond in less than "double the value of the goods to be replevied" is good. *Tuck v. Moses*, 54 Me. 115.

Bond Valid until Quashed. — A replevin bond which is erroneous only in amount is valid until quashed. *Hopkins v. Chambers*, 7 T. B. Mon. (Ky.) 257.

4. *Connecticut.* — *Smith v. Trawl*, 1 Root (Conn.) 168.

Indiana. — *Philippi Christian Church v. Harbaugh*, 64 Ind. 240.

and decisions of some jurisdictions a single surety is sufficient.¹

Under Seal. — It has been held that the bond should be a sealed instrument.²

Delivery and Approval of Bond. — The bond must be delivered to the

Maine. — *Garlin v. Strickland*, 27 Me. 443; *Greely v. Currier*, 39 Me. 516.

Massachusetts. — *Claffin v. Thayer*, 13 Gray (Mass.) 459.

Montana. — *Hedderick v. Pontet*, 6 Mont. 345.

New York. — *Whaling v. Shales*, 20 Wend. (N. Y.) 673; *New York Code Civ. Pro.*, § 1699; *Smith v. McFall*, 18 Wend. (N. Y.) 521; *Wilson v. Williams*, 18 Wend. (N. Y.) 581; *Milliken v. Selye*, 6 Hill (N. Y.) 623; *Shaw v. Tobias*, 3 N. Y. 188.

Pennsylvania. — *Saeltzer v. Ginther*, 2 Miles (Pa.) 86.

Rhode Island. — *Whitford v. Goodwin*, 13 R. I. 145; *Smith v. Fisher*, 13 R. I. 624.

See also *Bigelow v. Comegys*, 5 Ohio St. 256.

Massachusetts Statute. — A replevin bond from a person not the plaintiff with one surety is not such a bond "from the plaintiff or from some one in his behalf, with sufficient sureties," as is required by the Massachusetts Rev. Stat., c. 113, § 29, and if objection is made at the return term the action of replevin must be dismissed. *Claffin v. Thayer*, 13 Gray (Mass.) 459. See also *Wolcott v. Mead*, 12 Met. (Mass.) 516; *Cushman v. Churchill*, 7 Mass. 97; *Simonds v. Parker*, 1 Met. (Mass.) 508.

Solvency of Plaintiff Immaterial. — The officer is not justified in replevying the property without a legal bond, by showing that the plaintiff was a man of abundant property, since the solvency of plaintiff does not dispense with the bond. *Wilson v. Williams*, 52 Ark. 360; *Harriman v. Wilkins*, 20 Me. 93.

Security Additional to Plaintiff Indispensable. — Where an action of replevin was brought by a firm, one of whose members executed the bond as surety, it was held insufficient, because the statute requires security additional to the pecuniary responsibility of plaintiffs. *Hopkins v. Green*, 93 Mich. 394.

Objection by Plea in Abatement or Motion. — A replevin bond with only one surety is fatally defective, if objected to by a plea in abatement or by motion seasonably filed. *Greely v. Currier*, 39 Me. 516.

Action on Bond with One Surety. — A replevin bond with a single surety is not absolutely void; it may be enforced by the party for whose benefit it was taken. *Shaw v. Tobias*, 3 N. Y. 188.

Time for Excepting to Sureties. — In *New York* the defendant may except to the sureties offered by the plaintiff within three days after the chattel is replevied and a copy of the affidavit, requisition, and undertaking is served. *New York Code Civ. Pro.*, § 1703; *Pardee v. Buell*, 2 Hill (N. Y.) 357.

Bond Not Amendable. — A bond with only one surety is fatally defective and not amendable. It is collateral to the process, not a part of it. *Whitford v. Goodwin*, 13 R. I. 145.

Reasonable Time to Find Security. — The sheriff ought to allow the defendant a reasonable time to find security before a removal of the goods. *Hocker v. Stricker*, 1 Dall. (Pa.) 225.

1. *Sumner v. Steward*, 2 N. H. 39; *Claggett v. Richards*, 45 N. H. 360; *De Bow v. M'Clary*, 3 McCord. L. (S. Car.) 44.

In *Nebraska* the bond must be executed by one or more sufficient sureties, residents of the county in which the action is pending. *State v. Wait*, 23 Neb. 166.

In *Vermont* one surety in a replevin bond, in addition to the plaintiff or some one in his behalf, is sufficient. *Bent v. Bent*, 43 Vt. 42.

2. *Lovejoy v. Bright*, 8 Blackf. (Ind.) 206.

In *Missouri* a replevin bond in an action before a justice of the peace, which is the form provided by the statute, is good without a seal. *State v. Dunn*, 60 Mo. 64.

Bond Signed and Sealed in Partnership Names. — It is no ground for dismissing an action of replevin, that in the replevin bond taken by the officer serving the writ the sureties are described as partners, and sign and seal the same in their partnership names. *Judson v. Adams*, 8 Cush. (Mass.) 556.

Attestation. — Where the mark of defendant was made in the officer's presence, and the bond approved by the latter, it was held that the former's signature was sufficiently attested. *Hester v. Ballard*, 96 Ala. 410.

officer ¹ and approved by him.²

Justification. — Although in some states the sureties are required to appear and justify their solvency and responsibility over and above debts and exemptions, yet their failure to do so is not jurisdictional and does not affect the validity of the bond, and objections to the omission of this requisite will be regarded as waived unless they are seasonably taken.³

3. Objections to Bond. — Where no bond or an insufficient one has been given the defect is ground for objection, and where such objection is seasonably taken the action will be dismissed unless proper amendment is made.⁴

1. *Hartlep v. Cole*, 120 Ind. 247; *Smith v. Whiting*, 97 Mass. 316; *New York Code Civ. Pro.*, § 1694; *Morris v. Van Voast*, 19 Wend. (N. Y.) 283; *Bofil v. Russ*, 3 Strobb. L. (S. Car.) 98.

Sufficient Delivery. — The delivery of a replevin bond to the officer who serves the writ is a sufficient delivery thereof to the defendant, even if the officer neglects to make due return of it with the writ into court. *Smith v. Whiting*, 97 Mass. 316.

2. Equivalent to Approval. — A sheriff who turns over the property to the plaintiff upon delivery of the bond to him thereby accepts and approves the bond. *Hartlep v. Cole*, 120 Ind. 247.

Approval by Judge. — In *New York* it has been held that the bond in proceedings in district courts must be approved by the justice and not by the marshal. *Grotz v. Hussey*, (C. Pl. Gen. T.) 61 How. Pr. (N. Y.) 448.

3. *Hatch v. Christmas*, 68 Mich. 84; *Wheeler v. Paterson*, 64 Minn. 231.

New York Statute. — Under *Code Civ. Pro.*, § 1706, providing that on the failure of the sureties in an undertaking to justify, where the defendant seeks a return of replevied property, the goods must be delivered to the plaintiff by the officer, it has been held that such bond to obtain a return to defendant does not become operative and creates no liability until the justification and allowance of the sureties. *O'Connell v. Kelly*, 15 Daly (N. Y.) 513.

Affidavit of Justification Unnecessary. — Under section 2925 of the *Code Civ. Pro. N. Y.* providing that the sureties in a replevin bond "must justify before the justice" on the return of the summons in replevin before a justice of the peace, it was held that no affidavit of justification need be filed with the bond, nor did section 812 apply, which provides that affidavits of the justification

of the sureties must accompany the bond executed to them. *Clark v. Hooper*, 69 Hun (N. Y.) 445.

Adjournment of Examination of Sureties. — Sections 580 and 1705 of the *Code Civ. Pro. N. Y.* provide that the examination of sureties for the purpose of justification on replevin bonds may be adjourned, but that such adjournment must always be to the next judicial day unless the parties consent differently. It was held that these sections did not prevent a longer adjournment, where the purpose was not to continue the examination of a surety already begun, but for the purpose of permitting a party to bring forward his sureties, or substitute others at the examination continued. *Troy Carriage Works v. Muxlow*, (N. Y. City Ct. Gen. T.) 37 N. Y. Supp. 1023, (Supm. Ct. App. T.) 16 Misc. (N. Y.) 561.

Approval of Bond Pending Justification. — A "counter bond" given by the defendant is a nullity if it is approved during a stay of proceedings for justification of sureties. *Troy Carriage Works v. Muxlow*, (Supm. Ct. App. T.) 16 Misc. (N. Y.) 561.

Notice of Application to Approve Bond. — The defendant is entitled to notice of an application to approve the sureties in the replevin bond, if it can be given. *Smith v. Kerr*, 2 W. N. C. (Pa.) 222. See also *Troy Carriage Works v. Muxlow*, (Supm. Ct. App. T.) 16 Misc. (N. Y.) 561.

Justification Before Prothonotary. — The justification of a replevin bond before the prothonotary relieves the sheriff from responsibility for the solvency of the surety to the extent of the penalty, but he continues liable for the value of the goods in excess of it. *Com. v. Fife*, 29 Pittsb. Leg. J. 111.

4. *Greely v. Currier*, 39 Me. 516; *Parker v. Hall*, 55 Me. 362; *Clark v.*

4. Amendment. — In a proper case for amendment it is error to refuse to permit a defective replevin bond to be amended.¹

Connecticut River R. Co., 6 Gray (Mass.) 363; Cady v. Eggleston, 11 Mass. 282; Hudelson v. Tobias First Nat. Bank, 51 Neb. 557; Busch v. Moline, etc., Co., 52 Neb. 83; Bennett v. Allen, 30 Vt. 684; Tripp v. Howe, 45 Vt. 523. See also Wilson v. Nichols, 29 Me. 566.

Plea in Abatement. — An objection that a replevin bond is not for double the value of the property replevied must be pleaded in abatement or it cannot defeat the action, even though defendant first learned the fact from evidence elicited at the trial. Johnson v. Richards, 11 Me. 49; Douglass v. Gardner, 63 Me. 462; Wilson v. Nichols, 29 Me. 566. See also Spencer v. Dickerson, 15 Ind. 368; Tripp v. Howe, 45 Vt. 523; White v. Cushing, 30 Me. 267; Pope v. Jackson, 65 Me. 162.

Time of Making Motion to Dismiss. — A motion to dismiss for a defective bond must be filed at the first term, and is waived by pleading to the merits before the motion is filed, but not afterwards. Bacon v. Weston, 11 Cush. (Mass.) 164; Clark v. Connecticut River R. Co., 6 Gray (Mass.) 363; Rich v. Ryder, 105 Mass. 306; Lathrop v. Bowen, 121 Mass. 107. See also Chandler v. Smith, 14 Mass. 313; Simonds v. Parker, 1 Met. (Mass.) 508; Wolcott v. Mead, 12 Met. (Mass.) 516; Claffin v. Thayer, 13 Gray (Mass.) 459.

Form of Motion. — A motion to dismiss an action of replevin for want of a sufficient bond sufficiently states the cause of the motion, by alleging that the officer did not before the service of the writ "take from the said plaintiff, or some one in his behalf, a bond to the defendant with sufficient sureties," etc., enumerating all the requisites of the statute. Claffin v. Thayer, 13 Gray (Mass.) 459.

Exceptions to Sureties. — When the insufficiency of the bond consists of unsatisfactory sureties, the exception to them must be taken by notice served upon the sheriff. New York Code Civ. Pro., § 1703. See Cusick v. Cohen, 3 Den. (N. Y.) 267.

Approval of Bond under Misapprehension. — A justice of the peace issued a writ of replevin before any bond had been filed by the plaintiff, and approved it next day under a misapprehension as to a surety's qualifications. It was held

that section 6857 would not prevent the defendant from excepting to the sureties. Johnson v. Stilson, 42 Mich. 541.

Nebraska Statute. — Code Civ. Pro. Neb., § 180, relative to notice of exceptions, does not apply where the action is in a justice's court. Busch v. Moline, etc., Co., 52 Neb. 83.

Dismissal as to Part of Property. — Where a replevin bond is conditioned for a return of only a part of the property, the suit should be dismissed only as to that part for which no bond is given. Eastman v. Barnes, 58 Vt. 329.

Effect of Filing Good Bond. — A motion to dismiss an action of replevin will be overruled upon the filing by the plaintiff of a sufficient bond. Dowell v. Richardson, 10 Ind. 573.

Effect of Filing Affidavit of Merits. — The filing of an affidavit of merits simultaneously with a motion to dismiss is not a waiver of that motion. Claffin v. Thayer, 13 Gray (Mass.) 459.

Losing Defendant Cannot Object to Insufficient Bond. — Where an action of replevin was decided adversely to the defendant he cannot be heard to complain of an insufficient bond of the plaintiff. Kennedy v. Roberts, 105 Iowa 521.

1. Smith v. Howard, 23 Ark. 203; Bloomingdale v. Chittenden, 75 Mich. 305; Hopkins v. Green, 93 Mich. 394; Bublitz v. Trombley, 113 Mich. 413; Briggs v. Wiswell, 56 N. H. 319; Hawley v. Bates, 19 Wend. (N. Y.) 632; Whaling v. Shales, 20 Wend. (N. Y.) 673; Cutler v. Rathbone, 1 Hill (N. Y.) 204; Newland v. Willets, 1 Barb. (N. Y.) 20; De Reguie v. Lewis, 3 Robt. (N. Y.) 708; Jamieson v. Capron, 95 Pa. St. 15. See also Dale v. Gilbert, 59 Hun (N. Y.) 615, 12 N. Y. Supp. 370, 128 N. Y. 625; Martin v. Gilbert, 119 N. Y. 298; Simpson v. Wilcox, 18 R. I. 40.

Value of Property. — Plaintiff may have leave to amend by stating a less value, or he may have leave to file a new bond. Briggs v. Wiswell, 56 N. H. 319.

Description of Plaintiffs. — In Pennsylvania a property bond in which the plaintiffs are styled executors of A. may be amended, by styling them heirs of A., without discharging the sureties. Jamieson v. Capron, 95 Pa. St. 15.

5. Filing New Bond. — Where a bond is insufficient in an action of replevin, the court may permit the filing of an entirely new bond *nunc pro tunc*, or a supplemental bond to increase the security.¹

6. Summary Judgment on Bond. — In some states a summary judgment may, on the trial of the replevin suit itself, be entered against the sureties on the bond, without giving them notice thereof, unless a forthcoming bond be given to the levying officer.²

7. Action on Bond — a. JURISDICTION. — It has been held that an action on the bond is a mere continuation of the original suit, and must be brought in the same court in which the original suit was brought.³

Bond Not "Process" Within Statute. — In an action of replevin the bond is no part of the process, but only collateral thereto, and hence under Pub. Stat. R. I., c. 210, § 4, authorizing the process to be amended, a defective bond is not amendable. *Simpson v. Wilcox*, 18 R. I. 40.

Excuse for Failure to Amend. — Where replevin is brought by a firm and the bond is given by said firm and one of the partners is made surety, such bond is amendable; but in refusing to consent to amendment and by holding that it cannot be amended, defendant waives no rights, and where no new bond as an amendment is ordered by the court, the proceedings should be quashed. *Hopkins v. Green*, 93 Mich. 394.

1. Arkansas. — *Dixon v. Thatcher*, 8 Ark. 134; *Patterson v. Fowler*, 22 Ark. 396.

Illinois. — *Treman v. Morris*, 9 Ill. App. 237.

Iowa. — See *Kennedy v. Roberts*, 105 Iowa 521.

Kentucky. — *Bloomer v. Craig*, 6 Dana (Ky.) 310.

Massachusetts. — *Clafin v. Thayer*, 13 Gray (Mass.) 459.

Michigan. — *Moore v. Lewis*, 76 Mich. 300. See also *Lynch v. Bruce*, 2 Dougl. (Mich.) 123; *Busch v. Fisher*, 73 Mich. 370.

Missouri. — *South Missouri Land Co. v. Jeffries*, 40 Mo. App. 360.

New Hampshire. — *Briggs v. Wiswell*, 56 N. H. 319.

New York. — *Cobb v. Lackey*, 6 Duer (N. Y.) 649; *Newland v. Willetts*, 1 Barb. (N. Y.) 20; *Whaling v. Shales*, 20 Wend. (N. Y.) 673; *De Reque v. Lewis*, 3 Robt. (N. Y.) 708; *Hafelin v. Silverman*, (N. Y. City Ct. Gen. T.) 32

N. Y. Supp. 918. But see *Bulmer v. Jenkins*, 3 How. Pr. (N. Y.) 11; *U. S. Land, etc., Co. v. Bussey*, 53 Hun (N. Y.) 516; *Hohenstein v. Westminster Candle Co.*, 31 N. Y. App. Div. 11.

North Carolina. — See *Smith v. Whitten*, 117 N. Car. 389.

Pennsylvania. — *Rowand v. Fox*, 7 W. N. C. (Pa.) 438; *Strouse v. McCouch*, 10 W. N. C. (Pa.) 274; *Abeles v. Loag*, 12 W. N. C. (Pa.) 407; *Nittinger v. Alexander*, 17 W. N. C. (Pa.) 284.

New Bond on Appeal. — In *South Missouri Land Co. v. Jeffries*, 40 Mo. App. 360, it was held that after an appeal from a justice's court the invalidity of the bond is no ground for dismissal, since the Circuit Court may require a new one.

Property in Custody of Court. — Where the first bond given in an action of replevin is not sufficient in amount, an additional bond need not be given when the property in question has already been placed in the custody of the court. *Kennedy v. Roberts*, 105 Iowa 521.

Insolvency of Surety. — In *New York* after the bond has been given and the property taken thereunder, it is not within the jurisdiction of the court to demand further undertaking, even where a surety is insolvent. *Hohenstein v. Westminster Candle Co.*, 31 N. Y. App. Div. 11.

2. Philman v. Marshall, 103 Ga. 82; *Boylston Ins. Co. v. Davis*, 74 N. Car. 78. See also *Smith v. Adams*, 79 Ga. 802; *Harker v. Arendell*, 74 N. Car. 85.

3. McDermott v. Doyle, 11 Mo. 443, in which case the court cited *Davis v. Packard*, 6 Wend. (N. Y.) 327.

Bond Given Before Justice. — Suit on a bond given in a case before a justice is

b. FORM OF ACTION. — In some states the action is debt on the bond,¹ or a writ of scire facias may be issued.² But proceedings by scire facias on a replevin bond cannot be used, unless a writ *pro retorno habendo* be issued and returned *elongata*.³

c. PARTIES — Action by Sheriff. — Where there has been a breach of the conditions of a replevin bond for failure to prosecute or otherwise, the sheriff is a proper party plaintiff to bring an action thereon.⁴

properly brought in the Circuit Court. It is not necessary to bring it before the justice before whom the writ was issued, especially where the penalty is beyond the jurisdiction of the justice. *Henoch v. Chaney*, 61 Mo. 129.

New Jersey Statute. — The laws of 1878, p. 162, extended the jurisdiction of District Courts to all civil suits where the amount involved, exclusive of costs is not more than \$200. In an action on a replevin bond for a penal sum of \$200 the District Court of Newark has jurisdiction. *Hood v. Spaeth*, 51 N. J. L. 129.

1. *Arkansas.* — *Nunn v. Goodlett*, 10 Ark. 89.

Illinois. — *Manning v. Pierce*, 3 Ill. 4; *Humphrey v. Taggart*, 38 Ill. 228; *Dixon v. Niccolls*, 39 Ill. 372.

Indiana. — *Thomas v. Wilson*, 6 Blackf. (Ind.) 203.

Missouri. — *Hansard v. Reed*, 29 Mo. 472.

Mississippi. — *Thompson v. Raymon*, 7 How. (Miss.) 186.

South Dakota. — *Knott v. Sherman*, 7 S. Dak. 522.

United States. — *Jenkins v. Porter*, 2 Cranch (C. C.) 116.

Warrant to Confess Judgment. — Where a replevin bond contains a warrant to confess judgment, it may be confessed after verdict in the replevin suit, and before final judgment is rendered thereon. *Clark v. Morss*, 142 Pa. St. 311.

Alleging Prior Issuance of Execution. — *Nebraska Statute.* — Section 196 of the Nebraska Code declares that "no suit shall be instituted on the undertaking given under section 186 [of the code] before an execution issued on a judgment in favor of the defendant in the action shall have been returned, that sufficient property whereon to levy and make the amount of such judgment cannot be found in the county." A petition states no cause of action without these allegations. *Hershiser v. Jordan*, 25 Neb. 275.

2. *Snyder v. Norris*, 6 Blackf. (Ind.)

33; *Thompson v. Raymon*, 7 How. (Miss.) 186. See also *Hansard v. Reed*, 29 Mo. 472.

Alabama Statute. — A scire facias was the proper remedy on the replevin bond, authorized by the statutes of 1818 and 1833, and a discontinuance, as in other suits at common law, could not be entered as to such of the obligors as were not served with process, and judgment rendered against those who were served. *Sartin v. Weir*, 3 Stew. & P. (Ala.) 421.

3. *Snyder v. Norris*, 6 Blackf. (Ind.) 33; *Pemble v. Clifford*, 2 McCord L. (S. Car.) 31. See also *Cowden v. Pease*, 10 Wend. (N. Y.) 333.

4. *Delaware.* — *Ogle v. Smith*, 2 Houst. (Del.) 174.

Illinois. — *Buckmaster v. Beames*, 9 Ill. 443; *Hanchett v. Buckley*, 27 Ill. App. 159; *Tedrick v. Wells*, 59 Ill. App. 657; *Humphrey v. Taggart*, 38 Ill. 228; *Atkins v. Moore*, 82 Ill. 240; *Blatchford v. Boyden*, 122 Ill. 657; *Schott v. Youree*, 142 Ill. 233.

Montana. — *Lomme v. Sweeney*, 1 Mont. 584.

New Jersey. — *Caldwell v. West*, 21 N. J. L. 411.

Pennsylvania. — *Thompson v. Schofield*, 2 Bright. Dig. (Pa.) 2132; *Clark v. Morss*, 28 W. N. C. (Pa.) 301.

For Use of But One of Several Parties in Interest. — Where an action of replevin is brought in the name of the sheriff, the fact that it is brought for the use of but one of several parties in interest is not ground for demurrer; the nominal plaintiff is the only one of whom the court can take notice. *Buckmaster v. Beames*, 9 Ill. 443.

Any Person Injured May Sue in Sheriff's Name. — Where there has been a breach of the bond, any person injured may maintain an action thereon in the name of the sheriff to his own use. *Hanchett v. Buckley*, 27 Ill. App. 159; *Humphrey v. Taggart*, 38 Ill. 228. See *Atkins v. Moore*, 82 Ill. 240, and *Lomme v. Sweeney*, 1 Mont. 584.

Action by Stranger. — An action cannot be brought on the bond by a person who was neither a party to the original action nor an obligee in the bond.¹

Parties Defendant. — A plaintiff in the original action of replevin, who has signed an undertaking for the return of the property, is a proper defendant with the sureties, in an action upon such undertaking after judgment against him.²

d. DECLARATION OR COMPLAINT — In General. — In most of the states the mode of proceeding in actions upon replevin bonds is regulated by statute, and it will be necessary for the pleader to consult the statute of his state in order to ascertain the mode of procedure therein.³

In Sheriff's Individual Name. — A suit brought by a sheriff on a replevin bond given under the fourth section of this Act of 1795 need not be in his name of office; if brought in his individual name it is sufficient. *Caldwell v. West*, 21 N. J. L. 411.

Defect of Parties Waived. — Where a replevin bond is executed to a sheriff and an execution plaintiff jointly, and an action is subsequently brought to the execution plaintiff alone, the defect of plaintiffs will be waived by the failure of defendants to demur thereto. *Foster v. Bringham*, 99 Ind. 505.

Replevin for Property Seized under Execution. — Goods levied on by the sheriff under execution are in the possession of the sheriff, nor have the execution creditors either a right of property or possession therein. Where such goods are taken from the sheriff by replevin, it is unnecessary to make the execution creditors parties defendant in the action, and the proper party to sue on the replevin bond is the sheriff. *Blatchford v. Boyden*, 122 Ill. 657.

1. *Pipher v. Johnson*, 108 Ind. 401. See also *Charleston v. Price*, 1 McCord L. (S. Car.) 299.

Pennsylvania Statute. — It is provided in Act of March 21, 1772, § 11, that the sheriff shall assign to the avowant the bond taken in replevin of a distress for rent, and that such avowant may sue in his own name, but this was held not to apply to replevin suits where the title to the property is in question. In such suits no assignment is necessary, and the action on the bond for breach runs properly in the sheriff's name for the use of the beneficiary. *Clark v. Morss*, 28 W. N. C. (Pa.) 301.

Entry of Judgment in Main Action — Wisconsin Statute. — A surety in replevin is so far a party to the cause

that a statute providing that a judgment may be at once entered against him without notice does not deprive him of a trial and is constitutional. *Pratt v. Donovan*, 10 Wis. 378.

Requisites of Verdict in Original Action. — To enable the plaintiff in an action on a replevin bond to recover, the jury in the original action must fix the value of the property. *Clary v. Roland*, 24 Cal. 148; *GINICA v. Atwood*, 8 Cal. 446.

Joinder of Parties Plaintiff. — Holders of separate judgments, whose executions have been levied on personal property which has been taken from the sheriff by replevin, may unite as plaintiffs in a suit for breach of the replevin bond, and the assignee of one of the judgments, the assignment of which is technically defective, is a real party in interest as plaintiff. *Thomas v. Irwin*, 90 Ind. 557. See also *Kaufman v. Wessel*, 14 Neb. 161.

In a Suit upon a Joint or Several Demand, a party cannot treat the demand as a joint obligation of less than all the debtors. It must be joint as to all or several as to all. And where action was brought on a replevin bond against all the obligors, two of whom were defaulted, and the plaintiff, instead of proceeding to trial as to the others, discontinued as to them and took judgment against those who were defaulted, this action was held erroneous. *Winslow v. Herrick*, 9 Mich. 380.

2. *Buck v. Lewis*, 9 Minn. 314; *Boyd v. Rosenfield*, 69 Tex. 115.

3. Jurisdictional Averments. — The declaration need not allege that the court before whom the action was tried had jurisdiction. *Bates v. Williams*, 43 Ill. 494.

Surplusage. — When in an action on the bond the complaint contains un-

Description of Bond. — The declaration or complaint should, as in other actions on the bonds, describe the bond and set forth all the material conditions therein;¹ but it is unnecessary to aver that the bond was taken pursuant to statute, nor is it necessary to state that it was executed by the sureties, on the behalf of the plaintiff in the action of replevin; nor, if taken by the coroner, need it be averred that the writ was directed to him.²

necessary and harmless allegations, which may be stricken out without injury to the complaint, such allegations will be treated as surplusage. *Bradley v. Reynolds*, 61 Conn. 271.

Allegations as to Injuries. — Where the declaration does not aver and claim specific damages recoverable, what is therein averred as to such injuries may be rejected as surplusage. *Dalby v. Campbell*, 26 Ill. App. 502.

1. *GINICA v. Atwood*, 8 Cal. 446; *Mills v. Gleason*, 21 Cal. 274; *Lewin v. Stein*, 7 Colo. App. 65; *Bowen v. Penny*, 76 Ga. 743; *Smith v. Brown*, 60 Ill. App. 77; *Barton v. Donnelly*, (Supm. Ct. Spec. T.) 6 Misc. (N. Y.) 473.

Description of Bond. — An allegation that "an undertaking was entered into as provided by law, and that said undertaking was lost or mislaid," is sufficient after judgment to show that the undertaking was in writing, and will sustain the judgment. *Dorrington v. Meyer*, 8 Neb. 211.

Filing Copy of the Bond. — Where the statute requires either the original bond or a copy thereof to be filed with the complaint, such complaint should be dismissed on demurrer for failure to file the same. *Burt v. Little*, 12 Ind. App. 567.

Defect of Form Rather than Substance. — When the only description of the bond in the complaint is that it corresponds with the form given by statute, this is rather a defect of form than of substance, and to avail the defendant should be demurred to before the trial. *Mills v. Gleason*, 21 Cal. 274.

Naming Sureties and Principals. — It is not necessary to aver who are the sureties and who are the principals in the bond, nor to file with the declaration copies of the writ of replevin and the return of the officer thereon. *Shappendocia v. Spencer*, 73 Ind. 133.

Immaterial Variance. — Where there is a copy of the bond filed with the declaration in the action, and there is a variance between the recitals in the complaint and those in the bond, the

recitals in the bond will control, and the variance will not avail on demurrer. *Blackburn v. Crowder*, 108 Ind. 238.

Fatal Variance. — Where the declaration in stating the bond payable three months after date, says nothing of interest, and over is given of a bond bearing interest from date, the variance is fatal. *Salter v. Richardson*, 3 T. B. Mon. (Ky.) 204.

Defects Suggested. — Defects in a replevin bond may be suggested in a complaint on such bond, and a recovery had the same as if such defects did not exist. *Fuller v. Wright*, 59 Ind. 333.

2. *Shaw v. Tobias*, 3 N. Y. 188. See also *Slack v. Heath*, (C. Pl. Gen. T.) 1 Abb. Pr. (N. Y.) 331; *Morange v. Mudge*, (Supm. Ct. Spec. T.) 6 Abb. Pr. (N. Y.) 243.

Alleging Delivery of Bond. — The declaration must allege the delivery of the bond to the person for whose benefit it was made. *Parrott v. Scott*, 6 Mont. 340; *Gibbs v. Bull*, 18 Johns. (N. Y.) 435; *Knapp v. Colburn*, 4 Wend. (N. Y.) 616. See also *Hedderick v. Pontet*, 6 Mont. 345.

That Proper Statutory Steps Were Taken. — Where an action was brought on a bond conditioned for the return of a horse replevied, it must be shown in the complaint that the proper statutory steps were taken by the defendant during the litigation, so that he might be entitled to the return of the property. *Barton v. Donnelly*, (Supm. Ct. Spec. T.) 6 Misc. (N. Y.) 473.

Justification, etc. — In an action on an undertaking given by a defendant in a replevin suit, where the complaint omitted to allege that the sureties justified, that the undertaking was allowed by the court, or what the sheriff did with the chattel, the complaint was dismissed, as the presumption was that the sheriff did his legal duty and delivered the chattel to the plaintiff. *O'Connell v. Kelly*, 15 Daly (N. Y.) 513.

Assignment of Breaches. — The breach assigned must be as broad as, but no broader than, the condition of the bond.¹

Each Condition Distinct and Separate. — The several conditions of a replevin bond are distinct and separate, so that an action lies upon the breach of any one of them.²

Alleging Judgment. — While a few cases seem to dispense with the

1. *Colorado Springs Co. v. Hopkins*, 5 Colo. 206; *Manning v. Pierce*, 3 Ill. 4; *Hunter v. Sherman*, 3 Ill. 539; *Peck v. Wilson*, 22 Ill. 205.

Assignment of Breaches. — In *New York* it has been held that replevin bonds are not within the statute requiring an assignment of breaches and assessment of damages; the judgment is for the penalty. *Gould v. Warner*, 3 Wend. (N. Y.) 54.

Alleging Breach in Terms. — It is not necessary formally to assign a breach, as it is sufficient that a breach appears from the facts alleged. *Hunter v. Sherman*, 3 Ill. 539; *Peck v. Wilson*, 22 Ill. 205; *Goelz v. Joerg*, 64 Ill. 114.

Sufficient Assignment of Breach. — A breach of the bond is sufficiently assigned where it is alleged that it was adjudged the plaintiff should take nothing by his writ, that a writ of *retorno habendo* was issued, and that the plaintiff "did not prosecute his suit with effect nor make return of the property." *Manning v. Pierce*, 3 Ill. 4.

In a declaration on a bond given to prosecute with effect a writ of replevin, an averment "that the suit was not prosecuted with effect" is a sufficient averment of a breach. *Gorman v. Lenox*, 15 Pet. (U. S.) 115.

Insufficient Assignment of Breach. — The condition of a bond was to prosecute the suit with effect, or return the goods, or pay the value. The breach assigned was that the plaintiff in replevin had not prosecuted his suit to effect. It was held on demurrer that the breach assigned was insufficient, though the bond was not void. *Dugan v. England*, Harp. L. (S. Car.) 214.

Where the breach averred is a failure to prosecute the action to effect and to return the property as directed, a plea which merely avers that the plaintiff did prosecute the action to effect is bad; it is not as broad as the breach. *Goelz v. Joerg*, 64 Ill. 114.

Allegations and Proof. — The proof of the breach need not be more extensive than the averment. *Peck v. Wilson*, 22 Ill. 205; *Kellogg v. Boyden*, 126 Ill.

378. See also *Chapin v. Matson*, 37 Ill. App. 257.

2. *Colorado.* — *Sopris v. Lilley*, 2 Colo. 496; *Lewin v. Stein*, 7 Colo. App. 65.

Illinois. — *Langdoc v. Parkinson*, 2 Ill. App. 136; *Humphrey v. Taggart*, 38 Ill. 228; *Vinyard v. Barnes*, 124 Ill. 346.

Indiana. — *Brown v. Parker*, 5 Blackf. (Ind.) 291; *Thomas v. Irwin*, 90 Ind. 557; *Tisse v. Katzentine*, 93 Ind. 490.

Maine. — *Pettygrove v. Hoyt*, 11 Me. 66.

Maryland. — *Doogan v. Tyson*, 6 Gill & J. (Md.) 453.

Montana. — *Lomme v. Sweeney*, 1 Mont. 584; *Parrott v. Scott*, 6 Mont. 340.

New York. — *Bown v. Weppner*, 62 Hun (N. Y.) 579.

Ohio. — *Biddinger v. Pratt*, 50 Ohio St. 719.

Pennsylvania. — *Balsley v. Hoffman*, 13 Pa. St. 603.

See also *Perreau v. Bevan*, 5 B. & C. 284, 11 E. C. L. 230.

Where Improper Judgment Has Been Rendered. — A judgment for the value of the property taken in replevin, instead of one for its return which was the proper judgment, does not change the liability of a surety in an action on the replevin bond. *Mason v. Richards*, 12 Iowa 73.

Failure to Return the Property in accordance with the judgment of the court is a breach of the replevin bond. *Schweer v. Schwabacher*, 17 Ill. App. 78.

Discontinuance of Action of Replevin. — If the statutory bond has been given by the plaintiff in an action to recover personal property, and he discontinues, though after the defendant has given the statutory bond and retaken the property, and defendant brings suit to recover damages for a breach of the condition to prosecute, the complaint in such latter action states facts sufficient to constitute a cause of action, where it alleges the above proceedings and damages by reason of the taking

allegation that a judgment was previously rendered in the original action,¹ yet according to the weight of authority such averment is necessary; but it is not necessary to set out the whole record in the replevin suit; it is sufficient to set out the judgment, and the failure of the obligors to comply with its terms.² The material facts to be alleged are the termination of

of the property. *Meigs v. Keach*, 1 Wash. Ter. 305.

Dismissal of Action for Want of Jurisdiction.—Where the condition was that plaintiff should prosecute the action, and the action was dismissed on defendant's motion for lack of jurisdiction in the justice, it was held that an action on the bond would lie. *Bidinger v. Pratt*, 50 Ohio St. 719.

Dismissal for Failure to Prosecute.—Where no judgment for the return of the property was claimed by the defendant, plaintiff may yet be sued on the bond given in an action of replevin, which was dismissed for failure to prosecute. *Little v. Bliss*, 55 Kan. 94.

Several Breaches Are Distinct Counts.—Several breaches of the conditions of penal bonds in a single count of the declaration are separate and distinct counts. *Sopris v. Lilly*, 1 Colo. 266.

1. Judgment for Return of Property.—It has been held unnecessary to aver in the declaration that a judgment for the return of the property has been awarded, since the fact that it was entered is a matter of proof. *M'Farland v. M'Nitt*, 10 Wend. (N. Y.) 329; *Cowden v. Pease*, 10 Wend. (N. Y.) 333; *Smith v. Pries*, 21 Ill. 656.

2. Nunn v. Goodlett, 10 Ark. 89; *Hunter v. Sherman*, 3 Ill. 539; *Parrott v. Scott*, 6 Mont. 340; *Eickhoff v. Eickenbary*, 52 Neb. 332; *Eldred v. Bennett*, 33 Pa. St. 183; *Barr v. McGary*, 131 Pa. St. 401, 25 W. N. C. (Pa.) 310; *Knott v. Sherman*, 7 S. Dak. 522.

Allegations and Proof.—A declaration alleging that it was adjudged that the plaintiff take nothing by his suit, that a return of the goods was awarded, and that judgment was rendered for the defendant for one cent damages and costs, is supported by a record which shows merely a dismissal of the suit for failure to give security for costs, a judgment for costs, and return of the property. *Stevison v. Earnest*, 80 Ill. 513.

Allegation that Judgment Is Yet Unsatisfied.—If the property of a judgment debtor, levied upon to satisfy the judg-

ment, is replevied from the sheriff by third parties, who fail to prosecute the action, then in an action by the judgment creditor on the undertaking in replevin his right to recover rests upon the right to have the replevied property applied to the payment of the judgment in the original action; and when his complaint alleges that an execution had issued on the judgment, but does not allege that the judgment has not been satisfied, it is fatally defective. *Parrott v. Scott*, 6 Mont. 340.

Review of Judgment in Replevin Suit.—In an action on the bond it is improper to review the judgment in the replevin suit, which is final and conclusive for the purposes of this action. *Cantril v. Babcock*, 11 Colo. 143, 11 Colo. 142, 458.

Alleging Finding Value.—The complaint in the action on a replevin bond must allege that the value of the property in question was found by the jury in the original action. *Clary v. Rolland*, 24 Cal. 147; *Wall v. Humphreys*, 4 Dana (Ky.) 209.

California.—In an action against the sureties on an undertaking given in a replevin suit, where there has been a trial and judgment in the replevin suit, the complaint does not state facts sufficient to constitute a cause of action unless it aver that the value of the property was found by the jury, and that an alternative judgment was rendered, as provided in section 200 of the Practice Act. *Clary v. Rolland*, 24 Cal. 147.

Texas.—A judgment against plaintiff and sureties in an action on the replevin bond must contain a distinct and separate valuation of all the articles replevied. *Herder v. Schwab Clothing Co.*, (Tex. Civ. App. 1896) 37 S. W. Rep. 784.

Sufficient Averment of Value.—Where in an action on the replevin bond a "particular reference" in the statement is made to the records of a court of the county in which the action is brought, showing the value of the replevied goods, this is sufficient to bring that record and all that it con-

the action of replevin and judgment for costs in defendant's favor, the order for, though not the issuance of, the writ *de retorno habendo*,¹ and that the property replevied was delivered to the plaintiff in the replevin action.²

Allegation as to Title of Property. — The declaration need not set forth the title of the defendant in the replevin, the making of a previous affidavit, or the avowry or cognizance.³

Demand and Notice. — It is not necessary to allege a demand of the property replevied, or notice to the obligor on the bond.⁴

tains into the statement, and is a sufficient averment of the value of the goods. *Krumbhaar v. Stetler*, 10 Pa. Co. Ct. 12.

Objection After Verdict. — Where the complaint fails in an action on the replevin bond to aver the value of the property replevied, demurrer is the proper method of taking advantage of the defect, and a failure to demur will cure such defect after verdict. *Krumbhaar v. Stetler*, 10 Pa. Co. Ct. 12.

1. *Manning v. Pierce*, 3 Ill. 4; *Hunter v. Sherman*, 3 Ill. 539; *Fisse v. Katzentine*, 93 Ind. 490; *Keyes v. McNulty*, 14 Iowa 484; *Gould v. Warner*, 3 Wend. (N. Y.) 54; *Barr v. McGary*, 131 Pa. St. 401; *Dugan v. England*, Harp. L. (S. Car.) 215.

Alleging Issuance of Writ Retorno Habendo. — It is not necessary to allege that a writ of *retorno habendo* has been issued. *Hunter v. Sherman*, 3 Ill. 539; *Peck v. Wilson*, 22 Ill. 205; *Slack v. Heath*, (C. Pl. Gen. T.) 1 Abb. Pr. (N. Y.) 331; *Knapp v. Colburn*, 4 Wend. (N. Y.) 618; *Collins v. Donahue*, 5 N. Y. Leg. Obs. 227; *Wetherbee v. Colby*, 6 Vt. 647.

Averment as to Ownership of Property. — A complaint in an action on a replevin bond, which alleges that the suit of replevin was commenced against A and B, and that the property replevied was in the possession of both of them and that judgment was rendered in favor of the defendants, shows a cause of action in favor of B, although it avers further that the lumber belonged to A. *Story v. O'Dea*, 23 Ind. 326.

Effect of Claiming Oyer. — The tenor of the bond declared on, if oyer is claimed, is considered as forming part of the declaration, and the defendant may avail himself of any defect apparent upon the face of the bond, or variance between its terms and the allegations in the declaration after oyer, by demurrer. *Matthews v. Storms*, 72 Ill. 316.

Sufficient Averments. — In an action on an undertaking in replevin facts were alleged showing the commencement of the action, the undertaking for the immediate delivery, of the property in controversy, its delivery, and the failure to prosecute the action of replevin or redeliver the property. The complaint then alleged that by reason of the premises aforesaid said undertaking had become forfeited to the plaintiff in the suit on the bond, and an action had accrued to said plaintiff. The court held that the facts so stated were sufficient to constitute a cause of action. *Cooper v. McGrew*, 8 Oregon 327.

Negating Consent to Dismissal. — Where a bond in replevin is conditioned to prosecute the action it need not be averred in an action thereon that the defendant sheriff did not consent to a dismissal of the original action, and that he did not waive his right and claim for a return with damages. *Parrott v. Scott*, 6 Mont. 340.

2. *Nickerson v. Chatterton*, 7 Cal. 568. See *Coburn v. Pearson*, 57 Cal. 306.

Perishable Property. — Where in an action on a bond the allegations of the complaint stated that the property was perishable and consumed by claimant, without a readvertisement of such property, it was held sufficient. *Bowen v. Penny*, 76 Ga. 743.

3. *Gould v. Warner*, 3 Wend. (N. Y.) 54.

4. *Wright v. Quirk*, 105 Mass. 44; *Wetherbee v. Colby*, 6 Vt. 647; *Cushenden v. Harman*, 2 Tyler (Vt.) 431; *Sweeney v. Lomme*, 22 Wall. (U. S.) 208.

Without Demand. — If the defendant has judgment for the costs of suit he may maintain an action of debt on the bond, without making a demand of payment or suing out a writ of execution. *Cook v. Lothrop*, 18 Me. 260; *Robertson v. Davidson*, 14 Minn. 554.

Alleging Delivery of Property. — It is unnecessary to allege or prove that the property was delivered to the party requiring it and for whom the bond was given.¹

Alleging Assignment of Bond. — While the sheriff is the proper party to bring the action of replevin, yet it has been held that an assignment of the bond may be made to the real party in interest, in whose name the suit may be prosecuted.² But it is not necessary for the complaint in the action on the bond to allege an assignment by the officer to the plaintiff.³

e. PLEA OR ANSWER — In General. — In an action on the bond the plea or answer must state a complete defense to the action,⁴

See also *Phillips v. Waterhouse*, 40 Mich. 273.

1. *Nickerson v. Chatterton*, 7 Cal. 568.

Averment that Delivery Could Not Be Had. — In an action against the sureties upon an undertaking, on appeal from judgment in claim and delivery, it is not necessary to the sufficiency of the complaint to allege the issuance and return of the execution unsatisfied; or that notice of the dismissal of the appeal was given; or that demand was made prior to the commencement of the action; or that delivery of the property could not be had; or that any order was made by the appellate court which the appellant failed or refused to obey. *Pieper v. Peers*, 98 Cal. 42.

2. *Shute v. McMahon*, 10 Ala. 76; *Adkins v. Allen*, 1 Stew. (Ala.) 130; *Sartin v. Weir*, 3 Stew. & P. (Ala.) 421; *Cummins v. Gray*, 4 Stew. & P. (Ala.) 397; *Sewall v. Franklin*, 2 Port. (Ala.) 493.

New Jersey Statute. — Where the act simply requires the sheriff "to assign" the bond to the plaintiff it need not be assigned under hand and seal in presence of two witnesses. *Everett v. Bartlett*, 20 N. J. L. 117.

In New York a replevin bond is not assignable, except where the goods replevied were taken from the plaintiff in replevin, by way of distress for rent. *Knapp v. Colburn*, 4 Wend. (N. Y.) 616.

3. *Parrott v. Scott*, 6 Mont. 340; *Hedderick v. Pontet*, 6 Mont. 345.

In Arkansas the defendant in the replevin suit derives his right to sue by the assignment of the sheriff, and it must affirmatively appear from the declaration that the assignment was made before the action was brought; but the date of the assignment need not be averred, nor is it essential to the

validity of the assignment that it should be dated, nor need it be made under the sheriff's seal. *Nunn v. Goodlett*, 10 Ark. 89.

Officer's Control Over Action. — In an action on an undertaking in replevin given to a sheriff in his individual name, but put in suit by the real parties in interest, the sheriff has no authority by a stipulation with the surety on the undertaking to dismiss such an action as to such surety, without the consent of the parties for whose benefit the undertaking was given. A dismissal under such circumstances is not a bar to a subsequent action on the undertaking prosecuted by the real parties in interest. *Norton v. Lawrence*, 39 Kan. 458.

4. *Alabama*. — *Sartin v. Weir*, 3 Stew. & P. (Ala.) 421.

Colorado. — *Lee v. Grimes*, 4 Colo. 185.

Illinois. — *Morehead v. Yeazel*, 10 Ill. App. 263; *Holler v. Coleson*, 23 Ill. App. 324; *King v. Ramsay*, 13 Ill. 619; *Chinn v. McCoy*, 19 Ill. 604; *Humphrey v. Taggart*, 38 Ill. 228.

Indiana. — *Sherry v. Foresman*, 6 Blackf. (Ind.) 56; *O'Neal v. Wade*, 3 Ind. 410; *Sammons v. Newman*, 27 Ind. 508.

Kansas. — *Boyd v. Huffaker*, 39 Kan. 525.

Maine. — *Miller v. Moses*, 56 Me. 128.

Maryland. — *Doogan v. Tyson*, 6 Gill & J. (Md.) 453; *Crabbs v. Koontz*, 69 Md. 59.

Michigan. — *Greenlee v. Lowing*, 35 Mich. 63.

Montana. — *Parrott v. Scott*, 6 Mont. 340.

Nebraska. — *Simons v. Sowards*, 29 Neb. 487.

Pennsylvania. — *Barr v. McGary*, 131 Pa. St. 401.

and must not contain repugnant counts.¹

At Common Law Nil Debet is not a good plea to an action of debt on the bond; but if such plea is put in and the plaintiff joins, the obligor may, it seems, prove any fact tending to reduce his indebtedness.²

Nul Tiel Record. — It would seem that a plea of *nul tiel* record is hardly proper in an action on a replevin bond.³

Return of Property. — In an action on the bond for failure to prosecute and to return the property, a plea of return of property is bad.⁴

That Merits Were Not Tried. — The statutes of some states permit

Rhode Island. — *Wright v. Card*, 16 R. I. 719.

United States. — *Washington Ice Co. v. Webster*, 125 U. S. 426.

Pleas in Mitigation. — Pleas in mitigation of damages only cannot be filed in actions on replevin bonds. *Sammons v. Newman*, 27 Ind. 508.

Insufficient Plea. — Where the declaration avers as a breach of the bond that the maker did not prosecute the suit to effect and without delay, a plea which professes to answer the entire declaration but does not answer that averment is bad, since the averment is material. An averment that the defendant did save the sheriff harmless and did make return of the property will not suffice. *Humphrey v. Taggart*, 38 Ill. 228.

In an action on an undertaking defendant answered that the execution alleged to have been returned unsatisfied was in favor of two defendants when it should have been in favor of one. It was held that the answer constituted no defense and it was not error for the justice to render judgment for the plaintiff on the pleadings. *Simons v. Sowards*, 29 Neb. 487.

Denial of Execution under Oath. — Where the declaration states the legal effect of the bond, it is unnecessary under the *Illinois* statute to prove the execution thereof, unless it has been denied by plea verified by affidavit. *Horner v. Boyden*, 27 Ill. App. 573.

Denial of Validity of Bond. — When it is claimed that a bond taken by a justice of the peace in replevin is void for want of jurisdiction on the part of the justice, such fact must be specially pleaded and affirmatively shown. *Tyler v. Bowlus*, 54 Ind. 333.

Denial of Final Judgment. — A plea in an action on a bond that there was no final judgment of return is not good

without an averment that the plaintiff prosecuted the suit to judgment. *Lindsay v. Blood*, 2 Mass. 518; *Sevey v. Blacklin*, 2 Mass. 541.

Immaterial Pleas. — The plea should of course never contain as defenses the allegation of matters immaterial and useless. *Ott v. Specht*, 8 Houst. (Del.) 61.

Rights of Sureties. — Where an unavailable defense is not urged by the principal's counsel in an action on the bond, this works no wrong to the sureties, nor is harm done by admitting the truth as to the genuineness of notes and the consideration that passed. *Jones v. Findley*, 84 Ga. 52.

1. *Wright v. Card*, 16 R. I. 719.

Non Est Factum and Payment. — Under the plea of payment and *non est factum*, to debt on a bond given by a defendant in replevin, on claim of property, the defendant cannot object that the bond is void in part. *Chaffee v. Sangston*, 10 Watts (Pa.) 265.

2. *Miller v. Moses*, 56 Me. 128.

3. *Fellheimer v. Hainline*, 65 Ill. App. 384; *Barbour v. Perry*, 41 Ill. App. 613.

Illinois. — Where several breaches are assigned in the declaration on a replevin bond, a plea of *nul tiel* record which attempts to answer the whole declaration, but which in fact answers only a part of it, is demurrable. *Larson v. Laird*, 36 Ill. App. 402.

Indiana. — Where the plaintiff in replevin has obtained possession of the property under his writ, neither his sureties nor himself can be permitted to allege as a defense to an action on the replevin bond, that no writ of summons had been issued, and consequently no suit was pending at the time the bond was given. *Sammons v. Newman*, 27 Ind. 508.

4. *Sopris v. Lilly*, 1 Colo. 266.

the defendant in an action on a replevin bond to plead that in the original action the merits were not tried.¹

General Performance. — Where a plea of general performance in an action on the bond is filed, a demurrer is the only proper remedy to test its correctness and efficiency.²

Negating Exceptions. — A plea in an action on the bond should negative exceptions, but a defect in this particular is cured by the reply.³

f. REPLICATION. — Where the plea of general performance is correctly pleaded, it is necessary for the plaintiff to show his cause of action in his replication, and to state the breaches of the condition of the bond upon which he expected to reply.⁴

g. JUDGMENT. — In an action on the bond judgment can be rendered against the sureties only in the manner prescribed by statute, where there is a provision on the point, nor can such judgment be greater than the value of the property fixed in the judgment in the original action, together with the damages awarded and costs therein incurred.⁵

1. *Lee v. Grimes*, 4 Colo. 185; *Chinn v. McCoy*, 19 Ill. 604; *Clark v. Hanchett*, 40 Ill. App. 212.

Requisites of Plea. — In *Illinois* where the defendant wishes to show under the statute that the merits of the case were not determined in the original action, he must show in his plea enough of the proceedings of that action to enable the court to decide that question on demurrer. *King v. Ramsay*, 13 Ill. 619.

Pleading Property in Defense. — Where the merits in replevin were not tried, the defendant in an action on the bond, though he may plead property either general or qualified in himself in mitigation of damages, cannot plead property in a third person. *Holler v. Coleson*, 23 Ill. App. 324. See *McDermott v. Isbell*, 4 Cal. 113.

Where Plaintiff Alleges Failure to Prosecute. — Where a declaration on the bond alleges as breaches thereof a failure to prosecute the suit, a failure to make return of the goods, and a failure to pay the costs adjudged, a plea in bar to the action which alleges only that the merits of the case were not tried and that the defendant was owner, etc., is bad, and it does not answer the averments of breaches of failure to prosecute and failure to pay costs. *Morehead v. Yeazel*, 10 Ill. App. 263.

Judgment by Consent. — Where a judgment by consent was entered in the original action, it was held that

this fact could not be pleaded in defense in an action on the bond. *Estep v. Harmon*, 40 Mich. 645.

Affidavit of Merits. — An affidavit of merits is necessary in support of a plea to an action on the bond; such a bond is not a contract within the meaning of the statute. *Peck v. Wilson*, 22 Ill. 205. See *Barr v. McGary*, 131 Pa. St. 401.

2. *Doogan v. Tyson*, 6 Gill & J. (Md.) 453.

Averment of Avowry on Writ de Retorno. — In an action on the bond an averment of avowry on a writ *de retorno habendo* is not required. *Ormsbee v. Davis*, 16 Conn. 578.

3. *Clark v. Howell*, 3 Colo. 564.

4. *Doogan v. Tyson*, 6 Gill & J. (Md.) 453.

Defective Reply. — The defendant pleaded in an action on the bond that the merits had not been determined in the original action. The reply of plaintiff set up judgment for defendant in a former replevin suit. In his rejoinder the defendant pleaded no trial of the merits in the latter suit. It was held that the reply was defective in not alleging that the ownership had not changed between the suits, but the defendant might still make his defense of failure of title in plaintiff, although the demurrer to his rejoinder was sustained. *Clark v. Hanchett*, 40 Ill. App. 212.

5. *California.* — *Nickerson v. Chaterton*, 7 Cal. 568; *GINICA v. Atwood*, 8

8. Procedure Against Officer Where Bond Is Insufficient. — Where a bond given in an action of replevin is insufficient, either an action of trespass lies against the officer in favor of the defendant,¹

Cal. 446; *Hunt v. Robinson*, 11 Cal. 262.

Illinois. — *Treman v. Morris*, 9 Ill. App. 237.

Indiana. — *McFadden v. Fritz*, 110 Ind. 1; *Ringgenberg v. Hartman*, 102 Ind. 537.

Iowa. — *Hershler v. Reynolds*, 22 Iowa 152.

Maine. — *Smallwood v. Norton*, 20 Me. 83; *Tuck v. Moses*, 58 Me. 461.

Massachusetts. — *Stevens v. Tuite*, 104 Mass. 328; *Wright v. Quirk*, 105 Mass. 44.

Michigan. — *Williams v. Vail*, 9 Mich. 162; *Fraser v. Little*, 13 Mich. 195; *Ryan v. Akeley*, 42 Mich. 516; *Jacobson v. Metzgar*, 43 Mich. 403; *Pearl v. Garlock*, 61 Mich. 419.

Mississippi. — *Young v. Pickens*, 45 Miss. 553.

Missouri. — *Baldwin v. Dillon*, 30 Mo. 429.

New Jersey. — *Caldwell v. West*, 21 N. J. L. 411.

Oregon. — *Carlson v. Dixon*, 14 Ore. 293.

Pennsylvania. — *Pittsburgh Nat. Bank v. Hall*, 107 Pa. St. 583.

Tennessee. — *Wells v. Griffin*, 2 Head (Tenn.) 568.

Texas. — *Bradford v. Taylor*, 74 Tex. 175; *Elliott v. Long*, 77 Tex. 467; *Watts v. Overstreet*, 78 Tex. 571.

Vermont. — *Safford v. Gallup*, 53 Vt. 291.

United States. — *Sweeney v. Lomme*, 22 Wall. (U. S.) 208.

In *Tennessee* the proper decree in an action upon a replevin bond is for the penalty of the bond, which may be satisfied by paying the value of the property with interest from the date of the bond. *Muhling v. Ganeman*, 4 Baxt. (Tenn.) 88.

Judgment in Excess of Penalty. — In an action against the sureties on a replevin bond no judgment can be recovered for an amount exceeding the penalty and costs of suit; and an allowance of interest beyond the penalty, from the time of the breach of condition, is erroneous. *Fraser v. Little*, 13 Mich. 195.

Penalty Less than Actual Value. — Where the jury find the value of the property in a larger amount than the penalty fixed in the bond, this fact will

not prevent its enforcement by summary execution against the sureties, provided the enforcement is limited to the penalty. *Rich v. Lowenthal*, 99 Ala. 487.

Confession of Judgment. — A judgment on a replevin bond with warrant to confess judgment may be confessed after verdict in the replevin suit, and before final judgment is entered therein. *Clark v. Morss*, 28 W. N. C. (Pa.) 301.

Enforcing the Judgment. — If there has been no breach of the condition of a bond, a confession of judgment thereon cannot be enforced. *Lewis v. Bonnett*, 12 Pa. Co. Ct. 366.

Setting Aside Judgment. — In *Georgia* it has been held that even after the judgment has been entered the surety may raise the question of the genuineness of the bond on a motion to set aside the judgment. *Taylor v. Dobson*, 89 Ga. 361.

Motion to Set Aside Denied. — Where the result has been reached which was designed and intended by the surety in executing a replevin bond, the judgment thereon will not be set aside for irregularity in treating the bond as accepted, and returning the papers into court before the case was docketed. *Jones v. Findley*, 84 Ga. 52.

Action on Bond Pending Appeal. — Where the defendant in replevin was successful, and thereupon brought suit upon the bond and obtained judgment, and in the meantime the plaintiff had, taken the replevin case to the Supreme Court and reversed it, it was held proper for the trial court to vacate the judgment on the bond. *McMillan v. Baker*, 20 Kan. 50. See also *Higbee v. McMillan*, 18 Kan. 133; *Jones v. Findley*, 84 Ga. 52.

1. *Parker v. Hall*, 55 Me. 362; *O'Grady v. Keyes*, 1 Allen (Mass.) 284; *Gibbs v. Bull*, 18 Johns. (N. Y.) 435; *Whitney v. Jenkinson*, 3 Wis. 407.

The Omission to Take Advantage of Defects in a bond, at the proper time, does not affect the defendant's right of action against the officer. *O'Grady v. Keyes*, 1 Allen (Mass.) 284.

Actions Against Officer and on Indemnifying Bond. — A judgment for damages against an officer in a replevin

or an action of debt on the official bond.¹

XIX. REDELIVERY BOND. — In some states the defendant is allowed to retain the property upon giving bond to have it forthcoming at the time and place of trial.² For the purpose of allow-

suit is no bar to an action on the indemnifying bond. *McAllister v. Clifton*, 60 Miss. 207.

1. *Robinson v. People*, 8 Ill. App. 279; *People v. Core*, 85 Ill. 248; *Wilkins v. Dingley*, 29 Me. 73; *Kimball v. True*, 34 Me. 84; *Murdoch v. Will*, 1 Dall. (Pa.) 341.

Necessary Allegations. — In an action against a sheriff, under section 4 of the replevin act of *New York*, for taking insufficient security, it is necessary to aver the issuing of a writ *de retorno habendo*, and a return of *elongata*. *Knapp v. Colburn*, 4 Wend. (N. Y.) 618.

2. *Alabama*. — *Cobb v. Thompson*, 87 Ala. 381.

Arkansas. — *Jetton v. Smead*, 29 Ark. 372. See *Harris v. Harrison*, 40 Ark. 50.

California. — *Coburn v. Smart*, 53 Cal. 742.

Colorado. — *Benesch v. Waggner*, 12 Colo. 534; *Benesch v. Mitchelson*, 12 Colo. 539.

Georgia. — *Bush v. Rawlins*, 80 Ga. 583.

Iowa. — In this state the defendant retains the property upon giving a receipt. *Davis v. Bayliss*, 51 Iowa 435.

Kansas. — *Kennedy v. Brown*, 21 Kan. 171; *Boyd v. Huffaker*, 39 Kan. 525.

Minnesota. — *Vanderburgh v. Bassett*, 4 Minn. 242.

New York. — *Hunt v. Mootry*, (Supm. Ct. Gen. T.) 10 How. Pr. (N. Y.) 478; *M'Cann v. Thompson*, (Supm. Ct. Spec. T.) 13 How. Pr. (N. Y.) 380; *Grant v. Booth*, (Supm. Ct. Spec. T.) 21 How. Pr. (N. Y.) 354; *Graham v. Wells*, (Supm. Ct.) 18 How. Pr. (N. Y.) 376; *Diossy v. Morgan*, 74 N. Y. 11; *Klinkowstein v. Greenberg*, (N. Y. City Ct. Gen. T.) 15 Misc. (N. Y.) 479.

Nevada. — *McBeth v. Van Sickle*, 6 Nev. 134.

Pennsylvania. — *Bradford v. Frederick*, 101 Pa. St. 445.

Tennessee. — *Harris v. Taylor*, 3 Sneed (Tenn.) 536, 67 Am. Dec. 576.

And see generally article FORTHCOMING AND DELIVERY BONDS, vol. 9, p. 647.

Noncompliance with Statute. — The defendant's bond for the property in

replevin, if not in accordance with the statute, does not warrant a judgment against the sureties, but shows, in the absence of contrary proof, that the defendant retains the property, and justifies a judgment against him therefor. *Fenn v. Harrington*, 54 Miss. 733.

Waiver of Right to Give Bond. — The defendant in replevin can waive his right to execute a forthcoming bond, and such waiver is presumed in the absence of anything to the contrary. *Hartlep v. Cole*, 120 Ind. 247.

In Whose Name Made. — It is no objection to such an undertaking that it is made to the plaintiff instead of the sheriff. *Slack v. Heath*, 4 E. D. Smith (N. Y.) 95.

Notice and Demanding Return of Property. — In *New York* the defendant cannot be permitted to give a counter bond without service upon the sheriff of a written notice that he requires a return of the property, and filing an affidavit that he, as the owner, is lawfully entitled to the possession thereof. *Teschner v. Deveron*, (Marine Ct. Spec. T.) 59 How. Pr. (N. Y.) 467.

Justification of Sureties. — In *New York* if the defendant gives an undertaking to reclaim the property, with an affidavit by the sureties annexed, and on notice the sureties duly justify in the aggregate amount of twice the sum stated as the value of the property, the sheriff is bound to deliver the property to defendant. The fact that a smaller amount was specified in the affidavit accompanying the undertaking when delivered to the sheriff is immaterial. Such affidavit is not required by law, and is unnecessary to the validity of the undertaking. *Grant v. Booth*, (Supm. Ct. Spec. T.) 21 How. Pr. (N. Y.) 354.

Bond for Goods Found and Taken. — Where the plaintiff's affidavit to replevy chattels states only the aggregate value thereof, and a part only is taken, the defendant, to retain the same, is not required to give an undertaking conditioned for the delivery of all the chattels sued for. If all the chattels have been taken, the undertaking should of course so recite; and if a part only has been taken, the recitals

ing defendant an opportunity to make such bond the sheriff should hold the property for a reasonable time before surrendering it to the plaintiff, and this reasonable time has been fixed at three days by the statutes of some states.¹

should be so modified as to conform to the fact, and the undertaking should be for the return of the articles actually replevied. *Weber v. Manne*, (Supm. Ct. Spec. T.) 11 Civ. Pro. (N. Y.) 64.

Order for Inspection of Property. — An order permitting a party to inspect goods taken from the officer under a redelivery bond will not be made, where such goods have been for a long while in the officer's possession, accessible and free for inspection. *Downey v. MacAleenan*, (N. Y. City Ct. Gen. T.) 16 N. Y. Supp. 916.

Plaintiff Cannot Retake. — Personal property which has been redelivered by the sheriff to the defendant in replevin cannot be retaken by the plaintiff. *Hunt v. Mootry*, (Supm. Ct. Gen. T.) 10 How. Pr. (N. Y.) 478.

The Failure of the Defendant to File the Bond given by him for the redelivery of the property, although it is required by statute to be filed, does not affect the plaintiff's right to sue thereon. *Hedderick v. Pontet*, 6 Mont. 345.

1. *Vanderburgh v. Bassett*, 4 Minn. 242.

In New York the sheriff or other officer is required to retain the property in his possession during the three days allowed the defendant within which to elect to retain the property by giving bond. *Graham v. Wells*, (Supm. Ct.) 18 How. Pr. (N. Y.) 376.

Justification of Sureties. — The bond is not operative, and no liability is incurred thereon until the justification of the sureties. *O'Connell v. Kelly*, 15 Daly (N. Y.) 513.

Time of Justifying. — The time within which the defendant's sureties may justify is not limited. *Graham v. Wells*, (Supm. Ct.) 18 How. Pr. (N. Y.) 376.

Redelivery Bond. — The judicial writ *de proprietate probanda* is unknown in *Pennsylvania* practice; in its place, if the defendant claim property in the goods, he gives bond to the sheriff for their redelivery, if the issue should be found against him. *Weaver v. Lawrence*, 1 Dall. (Pa.) 156.

REPLICATIONS AND REPLIES.

BY HENRY STEPHEN.

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CROSS-REFERENCES.

As to *Replications and Replies in Particular Actions*, see the concrete titles in this work in which the pleadings in such actions are treated, and the General Index.

I. SCOPE OF ARTICLE. — The purpose of this article is to state the general rules of pleading governing the necessity for replications and replies, the methods of framing them, and objections

thereto. Rules relating to replications and replies in particular forms of actions are not stated herein further than is necessary to exemplify general rules.

II. DEFINITIONS — 1. **Replications** — *a.* **IN ACTIONS AT LAW.** — The replication in an action at law is the plaintiff's reply to the allegations of the plea.¹

b. **IN SUITS IN EQUITY.** — A replication in equity is a formal pleading averring the truth of the allegations of the bill and denying the truth of those of the answer.²

2. **Replies.** — A reply is, under the codes, the pleading which is the substitute for and which is equivalent to the replication at law or in equity.³

III. REPLICATIONS AT LAW — 1. **Necessity and Uses of Replications** — *a.* **IN GENERAL.** — Where there is a plea in bar by way of traverse, and therefore concluding to the country, the plaintiff has no option but to join issue by adding a similiter;⁴ but where a plea responsive to a declaration sets up new matter in avoidance,⁵ and, in short, whenever the plea appears to be sufficient in

1. **Under the Alabama Code** a general replication is a joinder in issue on the plea, and a special replication is a brief statement in plain language of the facts relied on as an answer to the plea. *Lee v. De Bardeleben Coal, etc., Co.*, 102 Ala. 630.

In Replevin the answer to the avowry or recognizance of the defendant is termed a plea, and the answer to such plea is termed a replication, though the pleadings respectively stand, with respect to the proper order of pleading, in the position of replications and rejoinders. *McCarty v. Hudson*, 24 Wend. (N. Y.) 291; *Judd v. Fox*, 9 Cow. (N. Y.) 259.

2. *Jameson v. Conway*, 10 Ill. 227.

If the Defendant Has Put in a Plea the replication is the reply of the complainant to its allegations.

3. **Under the Judicature Acts** the reply is the answer of the plaintiff to the defendant's statement of defense. 3 Steph. Com. 526.

4. *Co. Litt.* 126*a*; *And. Steph. Pl.* 150.

As to Similiters see article SIMILITERS.

Replication Unnecessary. — To a plea not stating facts necessarily precluding a recovery by the plaintiff it is not necessary to reply. *U. S. v. Atwill*, 24 Fed. Cas. No. 14,475.

Matter Arising After Joining Issue — *Michigan.* — Where it was provided by rule of court that the defendant may, when new matter arises after issue joined on which he relies as a defense,

give notice thereof as a special defense under a plea of the general issue, and that a replication is unnecessary, it was held that a plea *puis darrein* should stand as a notice and that replication was not necessary. *Burt v. Wayne Circuit Judges*, 90 Mich. 520.

5. *McKinnon v. McCollum*, 6 Fla. 376; *Benbow v. Marquis*, 17 Fla. 441; *Livingston v. L'Engle*, 22 Fla. 427; *Livingston v. Anderson*, 30 Fla. 117; *Herman v. Williams*, 36 Fla. 136; *Dean v. McKinstry*, 2 Smed. & M. (Miss.) 213; *Bozman v. Brown*, 6 How. (Miss.) 349; *Hogue v. Lewellen*, 42 Miss. 302; *Maxwell v. Beltzhofer*, 9 Pa. St. 139; *Wellsburg First Nat. Bank v. Kimberland*, 16 W. Va. 555; *Foxcroft v. Mallett*, 4 How. (U. S.) 353.

Plea of Former Conviction. — Where to an indictment for misdemeanor there was a plea of former conviction before a court of inferior jurisdiction, and the state intended to rely on the fact that the former trial and conviction were fraudulent, it was held that there should have been a replication to that effect. *State v. Clenny*, 1 Head (Tenn.) 270.

Discharge in Bankruptcy. — After verdict in assumpsit the defendant obtained a discharge in bankruptcy, which he pleaded in bar of judgment. The plaintiff moved for judgment *non obstante veredicto*. It was held that his proper course, if he wished to avail himself of fraud of the defendant in contracting the debt which was the

law, a replication must be made.¹

b. SPECIAL KINDS—(1) *Common Traverse*.—Where the allegations of the plea are expressed either affirmatively or negatively, and the pleader simply wishes to traverse the terms of its allegations, a common traverse is proper.²

(2) *Special Traverse*.—Where the pleader desires to explain or qualify a denial instead of putting it in a direct and absolute

cause of action, was to reply setting up that fact. *Kellogg v. Kimball*, 135 Mass. 125.

A Plea of the Statute of Limitations requires a replication in order to avoid the effect of the plea. *Withers v. Richardson*, 5 T. B. Mon. (Ky.) 94; *Bogle v. Conway*, 3 Call (Va.) 1; *Walker v. Mississippi Bank*, 7 Ark. 503; *Baltimore, etc., R. Co. v. Faulkner*, 4 W. Va. 180; *State v. Douglass*, 20 W. Va. 770; *Ruffner v. Hill*, 21 W. Va. 155; *Curry v. Mannington*, 23 W. Va. 14. See also article LIMITATIONS, vol. 13, p. 238.

To a Plea of Nul Tiel Record there should be a replication. *Bone v. McGinley*, 7 How. (Miss.) 671.

1. *Miles v. Rose, Hempst. (U. S.)* 37; *Fesmire v. Brock*, 25 Ark. 20; *Hollis v. Moore*, 25 Ark. 105; *Cole v. Wagnon*, 2 Ark. 154; *Stone v. Robinson*, 9 Ark. 469; *Taylor v. Coolidge*, 17 Ark. 456; *Williams v. Perkins*, 21 Ark. 19; *Reagan v. Irvin*, 25 Ark. 86; *M'Guffin v. Helm*, 5 Litt. (Ky.) 47; *Rushing v. Key*, 4 Smed. & M. (Miss.) 191. See also *And. Steph. Pl.* 151.

Dismissal of Count in Declaration.—The necessity of replication to a plea to one count of a declaration is obviated by the dismissal of the count. *Shreffler v. Nadelhoffer*, 133 Ill. 536.

Materiality of Plea.—In an action to recover damages for personal injuries it appeared from the declaration that the cause of action as alleged therein arose more than two years prior to the commencement of the action, to which there was a plea that the limitation of the plaintiff's action was one year. It was held that this plea was material and required a replication of a special character, for "it would be extending presumptions too far for this court not only to presume that the plaintiff would have replied to said plea, but also that she would have put in a special rather than a general replication." *Curry v. Mannington*, 23 W. Va. 14.

Where a Plea Concludes with a Verification there can be no joinder of issue

without a replication. *Lockridge v. Carlisle*, 6 Rand. (Va.) 20; *Henry v. Ohio River R. Co.*, 40 W. Va. 234.

Plea in Abatement Filed Improperly.—Where, contrary to the proper order of pleading, a plea of the general issue and one in abatement are filed together, it is unnecessary to reply to the latter plea. *Dean v. McKinstry*, 2 Smed. & M. (Miss.) 213.

Voluntary Replication.—Under Act Mass. 1852, c. 312, § 19, authorizing a plaintiff to file a replication to new matter at any time before trial, it is held that where a first trial has proved ineffectual by reason of a disagreement of the jury, he may file a replication at any time before another trial. *Burke v. Miller*, 4 Gray (Mass.) 114.

Special Plea.—In *Tennessee* it has been held that where the defendant has pleaded specially there must be a replication, but that where notice has been given by the defendant of matters of defense on which he intends specially to rely, the plaintiff need not reply. *West v. Tylor*, 2 Coldw. (Tenn.) 96.

Replication Unnecessary.—Under the *Massachusetts* statutes obviating the necessity of replications unless ordered by the court, new matter alleged in the plea is deemed to be denied. *Stevens v. Parker*, 7 Allen (Mass.) 361.

Massachusetts.—By virtue of Gen. Stat. Mass., c. 129, § 23 (Pub. Stat. Mass., c. 167, § 24), the plaintiff may disprove the defendant's allegations without replying, because no further pleading is required after the answer except by order of court. *Montague v. Boston, etc., Iron Works*, 97 Mass. 502; *Cook v. Shearman*, 103 Mass. 21; *Medfield School Dist. v. Boston, etc., R. Co.*, 102 Mass. 552.

2. *And. Steph. Pl.*, § 111.

Plea of Plene Administravit.—In *Johnson v. Johnson*, 1 Bailey L. (S. Car.) 601, it was said by O'Neill, J., that in an action for money had and received against an executor where there is a plea of *plene administravit* the uniform

form, or where the common traverse would be improper by its opposition to a rule of law, or the use of the common form might involve in the issue of fact some question which it might be more desirable to develop as an issue in law, it is proper to make use of a special traverse.¹

At the Present Day the special traverse, without an inducement of new matter, is scarcely ever used; though where the case admits of such an inducement it is still occasionally adopted and is as fitting as in the earlier days of its use.²

(3) *Traverse de Injuria*. — Where it is desired to traverse generally all material allegations in special pleas whereby matter is pleaded in excuse of either a tort or a breach of contract, which tort or breach is admitted, a traverse *de injuria* is, in many states, permitted,³ although originally its use was confined to actions sounding in tort.⁴

practice is to reply by a general traverse, and that he had not found a single instance "in which it is undertaken to set out the assets which have not been administered."

1. And. Steph. Pl., § 124.

As to the form of a special traverse see *infra*, III. 4. c. (8) (f) *Special Traverse*.

By Resorting to This Kind of Traverse, instead of generally denying the matters pleaded or a material point presented, the facts are placed on the record and a legal question arises of their sufficiency or insufficiency as an answer to the case made by the plea. *Kinzie v. Farmers, etc., Bank*, 2 Dougl. (Mich.) 105.

2. And. Steph. Pl., § 125.

Special Traverse Legitimate. — Undoubtedly the special traverse is recognized as legitimate when the inducement amounts in substance to a sufficient answer to the plea, even though the plaintiff may be able to use the common traverse. *Douglas v. Hennessy*, 15 R. I. 272.

It Is a Proper Replication when the plaintiff sets up in bar of the plea new facts inconsistent with those alleged by him. After stating the facts which constitute his answer to the plea he concludes with a formal traverse of one or more of the material facts alleged by the defendant and which are inconsistent with the truth of his own. *Kinzie v. Farmers, etc., Bank*, 2 Dougl. (Mich.) 105.

3. *Ruckman v. Ridgefield Park R. Co.*, 38 N. J. L. 98, holding that there is no reason in principle why this form of traverse should not be used in contract.

Ex Contractu. — *It Is Allowable* where the plea sets up matter in excuse of the breach of contract. *Lincoln v. Souder*, 2 Clark (Pa.) 319, 4 Pa. L. J. 107; *Marshall v. Aiken*, 25 Vt. 327; *Paddock v. Jones*, 40 Vt. 474; *Isaac v. Farrar*, 1 M. & W. 65; *Gibbons v. Mottram*, 6 M. & G. 692, 46 E. C. L. 692; *Schild v. Kilpin*, 8 M. & W. 673; *Jones v. Senior*, 4 M. & W. 123; *Whittaker v. Mason*, 2 Bing. N. Cas. 359, 29 E. C. L. 357; *Crisp v. Griffiths*, 2 C. M. & R. 159.

It Is Not Allowable where the pleas do not set up matter in excuse, but deny some material allegation of the declaration or set up matter amounting to a discharge. *Solly v. Neish*, 2 C. M. & R. 355; *Parker v. Riley*, 3 M. & W. 230; *Cleworth v. Pickford*, 7 M. & W. 314; *Elwell v. Grand Junction R. Co.*, 5 M. & W. 669; *Ruckman v. Ridgefield Park R. Co.*, 38 N. J. L. 98, holding, in an action to recover from the defendant the amount of his subscription for capital stock of the plaintiffs, that where there was a plea denying the agreement contained in the declaration and setting out another contract, it was not an excuse for the nonperformance of a contract that was admitted.

Covenant. — It has been allowed in actions of covenant. *Rickards v. Murdock*, 10 B. & C. 527, 21 E. C. L. 123.

4. *Cowper v. Garbett*, 13 M. & W. 34, holding that the general traverse *de injuria* was, no doubt, until the coming into operation of the Hilary Rules, confined to actions of trespass, replevin, and actions on the case, for in those actions only did the necessity of such a traverse, generally speaking,

Limitations on Its Use. — *De injuria* will not be a good reply when the defendant insists as a justification on a right¹ arising from authority of law,² authority in fact derived from the opposite

occur. "In actions of assumpsit, and on the case of nonfeasance, there were probably no special pleadings containing matter in excuse and requiring such a traverse; * * * and in actions of covenant and debt on specialties such pleas were very rare, and the adoption of a general traverse was practically unnecessary. But since the new rules such pleas in actions of assumpsit and debt have become very common, and the principle being the same, viz., that a plaintiff should be at liberty to put in issue by one traverse the whole matter of excuse contained in the plea, it is highly reasonable that a similar form of general traverse should be allowed in those actions also, and accordingly all the courts have sanctioned such a form of replication in actions of assumpsit, making a change only in the words, which are merely formal." See also *Coffin v. Bassett*, 2 Pick. (Mass.) 357.

1. *Allen v. Scott*, 13 Ill. 80; *Neale v. Claunce*, 7 Har. & J. (Md.) 372; *Coffin v. Bassett*, 2 Pick. (Mass.) 357; *Hannen v. Edes*, 15 Mass. 347; *Ruckman v. Ridgfield Park R. Co.*, 38 N. J. L. 98; *Strong v. Smith*, 3 Cal. (N. Y.) 164; *Hyatt v. Wood*, 4 Johns. (N. Y.) 150; *Lytle v. Lee*, 5 Johns. (N. Y.) 112; *Collier v. Moulton*, 7 Johns. (N. Y.) 109; *Plumb v. M'Crea*, 12 Johns. (N. Y.) 491; *Brown v. Bennett*, 5 Cow. (N. Y.) 181; *Allen v. Crofoot*, 7 Cow. (N. Y.) 46; *Griswold v. Sedgwick*, 1 Wend. (N. Y.) 126; *Coburn v. Hopkins*, 4 Wend. (N. Y.) 577; *Tubbs v. Caswell*, 8 Wend. (N. Y.) 129; *Lincoln v. Souder*, 2 Clark (Pa.) 319, 4 Pa. L. J. 107; *Langford v. Waghorn*, 7 Price 670; *Jones v. Kitchin*, 1 B. & P. 76; *Cooper v. Monke*, Willes 54.

Rule for Use of de Injuria. — "There are cases undoubtedly sustaining the rule * * * that this replication is proper, except where the plea justifies by matter of record; and yet cases are not wanting where a special replication has been required to a plea setting up a defense in no way depending upon matter of record. It must be admitted that many of these distinctions are more artificial than substantial, and do not contribute very essentially to the promotion of the ends of justice. So long, however, as we are to look to the

rules of the common law to govern us in pleading, we are not at liberty to disregard them. The most satisfactory and tangible rule is this: that where the defense sets up matter of positive and absolute right, as the levy of an execution, the service of a warrant, the collection of tithes or taxes, and the like, there a special replication is required; but where the matter set up in defense amounts to but an excuse for the act complained of, and is not the exercise of an affirmative right, 'as *son assault demesne*, there the general replication, *de injuria*, etc., is sufficient." *Allen v. Scott*, 13 Ill. 80.

Proper Replication to Plea of Justification. — Where the plea justifies and does not excuse, it seems that the proper course of the plaintiff is to admit that portion of the plea which consists in the allegation of an authority in law and go on to aver that the defendant did the act in question of his own wrong and without the residue of the cause alleged in the plea. *Stickle v. Richmond*, 1 Hill (N. Y.) 77; *Curry v. Hoffman*, 5 Clark (Pa.) 274; *Robinson v. Raley*, 1 Burr. 320.

Plea of Justification — New York. — In New York, before the code, where the defendant alleged in his plea that matter whereof the plaintiff complained was authorized by statute, it was provided that the plaintiff might reply that the defendant did of his own wrong the act complained of, without the cause alleged by the defendant, whereupon the issue should be tried by a jury. *Comly v. Lockwood*, 15 Johns. (N. Y.) 188.

2. *Crogate's Case*, 8 Coke 66.

Authority in Law. — *De injuria* is improper in a case where the plea to which it is interposed sets up some authority in law which *prima facie* would be a legal defense or justification for the act complained of. *Tinker v. Rockford*, 36 Ill. App. 460.

Contra. — In *Erskine v. Hohnbach*, 14 Wall. (U. S.) 616, Field, J., said: "We are aware of numerous decisions in this country to the effect that the replication *de injuria* is only a good replication where the plea sets up matter of excuse, and is not good where the plea sets up matter of justification, though the justification be under process from

party,¹ or authority of record,² nor where the plea amounts to matter of discharge and not of excuse.³

Interest in or Title to Land or Personal Property. — Where the plea alleges that the defendant is interested in or entitled to land or goods seized it is improper to reply *de injuria*.⁴

(4) *Confession and Avoidance.* — Where it is desirable to con-

a court not of record, or rest upon some authority of law other than a judgment of the court. Such are the decisions of the Supreme Court of New York, *Griswold v. Sedgwick*, 1 Wend. (N. Y.) 131; *Coburn v. Hopkins*, 4 Wend. (N. Y.) 577, and they proceed upon the supposed doctrine of the resolutions in *Crogate's Case*, 8 Coke 66. But an examination of that case will show that the doctrine is not supported to the extent laid down in the New York decisions. The third resolution in *Crogate's Case* does state that a replication *de injuria* is bad where the justification is under authority of law, but, as observed by Mr. Justice Patterson, in *Selby v. Bardons*, 3 B. & Ad. 2, 23 E. C. L. 9, this, if taken to the full extent of the terms used, is inconsistent with that part of the first resolution which states that where the plea justifies under proceedings of a court not of record the replication may be used."

Trespass de Bonis Asportatis. — Where the defendant justified his entry into a dwelling house, the outer door being open, and his attachment of certain property under a writ of attachment, and as to the residue pleaded not guilty, it was held that the plaintiff could not reply *de injuria* as to the residue, protesting that the writ was not served. *Oystead v. Shed*, 12 Mass. 505.

1. *Crogate's Case*, 8 Coke 66.

Reason for Rule. — This rule "appears to be founded in good sense; for although the plaintiff may be well allowed by his general replication to put in issue and to compel the defendant to prove all the facts which constitute his defense, when they lie in his, the defendant's, exclusive knowledge, yet where facts are pleaded which lie equally in the knowledge of the plaintiff and the defendant, such as an authority or license given by the plaintiff, there is no reason for compelling the defendant to prove them, unless the plaintiff thinks proper to deny them by a special traverse." *Salter v. Purchell*, 1 Q. B. 209, 41 E. C. L. 506.

Assumpsit for Money Had and Received.

— Where the plea denied the plaintiff's sole right to the money claimed, and alleged that the defendant retained the money sought to be recovered as his own to pay advances made by him pursuant to the plaintiff's license, and the plaintiff replied *de injuria*, the replication was held bad because the plea did not contain matter of excuse for the defendant's breach of promise, but denied the promise made to the plaintiffs. *Solly v. Neishe*, 2 C. M. & R. 355.

2. *Crogate's Case*, 8 Coke 66.

3. *Ruckman v. Ridgefield Park R. Co.*, 38 N. J. L. 98.

Pleas Amounting to a Denial. — Where the plea, though purporting to be in excuse by way of confession and avoidance, is in fact a traverse, *de injuria* is bad. *Fisher v. Wood*, 1 Dowl. N. S. 54.

Plea of Accord and Satisfaction. — In an action on a bill of exchange where the plea was in substance one of accord and satisfaction by matter arising after the maturity of the bill, it was held to be matter of excuse and not discharge. *Jones v. Senior*, 4 M. & W. 123.

4. *Crogate's Case*, 8 Coke 66; *Selby v. Bardons*, 3 B. & Ad. 2, 23 E. C. L. 9; *Wallace v. Hibbs*, 4 Phila. (Pa.) 154, 17 Leg. Int. (Pa.) 397.

Trespass Quare Clausum. — Where the defendant denied that what was charged was a trespass, because the close broken and the goods taken were his own property, so that it could not be a trespass upon the plaintiff, it was held that the plaintiff should traverse the rights set up and could not reply generally *de injuria*. *Berry v. Cahanan*, 7 N. J. L. 77.

Title Alleged as Inducement. — But if the title or interest be only inducement, *de injuria* is a good replication; as in battery, if the defendant pleads that he was seized in close and had cut his corn, and the plaintiff came to take away his corn, and he in his defense, etc., there the plaintiff may reply *de injuria*. *White v. Stubbs*, 2 Saund. 295b; *Vivian v. Jenkin*, 3 Ad. & El. 741, 30 E. C. L. 198.

fess and avoid the effect of a plea the plaintiff should set forth the special circumstances which make the defendant liable, notwithstanding his plea, by replying in confession and avoidance,¹ and it is permissible, where the *absque hoc* clause of a special traverse in the plea is insufficient in law, to confess and avoid its inducement.²

(5) *Matter of Estoppel*. — Where matter constituting an estop-

1. *Tomlinson v. Darnall*, 2 Head (Tenn.) 538; *Mulligan v. Shea*, 7 Pa. Co. Ct. 118; *Dunklee v. Goodenough*, 65 Vt. 257. See also article CONFESSION AND AVOIDANCE, vol. 4, p. 664.

Plea of Nonjoinder. — Where the nonjoinder of one of several joint obligors is pleaded in abatement his death may be replied in avoidance. *Cummings v. People*, 50 Ill. 132, 136.

Plea of Former Conviction. — A replication that the conviction was fraudulently obtained and that the evidence was not heard at the former trial is good in avoidance. *State v. Colvin*, 11 Humph. (Tenn.) 599.

Replications to Pleas of Actions Pending. — At common law the replication to pleas of this description is *nul tiel record*. But it is said that a more reasonable rule would be to permit a reply in avoidance of the plea of former action, when the court would be able to ascertain the true reason of the second action, and if it appeared vexatious to abate it. *Wilson v. Milliken*, (Ky. 1898) 44 S. W. Rep. 660.

Plea of Coverture. — If the plaintiff wishes to avoid the effect of a plea of coverture he should set forth the special circumstances which make the defendant liable notwithstanding the coverture. *Mulligan v. Shea*, 7 Pa. Co. Ct. 118.

Confession and Avoidance — Massachusetts. — The effect of the Massachusetts Practice Act providing that no further pleading is requisite after the answer, except under certain circumstances, is not to prohibit a plaintiff who has omitted to file a replication from availing himself of any facts by way of discharge or avoidance of new matter in an answer. *Lyon v. Manning*, 133 Mass. 439.

Proof of Matter in Avoidance. — The proof of matters which confess and avoid the plea is inadmissible unless such matters are specially and sufficiently pleaded. *Tomlinson v. Darnall*, 2 Head (Tenn.) 538.

Proof under Confession and Avoidance — Alabama. — Where in an action for

personal injuries the defendant pleads the general issue and also contributory negligence, and the plaintiff replies confessing the plea of contributory negligence, and in order to avoid its effect avers that the defendant was aware of the dangerous position of the plaintiff and was guilty of wanton recklessness, the burden devolves on the plaintiff to prove that the negligence was wanton. *Lee v. De Bardeleben Coal, etc., Co.*, 102 Ala. 628.

2. *Hubbard v. Mutual Reserve Fund L. Assoc.*, 80 Fed. Rep. 681.

Confession and Avoidance of Inducement.

— When a special traverse contained in a plea is not the gist of the action, or, in other words, is immaterial, it is proper for the plaintiff to pass by that averment, and although the inducement to a special traverse is in general not traversable, he may in such case take issue on any fact alleged in the inducement. *Wheelwright v. Beers*, 2 Hall (N. Y.) 391, which was an action on a charter-party. A special plea admitted the charter-party, etc., as alleged in the first count of the declaration, and averred that the defendant did not refuse to dispatch the vessel, but that the vessel was so much damaged by the perils of the sea that it was necessary to put into the nearest port; that while there she was examined to ascertain what repairs were necessary to enable her to proceed on her voyage; that it was found necessary for all concerned that she be sold, and she was sold; and that thus the voyage for which she was chartered was not performed. To this plea there was a replication admitting the injury and the vessel's putting into another port as of necessity, and that the voyage was prevented, but averring that the voyage was not broken up and prevented by perils of the sea as alleged by the defendant. It was held that the averment in the plea that the defendant did not refuse to dispatch the vessel presented no sensible or material issue to the plaintiff, and there could be no trial on such an issue of the merits of the

pel does not appear in the declaration and the plaintiff intends to rely thereon, he must expressly set it forth in a replication.¹

(6) *New Assignment* — (a) *In General*. — In all cases where the plaintiff has so vaguely and indefinitely framed his declaration that the real cause of complaint is not made sufficiently clear to the defendant, and the latter has pleaded to a grievance other than that intended by the plaintiff, there must be a new assignment,² which, though not properly speaking a replication, is in the nature of one, as it never occurs but in answer to a plea.³ If the circumstances of the case require it, there may be more than one new assignment.⁴

Where There Is But a Single Grievance embodied in the declaration and the plaintiff by his replication treats that as a cause of action for which he brought his suit, the declaration is thereby exhausted. There is no subject-matter remaining on which a new assignment can operate.⁵

case, to wit, the sufficiency of the defendant's excuse for breaking up the voyage.

1. *Kempe v. Goodall*, 2 Ld. Raym. 1154; *Oregonian R. Co. v. Oregon R., etc., Co.*, 10 Sawy. (U. S.) 465; *Trimble v. State*, 4 Blackf. (Ind.) 436; *Burdit v. Burdit*, 2 A. K. Marsh. (Ky.) 143; *Warner v. Bledsoe*, 4 Dana (Ky.) 73. See also article ESTOPPEL, vol. 8, p. 5.

2. *And. Steph. Pl.*, § 134; *Moses v. Levy*, 4 Q. B. 213, 45 E. C. L. 213. In this case Lord Denman said: "Where the declaration itself points at one particular transaction, and the plea applies itself to one particular transaction of the same sort, different from that intended by the declaration, or where the plea narrows the declaration contrary to the intention of the plaintiff, a new assignment is necessary."

In all cases where the defendant applies his justification to a different cause of action from that to which it is applicable there must be a new assignment. *Bagot v. Williams*, 3 B. & C. 235, 10 E. C. L. 62; *Williams v. Spears*, 11 Ala. 138.

The office of a new assignment is to obviate a difficulty occasioned by the generality of the declaration. *Dana v. Bryant*, 6 Ill. 104.

3. *And. Steph. Pl.*, § 134.

Object of New Assignment. — By saying that the cause of action covered by the plea was not that of which he had complained, but some other which he now stated, the plaintiff intended "to give the go-by to all that the defendant had pleaded." *Cheasley v. Barnes*, 10 East 80.

Michigan. — No opportunity for new assignment is offered by the Michigan practice. The plaintiff must therefore show in his declaration such facts as will enable him to go to trial upon his real matter of grievance, whatever defense he may have to meet. *McFarlane v. Ray*, 14 Mich. 465.

Several Trespasses. — Where several acts have been committed, some of which may be justifiable and some not, and the claim is for those not justifiable, there should, if the plea is to the justifiable acts, be a new assignment. *Scott v. Dixon*, 2 Wils. C. Pl. 3; *Groenvelt v. Burwell*, 1 Ld. Raym. 463.

False Imprisonment. — Where there is a plea of justification under a warrant in an action for false imprisonment, if the plaintiff intends to show that there is a different arrest from that which the plea justifies he must, as a basis for introduction of evidence thereof, new-assign. *Stickle v. Richmond*, 1 Hill (N. Y.) 77.

In Assault and Battery, there is no necessity for a new assignment where the beating complained of is the same as that which the plea attempts to justify. In order to make a new assignment necessary there should be a further assault after that averred in the plea. *Hannen v. Edes*, 15 Mass. 347.

4. *Tribble v. Frame*, 7 T. B. Mon. (Ky.) 529.

The plaintiff cannot carry a second new assignment beyond the first one. *Pugh v. Griffith*, 7 Ad. & El. 827, 34 E. C. L. 233.

5. *Spencer v. Bemis*, 46 Vt. 29. In

It Generally Occurs in Trespass, but where the reason is equally applicable it may be used in any form of action.¹

(b) **Uncertainty of Place or Time.** — Where there has been in the declaration only a general description of the locality in which a trespass has been committed the plaintiff will be driven to a new assignment.²

(c) **Unauthorized Acts.** — Where the plaintiff is desirous of pointing out that the grievances for which he seeks to recover are not protected by what the defendant may have pleaded in justification or excuse therefor, there must be a new assignment.³

this case the declaration counted on one act of trespass without continuation or repetition, and the defendant justified, setting forth by plea an alleged right of way, and that the alleged trespass was the doing what he lawfully might do in removing obstructions placed across the said way by the plaintiff, to which there was a replication denying the alleged way and right, and that there was any obstruction, which was followed by a new assignment alleging that the action was brought, not only for the trespasses justified by the plea, but also for others. It was held that it was not permissible for the plaintiff to bring upon the record other acts of trespass which were not within the scope of the declaration.

In the Case of a Single Act of trespass, a new assignment is an attempt to amplify the cause of action stated in the declaration which cannot be allowed. If the act sought to be justified is excessive or committed with more violence than the subject of justification authorized, that may be put on the record by a replication, but not by a new assignment of a different trespass. *Stults v. Buckelew*, 28 N. J. L. 150.

Single Cause of Action. — There must be more than one cause of action or it is impossible that there should be a new assignment. *Thomas v. Marsh*, 5 C. & P. 596, 24 E. C. L. 470; *Cheasley v. Barnes*, 10 East 78.

1. 1 Chitty on Pleading 654.

Assumpsit. — Where the claim was for goods sold and a plea which might be applied to one sale, but not to the one for which the plaintiff sued, was filed, it was held that there might be a new assignment that the action was brought to recover the price of other goods sold to the defendant. *Seddon v. Tutop*, 6 T. R. 607.

Judgment Recovered. — Where a per-

son has two causes of action for a breach of contract, for one of which he has already obtained a judgment, and to an action for the other the defendant pleads the judgment recovered, the plaintiff should new-assign and show that the action was brought for a different breach of contract from that for which the judgment pleaded had been obtained. *Seddon v. Tutop*, 6 T. R. 607; *Kitchen v. Campbell*, 3 Wils. C. Pl. 304; *Williams v. Spears*, 11 Ala. 138.

Plea in Abatement. — Where there is a plea in abatement that another action is pending it is not necessary to new-assign in order to admit proof of an extrinsic fact not contradicting but merely limiting the operation of the record by which the defendant must support his plea. *Williams v. Spears*, 11 Ala. 138.

2. *Elwis v. Lombe*, 6 Mod. 117; *Lambert v. Strother*, Wilses 223; *Martin v. Kesterton*, 2 W. Bl. 1089; *Goodright v. Rich*, 7 T. R. 323.

New assignments are also adopted for the purpose of ascertaining with greater precision and exactness the place or time which has been alleged only generally in the declaration. *Greene v. Jones*, 1 Saund. 299; *Williams v. Spears*, 11 Ala. 138.

3. *Monprivatt v. Smith*, 2 Campb. 175; *Oakes v. Wood*, 3 M. & W. 150; *Atkinson v. Warne*, 5 Tyrw. 481; *Penn v. Ward*, 5 Tyrw. 975; *Dye v. Leatherdale*, 3 Wils. C. Pl. 20; *Taylor v. Cole*, 3 T. R. 292; *Fisherwood v. Cannon*, cited in *Taylor v. Cole*, 3 T. R. 297; *Bush v. Parker*, 1 Bing. N. Cas. 72, 27 E. C. L. 312; *Phillips v. Howgate*, 5 B. & Ald. 220, 7 E. C. L. 74; *Stammers v. Yearsley*, 10 Bing. 35, 25 E. C. L. 19; *Yingling v. Hoppe*, 9 Gill (Md.) 310.

License. — In trespass for breaking and entering the plaintiff's house the

c. ABSENCE OF REPLICATION. — If the plaintiff fails to reply within such time as is prescribed by the rules of court the defendant may move for a rule to compel him to do so or suffer a judgment of *non pros*.¹

d. WAIVER OF REPLICATION — (1) *Implied Waiver*. — If the record shows that though no replication has been filed an informal issue has been treated as sufficient by the parties, and that under it they have had the full benefit of their evidence, the court will consider the irregularity waived, and in the case of a jury trial will refuse to disturb the verdict;² and the rule is the

defendant pleaded a license from the plaintiff. It was held that if the plaintiff wished to take advantage of a revocation he must new-assign. *Ditcham v. Bond*, 3 Campb. 524.

De Injuria Not Proper. — When the plaintiff replied *de injuria* to a plea of justification, it was held that he could not sustain the issue thus formed by evidence that the acts complained of went beyond the cause alleged in the plea; his proper course was to have new-assigned. *Oystead v. Shed*, 12 Mass. 505.

Where it is necessary only to show that the acts constituting the gist of the declaration are in excess of the justification pleaded it is held that recourse need not be had to a new assignment. *Hannen v. Edes*, 15 Mass. 347; *Loring v. Aborn*, 4 Cush. (Mass.) 608.

Justification of Trespass. — By new-assigning the plaintiff admits that a plea justifying a trespass well answers the declaration, but states in effect that the defendant is under a mistake, because the complaint is of a new and substantive trespass not answered by the plea. *Atkinson v. Matteson*, 2 T. R. 176; *Oakley v. Davis*, 16 East 82.

1. *Home Protection Ins. Co. v. Caldwell*, 85 Ala. 607; *Chicago, etc., R. Co. v. Wilcox*, 12 Ill. App. 42; *Brand v. Whelan*, 18 Ill. App. 186; *Seavey v. Rogers*, 69 Ill. 534; *Williams v. Brunton*, 8 Ill. 600; *Hogue v. Lewellen*, 42 Miss. 302.

As to Rule to Reply, see article TIME TO PLEAD.

Reversal of Judgment of Non Pros. — If there be a judgment of *non pros*. for failing to reply after a demurrer to the replication has been sustained, and there be an appeal in which there is a reversal of the lower court's ruling upon the demurrer, there will also be a reversal of the judgment of *non pros*. *Rutledge v. McAfee*, 72 Md. 28.

Dismissal of Petition for Mandamus. — Where the answer to a petition for a mandamus denies all the material allegations of the petition, and the petitioners file no replication and take no steps to form an issue of fact, the petition should be dismissed. *People v. Hercher*, 172 Ill. 271.

Failure to Reply After Withdrawal of Demurrer. — Where the plaintiff withdraws a demurrer to a plea and afterwards fails to file replications, the defendant is entitled to judgment on the plea. *Hunter v. Bilyeu*, 39 Ill. 367.

Demurrer to Replication Sustained. — A default for want of replication should not be entered where a replication has been successfully demurred to. *Wade v. Doyle*, 17 Fla. 522.

Failure to Reply Admits Truth of Plea. — If, after objection made to the absence of a replication, the plaintiff does not file one, he should be regarded as admitting the truth of the plea. *Amy v. Smith*, 1 Litt. (Ky.) 337; *Culver v. Uthe*, 7 Ill. App. 468.

No Aider by Verdict. — Where an issue cannot be made by an addition of a *similiter*, and there should be a replication, its want is not aided by verdict. *Baltimore, etc., R. Co. v. Faulkner*, 4 W. Va. 180; *State v. Douglass*, 20 W. Va. 770; *Ruffner v. Hill*, 21 W. Va. 153.

Reply to Notice of Defense. — In *Michigan*, where the rules of court provide that the defendant may give notice to the plaintiff of matter of defense arising after the joinder of issue, a default should not be entered for the failure of the plaintiff to reply to such notice of defense, but the case should stand for trial upon the declaration, a plea of the general issue, and the notice. *Burt v. Wayne Circuit Judges*, 90 Mich. 520.

2. *Alabama*. — *Comer v. Way*, 107 Ala. 300.

same where a jury has been waived and the case submitted on a statement of facts.¹

Objection on Appeal. — The failure to file a replication is not a ground of error when the objection is raised for the first time in an appellate court.²

(2) *Express Waiver.* — The parties may agree to try a cause without the filing of a replication, and a party to such stipulation is estopped from insisting on its being filed.³

2. Number of Replications Allowable. — Only one replication is allowed at common law to one plea;⁴ but in many states several

Arkansas. — *Sweeptzer v. Gaines*, 19 Ark. 96; *Tatum v. Tatum*, 19 Ark. 199; *Dorris v. Grace*, 24 Ark. 326; *Reagan v. Irvin*, 25 Ark. 86.

Illinois. — *Beesley v. Hamilton*, 50 Ill. 88; *Armstrong v. Mock*, 17 Ill. 166; *Kaestner v. Chicago First Nat. Bank*, 170 Ill. 322; *Shreffler v. Nadelhoffer*, 133 Ill. 536; *Bunker v. Green*, 48 Ill. 243; *Ross v. Reddick*, 2 Ill. 74; *Parmelee v. Fischer*, 22 Ill. 212; *Chicago, etc., R. Co. v. Wilcox*, 12 Ill. App. 42.

Indiana. — *Egbert v. Thomas*, 1 Ind. 393.

Missouri. — *Howell v. Reynolds County*, 51 Mo. 156; *St. Joseph F. & M. Ins. Co. v. Harlan*, 72 Mo. 203; *Young v. Glascock*, 79 Mo. 579; *Vanderline v. Smith*, 18 Mo. App. 55.

Pennsylvania. — *Stoever v. Weir*, 10 S. & R. (Pa.) 25; *Thompson v. Cross*, 16 S. & R. (Pa.) 350; *Beale v. Buchanan*, 9 Pa. St. 123.

United States. — *Thomas v. Gray*, *Blatchf. & H. Adm.* 493; *The Mary Jane, Blatchf. & H. Adm.* 390, 16 Fed. Cas. No. 9,215.

Objection Cannot Be Made by Plaintiff. — Where the case has been tried on its merits, the court will refuse to set aside a verdict at the request of the plaintiff on the ground that no replication was filed. *Henry v. Ohio River R. Co.*, 40 W. Va. 234.

Failure to Rule Plaintiff to Reply. — Where replications have not been filed at the commencement of the trial, the defendant is bound to be aware of it, and it is his duty to move for a rule upon the plaintiff to file replications. His failure so to do is equivalent to consenting that the trial, so far as the pleadings are concerned, may be commenced. An objection that the replication was not filed when the trial commenced nor with leave of the court before judgment is too late after judgment is entered. *Keator Lumber Co. v. Thompson*, 144 U. S. 434.

1. *Vanderline v. Smith*, 18 Mo. App. 55.

2. *Home Protection Ins. Co. v. Caldwell*, 85 Ala. 607; *Abercrombie v. Mosely*, 9 Port. (Ala.) 145 [*overruling* *Wheelock v. Fitch*, 3 Port. (Ala.) 387]; *Allen v. Michel*, 38 Ill. App. 313; *Kellogg v. Boehme*, 71 Ill. App. 643.

3. *Kelsey v. Lamb*, 21 Ill. 559.

4. *Dekay v. Darrah*, 14 N. J. L. 288; *Hazzard v. Smith*, 1 J. J. Marsh. (Ky.) 67; *Chillicothe Bank v. Swayne*, 8 Ohio 257.

Aider by Verdict. — In a case where double replications, each containing a good answer to the defendant's plea, were filed, and both were found by the jury to be true, it was held that, had the defendant wished to confine the plaintiff to one answer to his plea, he should have objected to the double replications before the trial, when the court would have compelled the plaintiff to confine his proof to one and ordered the other to be struck from the record, and that under these circumstances it was too late to disturb the verdict. And the court said that there must be strong ground to induce it to reverse the plaintiff's judgment, because it appeared that he had "two valid answers to the defense set up, when either one would be sufficient for him." *Richmond v. Patterson*, 3 Ohio 368.

Declaration Containing Several Counts. — Where there are several counts for the same cause of action, and a plea to the whole declaration, the plaintiff may file several replications in reference to the several parts of the declaration. *Little v. Blunt*, 13 Pick. (Mass.) 473.

Statutes Giving to Defendants a Right to File as Many Pleas as Necessary have uniformly been held to extend to pleas only and to leave the parties to be governed by the common-law rule as to replications. *Gray v. White*, 5 Ala. 492; *State Bank v. Minikin*, 12 Ark.

replications are, under certain circumstances, permissible, as the common-law rule has been changed by statute.¹

Compelling Plaintiff to Elect — Demurrer. — Should there be more than one replication to a plea the defendant may move that all the replications but one be stricken out and that the plaintiff be put to his election as to which he will retain, or there may be a demurrer to all of the replications, but not a separate one to each.²

3. Replication and Demurrer to Same Plea. — There cannot be a replication and a demurrer at the same time to the same plea.³

716; *Ridley v. Buchanan*, 2 Swan (Tenn.) 555; *Pickering v. Pickering*, 19 N. H. 389; *Warren v. Ivie*, 2 Stra. 908.

Objection Waived by Rejoinder. — Where several replications are rejoined to by the defendant he waives his right to the objection. *King v. Anthony*, 2 Blackf. (Ind.) 131.

1. Alabama. — Where the replication was precisely as if three distinct replications had been formally made to the plea, the court said in holding that a statute authorizing several pleas did not extend to replications: "If that could be tolerated it would be in the power of the other party to make several rejoinders to each replication, and thus an infinity of issues would be presented." *Stiles v. Lacy*, 7 Ala. 17.

Special Replications. — Where special pleas have been filed there may be special replications setting up special matter of reply, but unless they contain such matter they will be stricken from the files. *Watson v. Kirby*, 112 Ala. 436; *Louisville, etc., R. Co. v. Mother-shed*, 110 Ala. 143.

Arkansas. — Upon application for that purpose leave may be given to file more than one replication whenever such course seems necessary in the opinion of the court to attain the ends of justice. In order to enable the court to exercise its discretion, the fact should be presented by motion or petition, and perhaps the more regular practice is to present with it the pleading intended to be filed, that the court may, upon examination of the issues formed and the nature of the action, as well as the additional pleading presented, determine whether such leave should or should not be granted. And such application and the decision of the court upon it, as in the case of all other matters determined by the court, should appear of record. *State Bank v. Minikin*, 12 Ark. 716.

Mississippi. — Under Annot. Code Miss., § 692, more replications than one can be filed only when verified by oath. *Wilmot v. Yazoo, etc., R. Co.*, (Miss. 1899) 24 So. Rep. 701.

New Hampshire. — The right to file several and separate replications was one entirely within the discretion of the court until the statute of 1847, c. 307, which rendered the right independent of the court and conferred it absolutely in all cases. *Pickering v. Pickering*, 19 N. H. 389. See also *Chapman v. Sloan*, 2 N. H. 464; *Probate Judge v. Lane*, 50 N. H. 556.

New York. — It appears that before the code in New York, several replications were allowed whenever necessary in the interests of justice upon making special application. Where such replications were interposed by the plaintiff *sua sponte* it was held improper; but they were permitted to stand on terms, as the plaintiff showed their necessity. *Ames v. West*, 4 Wend. (N. Y.) 211. See also *Oakley v. Romeyn*, 6 Wend. (N. Y.) 521.

West Virginia. — To any special plea pleaded by a defendant, the plaintiff may plead as many special replications as he may deem necessary. *Sweeney v. Baker*, 13 W. Va. 158.

2. Vance v. Wells, 8 Ala. 399; *Williams v. Hinkle*, 15 Ala. 713; *Duncan v. Hargrove*, 22 Ala. 150.

3. Riley v. Harkness, 2 Blackf. (Ind.) 34; *Lang v. Lewis*, 1 Rand. (Va.) 277; *Chesapeake, etc., R. Co. v. American Exch. Bank*, 92 Va. 495. But see *Eppes v. Smith*, 4 Munf. (Va.) 466; *Jones v. Stevenson*, 5 Munf. (Va.) 1.

Withdrawal of Issues of Law Before Replication. — "Whatever may be the law with regard to both a plea and demurrer to the same declaration at the same time, it does not extend to any other part of the pleadings. As to them, issues in law ought to be withdrawn before the issue in fact is made

4. Requisites and Sufficiency of Replications — *a. TITLE.* — The replication should be entitled in the court and of the term in which it is pleaded and should state the names of the plaintiff and the defendant in the margin.¹

b. COMMENCEMENT. — The commencement immediately follows the title and contains a general denial of the plea.²

c. BODY — (1) *In General.* — The body should contain the matter of answer to the plea that is appropriate to the action, and should either traverse or confess and avoid the plea, present matter of estoppel, or make a new assignment.³ If there is a

up, to make the record speak the faithful and complete history of the cause, and not present the absurdity of both admitting and denying or avoiding the same facts at the same moment." Patrick v. Conrad, Litt. Sel. Cas. (Ky.) 508.

If the Plea Seems Bad in Law the practice is to demur, and if the demurrer is overruled, to obtain from the court an order to withdraw the demurrer and then to answer over; but if the demurrer is not withdrawn, no further answer can be made and the court must give judgment in favor of the defendant on issue raised by the plea. Chesapeake, etc., R. Co. v. American Exch. Bank, 92 Va. 495.

Plea to Several Counts of Declaration. — Where the plea is to certain counts of a declaration the plaintiff may reply to it in its application to some of the counts, and demur to it as it applies to other counts. Dunlop v. Munroe, 1 Cranch (C. C.) 536.

In Florida, by Statute, it is provided that when there are both a demurrer and a replication to a plea, it is a matter of discretion which issue shall be disposed of first. Assuming that the discretion as to which issue shall be first disposed of can be controlled, there must first be a showing of an abuse of the discretion. Myrick v. Merritt, 22 Fla. 335.

1. 1 Chitty on Pleading 625.

2. And. Steph. Pl., § 208.

Hilary Rules. — It was provided by rules of court, 4 Wm. IV., that it shall not be necessary "in any replication, or subsequent pleading intended to be pleaded in maintenance of the whole action, to use any allegation of *precludi non*, or to the like effect, or any prayer of judgment; and all pleas, replications, and subsequent pleadings pleaded without such formal parts as aforesaid shall be taken, unless other-

wise expressed, as pleaded respectively in bar of the whole action, or in the maintenance of the whole action; provided, that nothing herein contained shall extend to cases where an estoppel is pleaded."

Under the Maryland Code any replication necessary to prove a legal defense shall be sufficient, without reference to mere form, and it is unnecessary to state any formal commencement or conclusion; therefore where the replication contains new matter it should be taken as if concluded with an averment. Cumberland, etc., R. Co. v. Slack, 45 Md. 161.

Defect in Commencement. — In a case where a replication in estoppel was defective in its commencement it was held good where the substance of it constituted an estoppel. Cecil v. Early, 10 Gratt. (Va.) 198.

3. Wright v. Minter, 2 Stew. (Ala.) 453; Mason v. Craig, 3 Stew. & P. (Ala.) 389; Barbour v. Washington F., etc., Ins. Co., 60 Ala. 433; Calvert v. Lowell, 10 Ark. 147; Pierson v. Wallace, 7 Ark. 282; Northwestern L. Assoc. v. Stout, 32 Ill. App. 31, Palister v. Little, 6 Me. 350; Whittemore v. Stephens, 48 Mich. 573; McGavock v. Whitfield, 45 Miss. 452; Dunklee v. Goodenough, 65 Vt. 257; Caperton v. Martin, 4 W. Va. 138; U. S. v. Buford, 3 Pet. (U. S.) 31.

As to Framing Such Matter of Answer, see *infra*, III. 4. c. (8) *Traverses*; III. 4. c. (9) *Confession and Avoidance*; III. 4. c. (10) *New Assignment*.

Result of Breach of This Rule. — Where the replication disclosed a cause of action recoverable only on a special count setting out an agreement and assuming its breach, it was held that it neither traversed, confessed and avoided, nor presented matter of estoppel to the plea, but passed them unnoticed and introduced a new cause of action.

failure to adopt one of these courses the replication is bad.¹

Traverse and Confession and Avoidance Not Allowable. — Where a material fact alleged by the defendant is fully confessed and avoided, that is, where the plaintiff sets up matter consistent with such allegation which, if true, answers it, there cannot also be a traverse.²

Where the Plea Is Applicable to the Whole Declaration, the repliant must, no matter what form of answer to it may be appropriate, reply sufficiently to all of its material allegations.³ So also if there

The court said: "If this could be allowed the defendant could rejoin new matter of defense, and the record 'would be spun into endless prolixity,' the parties never reaching an issue." The proper course would have been for the plaintiffs to amend, counting on the special agreement with a mere general traverse of the pleas. *Winter v. Mobile Sav. Bank*, 54 Ala. 172.

Issue Must Be Taken on Material Allegations of Plea. — It is necessary that the facts of the plea should be traversed by the replication unless matter in avoidance be set up, and it is not sufficient to allege facts in the replication that are inconsistent with those stated in the plea. Where it was material to the defense to show that the loan of certain money was a private transaction, and the plea in substance stated it, the replication should have traversed that fact. *U. S. v. Buford*, 3 Pet. (U. S.) 12.

Hilary Rules. — It was provided by rules of court, 4 Wm. IV., that no venue should be stated in the body of the replication, but that where local description was requisite at common law, such local description should be given.

1. *Barbour v. Washington F., etc.*, Ins. Co., 60 Ala. 433; *Galena, etc.*, R. Co. v. *Barrett*, 95 Ill. 467.

Attempt to Explain Allegation of Plea. — Where the plea set up a deed of release of errors, a replication which did not deny or confess and avoid the ground of defense in the plea, but attempted to explain the scope and meaning of the deed and show that its provisions did not embrace the matters in controversy, was held defective. *McCutcheon v. Sigerson*, 34 Mo. 280.

Replication to Plea of Payment. — To a declaration on two promissory notes there was a plea of payment before action, to which there was a replication that previous to the time of payment alleged in the plea the plaintiff was the *bona fide* holder before maturity of the

notes on which the action was founded. It was held that the replication was bad because every one of its averments might have been true and yet payment might have been made to the plaintiff. *Barbour v. Washington F., etc.*, Ins. Co., 60 Ala. 434.

2. *Commercial Bank v. Sparrow*, 2 Den. (N. Y.) 97; *Dunklee v. Goodenough*, 65 Vt. 257; *Bedell v. Lull*, Yelv. 151; *Bennet v. Filkins*, 1 Saund. 20.

The Reason for the Rule is that by the addition of a traverse the defendant will be prevented from denying the facts which avoid his defense. *Oystead v. Shed*, 13 Mass. 520.

Sufficient if One of Several Replications Is Good. — Where several replications are allowed it is sufficient if one of them is good, and it is immaterial whether the others are good or bad. *Hurd v. Earl*, 6 Blackf. (Ind.) 39; *Hays v. Roberts*, 23 Ark. 193.

3. *Whitehurst v. Boyd*, 8 Ala. 375; *Pierson v. Wallace*, 7 Ark. 282; *Pearson v. Chapman*, 21 Ill. 650; *Conard v. Dowling*, 7 Blackf. (Ind.) 481; *Hood v. Winsatt*, 1 B. Mon. (Ky.) 208; *Wren v. Span*, 1 How. (Miss.) 115; *Love v. Humphrey*, 9 Wend. (N. Y.) 204; *Reynolds v. Torrance*, 3 Brev. (S. Car.) 49; *Wood v. Springfield*, 43 Vt. 617; *Carpenter v. McClure*, 38 Vt. 375; *Lang v. Lewis*, 1 Rand. (Va.) 277; *Jones v. Hays*, 4 McLean (U. S.) 521.

Denial of Material Allegation. — In an action on a promissory note, there was a plea that before the giving of the note the plaintiffs, in a conversation between them and the defendant, made false representations to the defendant respecting their ownership of land which they proposed to sell to the defendant, and that the note was given in part consideration of the purchase money. There was a replication that the plaintiffs had not made such representations. It was held that the fraudulent representation of the plaintiffs was the material allegation contained in the

are several pleas and the replication undertakes to answer one of them it must answer the whole of the plea which it professes to

plea, and that as the replication denied this, it was good, inasmuch as the other matters alleged in the plea constituted one entire defense and formed one connected proposition. *Bradner v. Demick*, 20 Johns. (N. Y.) 404.

Failure to Deny Material Allegation. — In an action against a railroad relief association by the mother of a member of the association who had been killed while in the employment of a railroad company the plaintiff alleged that the decedent had lawfully and in pursuance of the by-laws and constitution of the association designated her as his beneficiary. The defendant pleaded that its constitution provided that it should not be required to pay claims to the beneficiary of the member killed before the person legally entitled to sue had released the railroad company from all claim to damages, and that the wife and child of the member, who were legally entitled to sue the railroad company and recover damages, had sued and recovered damages instead of releasing the railroad company. A replication that the death was not caused by the railroad company's negligence and that the wife and child were not entitled to recover unless there was negligence was held bad because it did not negative the allegation in the plea that the wife and child were entitled to sue and had in fact recovered damages and had not released the company as they should have done. *Fuller v. Baltimore, etc., Employees' Relief Assoc.*, 67 Md. 433.

Action on Bond. — To an action on a bond conditioned that the defendant would pay the amount of a final decree in equity or surrender himself under an attachment then in force against him, there was a plea that after the final decree the defendant had always been ready to surrender himself, but that after the said final decree there was not any attachment in force against him. The replication, which merely asserted that there was an attachment in force against the defendant, was held bad because it did not answer the whole plea; it should have set out the attachment and have answered that part of the plea which alleged that the defendant was always ready to surrender himself. *Gray v. Gidiere*, 5 Rich. L. (S. Car.) 386.

If the Plaintiff Replies to a Double Plea he must answer the plea fully, although he might demur for duplicity. *Barrett v. Ruitt*, 3 Ind. 571; *Richards v. Allen*, 1 Bibb (Ky.) 189.

Immaterial Allegations in Replication. — Where no facts alleged in the plea are traversed by a replication, and it merely states immaterial allegations, it does not constitute an answer to the plea. *Watriss v. Pierce*, 36 N. H. 232.

Where the Plea Sets Up Accord and Satisfaction and the payment of a sum agreed upon, a replication not admitting or denying the payment, but alleging that the settlement was procured by fraud, is insufficient. *Shampeau v. Connecticut River Lumber Co.*, 42 Fed. Rep. 760.

Matter Material to Plaintiff's Right of Action. — Where in an action on contract the plea alleged that the plaintiffs did not within a reasonable time after contracting inform the defendants that neither they nor their agents had been able to effect certain sales, it was held that the plaintiff's right of action depended materially upon the question whether due notice of the failure to make sales had been given, and a replication that the plaintiffs had within a reasonable time informed the defendants that they had been unable to effect the sales was sufficient. *Austin v. Walker*, 26 N. H. 456.

Pleas Setting Up Fraud and Want of Consideration. — In a suit on a promissory note several special pleas set up failure of consideration, want of consideration, payment, and fraud in procuring the execution of the note. The plaintiff replied that he had purchased the note from the payee; that before purchasing he went to the defendant, a woman, and asked whether the note was all right and whether she would pay it; that she then said to the plaintiff that the note was all right and that she would pay it, and that the plaintiff, relying upon such statements and representations, bought the note from the payee, paying him a valuable consideration therefor; and that if the statements contained in the pleas were true, the plaintiff was ignorant of them at the time of purchasing the note, which he was induced by the defendant's statements to buy. It was held that this replication was a full answer

answer.¹ In other words, no replication is sufficient that does not put in issue everything that is material in the plea to which it applies, and if it is bad in part it should be rejected.²

Replication to Any Essential Allegation of Plea. — The pleader may, however, reply to any one of several material allegations of the plea where each of such allegations is essential to its support, because the demolition of any one of them will effectually destroy the whole defense.³

(2) *Argumentativeness.* — The facts upon which the replication relies must be directly alleged and not set out argumentatively

to the whole of the pleas. *Kimball v. Penney*, 117 Ala. 245.

Replication to Plea of Res Judicata. — In an action on contract the defendant pleaded *res judicata*, setting up therein a final decree in a cause between the same parties upon the same contract, finally adjudicating all matters in issue between the parties to the action arising out of or incident to the contract. The replication did not deny the existence of such decree and did not allege any specific matter of damages arising out of or incident to the said contract which had not been settled by the decree in chancery, but simply affirmed that the decree did not award the plaintiff the damages he had sustained and that it could not be performed by the defendant. On demurrer the replication was held bad. *Sanford v. Cloud*, 17 Fla. 532.

Criminal Law. — To a plea of *autrefois acquit* there must be a traverse. It is not sufficient to reply *nul tiel record*. *Com. v. Boyer*, 8 Phila. (Pa.) 611.

Replication Putting in Issue Matters Set Up in Bill of Particulars. — In a case where a husband and wife sued to enforce a claim due to the wife, the defendant pleaded payment and filed a bill of particulars setting off money owing to him by the wife, to which there was a replication denying the liability of the wife by reason of her coverture. The replication was held bad because it put in issue not the matter stated in the plea of payment, but the matters contained in the bill of particulars filed with the plea. *Vanzandt v. Shelton*, 40 Miss. 332.

Re-avertment of Matters Alleged in Declaration. — Where the replication turns wholly away from the plea and takes no notice of any of the matters of the defense, but merely avers over again what was before set forth in the declaration, it is vicious and should be

set aside. *Gibbons v. Ogden*, 8 N. J. L. 288.

When the plea is "no consideration" as to part of a note, a replication that the note was "not made without consideration" is bad. *Hawk v. Polard*, 6 Blackf. (Ind.) 108.

Sufficiency of Proof. — No stronger testimony is necessary to establish an averment of the replication than would be necessary to support the same averment if it were set out in the declaration. *Moore v. Mickell*, Walk. (Miss.) 231.

To a Plea of Misnomer of either party the plaintiff may reply that such party is as well known by one name as another. *Selman v. Shackelford*, 17 Ga. 615; *Lucas v. Farrington*, 21 Ill. 31. But see *Labat v. Ellis*, Tayl. (N. Car.) 148.

1. *Lawson v. State*, 9 Ark. 9; *Perkins v. Burbank*, 2 Mass. 81; *Slocumb v. Holmes*, 1 How. (Miss.) 139.

2. *Whitehurst v. Boyd*, 8 Ala. 375; *Highland Ave., etc., R. Co. v. South*, 112 Ala. 642; *Wilmot v. Yazoo, etc., R. Co.*, (Miss. 1899) 24 So. Rep. 70*; *Carpenter v. McClure*, 38 Vt. 375; *Trueman v. Hurst*, 1 T. R. 40; *Webber v. Tivill*, 2 Saund. 127.

3. *And. Steph. Pl.*, § 138; *Lawson v. State*, 9 Ark. 9.

General Denial — Vermont. — A replication that the plaintiffs "deny each and every material fact so by the said defendant pleaded as aforesaid" is clearly bad at common law for failing to deny any single and material fact stated in the plea and for duplicity in putting in issue two and more several and distinct matters, and it is not helped by Stat. Vt., § 1151, permitting a general denial only as against matters pleaded in confession and avoidance, where the pleas are held not to be of that character. *Dibble v. Deerfield River Co.*, 69 Vt. 482.

and left to be inferred from other facts which are averred.¹

(3) *Definiteness and Certainty*.—The quality of certainty is especially requisite in the replication,² and greater definiteness is required in a replication than in a declaration.³

1. Bac. Abr., tit. Pleas and Pleadings, I. 5; And. Steph. Pl., § 201; Austin v. Parker, 13 Pick. (Mass.) 222.

Instances of Argumentativeness.—In an action of trespass for breaking and entering the plaintiff's close to bore for coal, the plea claimed the liberty of boring for and getting the coal during the continuance of the defendant's copyhold estate, to which there was a replication that the copyhold had always been demised without excepting or reserving the seams of coal. It was held that this replication did not confess the liberty claimed by the plea and avoid it, but was the mere argumentative denial of its existence. Bourne v. Taylor, 10 East 189.

In an action of ejectment the defendant pleaded the surrender of a copyhold by the hand of F., at that time steward of the manor. The plaintiff denied that F. was steward. It was held that there was no issue and that the traverse should have been that F. did not surrender, for, if he were not steward, the surrender was void. As it was, the replication argumentatively denied the surrender, which should have been traversed directly. Wood v. Butts, Cro. Eliz. 260.

Facts Stated Protestando.—To the plea of a former recovery there was a replication *protestando* that the trespass alleged in the declaration was not the same for which damages had been given and a recovery had in the action pleaded. It was held that the replication was bad, being argumentative instead of traversing and denying the former recovery, and that the matter contained in the *protestando* should have formed the substance of the replication. Snider v. Croy, 2 Johns. (N. Y.) 227.

2. Sealey v. Thomas, 6 Fla. 25; Prewitt v. Walker, 7 J. J. Marsh. (Ky.) 332; Eastland v. Caldwell, 2 Bibb (Ky.) 23; Archbold's Civ. Pl. 258. And see generally article DEFINITENESS AND CERTAINTY IN PLEADINGS, vol. 6, p. 248.

Legal Conclusions.—A replication should either be a general traverse or a confession and avoidance by new matter; and if a special form of traverse be resorted to, the facts must be

stated with such definiteness and certainty as to show legally the untruth or nonexistence of the material fact or facts intended to be denied. A statement of conclusions merely is not sufficient. Louisville, etc., R. Co. v. Mothershed, 110 Ala. 143.

Claim of Statutory Exemption.—To an action of trespass brought for seizing a horse exempt from execution as a "work beast" the defendant justified under a writ of execution. The replication of the plaintiff was that he was a *bona fide* housekeeper and the horse his only work beast not previously levied on by execution, thereby showing that the plaintiff had other horses which might have been unencumbered at the time of the taking. The replication was held bad for the reason that though it might be perfectly true, it was not a necessary deduction that the horse taken by the defendant was, when taken, the plaintiff's "only work beast." Faulkner v. Bradley, 2 Dana (Ky.) 141.

Uncertainty for Which of Several Pleas Replication Is Intended.—Where there are more pleas than one and the replication does not state in terms which of the pleas it intends to answer, it is good, though somewhat informal, if there is no difficulty from the nature of the pleadings in seeing for which of the pleas it is intended. Carey v. Hanchet, 1 Cow. (N. Y.) 154.

Averments as to Place.—Where place is immaterial there need be no special averment of the place at which the circumstance occurred. Ilderton v. Ilderton, 2 H. Bl. 145.

3. Archbold's Civ. Pl. 258.

Replication to Plea of Statute of Limitations.—In reply to a plea of the statute of limitations the plaintiff, who sued as indorsee of a note, said that at the time when the several causes of action "accrued to the plaintiff" he was beyond seas. This was held bad for uncertainty, for, though it might be literally true, it would not bring the plaintiff within the saving clauses of the statute nor avoid the plea, for the replication omitted what was material to relieve him from the statute, viz., that at the time when the action

Setting Out Particulars. — Where many items of the same kind are embraced in the same cause of action, to each of which, if particularized, there may be a defense of which a general answer to the replication cannot take advantage, then the replication should set out the particulars,¹ and where the plaintiff confines his replication to a part only of his claim he should specify such part, in order that the defendant may know what to meet by evidence.²

The Replication Must Be Entirely Free from Ambiguity, for it is a rule in all pleadings that where they are susceptible of two constructions that one shall be adopted which is most unfavorable to the pleader.³

Certainty of Time and Place. — When material, it is necessary to set forth time, place, and other circumstances with the same certainty and precision as in the previous proceedings.⁴

Facts Within Knowledge of Defendant. — Where the facts lie more in the knowledge of the defendant than of the plaintiff, as it is difficult if not impossible in some cases for the latter to ascertain them, more general allegations are allowed.⁵

(4) **Conciseness.** — Where the subject comprehends multiplicity of matter, conciseness is desirable, and useless prolixity should be avoided.⁶

accrued, he, being entitled to sue, was beyond seas. *Bennett v. Herring*, 1 Fla. 434.

1. *Treasurers v. Rivers*, 2 McMull. L. (S. Car.) 207, holding the replication to be insufficient where the defendants pleaded performance to an action of debt on the official bond of a sheriff, and the replication assigned as a breach that it was the duty of the sheriff to collect and pay over all tax executions which might be lodged with him, and that on a particular debt there were tax executions to the amount specified lodged in his office and that he did not collect and pay them over.

2. *Hotchkiss v. Ladd*, 36 Vt. 593, holding that where a plea of the statute of limitations alleged that the causes of action mentioned in the declaration did not accrue within six years, a replication that the said causes of action or some of them did accrue within six years was bad for uncertainty because the defendant could not possibly know to which of several causes of action the replication was intended to apply.

3. *Wooster v. Bullock*, 52 Vt. 48.

4. *Parker v. Grayson*, 1 Nott & M. (S. Car.) 171; *Smith v. Bower*, 3 T. R. 662; *Hodsden v. Harridge*, 2 Saund. 634, note.

5. *State v. Peck*, 58 Me. 123; *Sherwood v. Johnson*, 1 Wend. (N. Y.) 443; *Gale v. Reed*, 8 East 80.

General Allegation of Fraud Held Sufficient. — In an action against a railroad company for an injury to a person traveling on a turnpike which the railroad company was required by its charter not to render dangerous, the declaration alleged that the defendant had constructed its road so that traveling on the turnpike was dangerous, to which there was a plea that a committee appointed under the charter to determine whether or not the road had been properly constructed had approved of the manner in which the construction had been carried out. A replication averring generally that the fraud of the defendant had conduced to the judgment of the committee was held sufficient. *Durand v. New Haven, etc., R. Co.*, 42 Conn. 211. But see *Kellogg v. Kimball*, 138 Mass. 441.

6. *State v. Peck*, 58 Me. 123; *Hughes v. Smith*, 5 Johns. (N. Y.) 169; *Arlington v. Merricke*, 2 Saund. 410, note 4; *Shum v. Farrington*, 1 B. & P. 640; *Barton v. Webb*, 8 T. R. 459.

Repetition of Declaration. — Where the condition of a bond is set forth in the declaration, and the breaches are assigned therein, a general replication

(5) *Departure*. — Although the replication should strengthen and fortify the declaration in all its essential allegations,¹ it cannot amend the declaration, and should not, in any material matter, depart from the cause of action set out therein, with regard to either the facts or the parties.²

is sufficient, and to repeat in the replication the assignment of breaches is useless tautology. *Conover v. Gatewood*, 2 A. K. Marsh. (Ky.) 567.

1. *Fowler v. Macomb*, 2 Root (Conn.) 388; *Paine v. Fox*, 16 Mass. 129; *Keay v. Goodwin*, 16 Mass. 1; *Darling v. Chapman*, 14 Mass. 101; *Salt Lake City Nat. Bank v. Hendrickson*, 40 N. J. L. 52; *Wyman v. Mitchell*, 1 Cow. (N. Y.) 316; *Hallett v. Slidell*, 11 Johns. (N. Y.) 56; *Bame v. Drew*, 4 Den. (N. Y.) 287; *Troup v. Smith*, 20 Johns. (N. Y.) 33; *Carpenter v. McClure*, 40 Vt. 108; *U. S. v. Morris*, 1 Paine (U. S.) 209, 26 Fed. Cas. No. 15,816; *Collett v. Dickinson*, 26 W. R. 403; *Long v. Jackson*, 2 Wils. C. Pl. 8.

2. See generally article DEPARTURE, vol. 6, p. 460, and see the following cases:

Alabama. — *Eskridge v. Ditmars*, 51 Ala. 245; *Winter v. Mobile Sav. Bank*, 54 Ala. 172; *Morris v. Beebe*, 54 Ala. 300; *Smith v. Kirkland*, 81 Ala. 345; *Turner Coal Co. v. Glover*, 101 Ala. 289; *Culberson v. American Trust, etc., Co.*, 107 Ala. 457; *Christian v. Niagara F. Ins. Co.*, 101 Ala. 634; *McAden v. Gibson*, 5 Ala. 341; *George v. Mobile, etc., R. Co.*, 109 Ala. 245; *Louisville, etc., R. Co. v. Markee*, 103 Ala. 160; *Davis v. Miller*, 109 Ala. 589.

Colorado. — *Rocky Ford Canal, etc., Co. v. Simpson*, 5 Colo. App. 30; *Kan-
naugh v. Quartette Min. Co.*, 16 Colo. 341.

Connecticut. — *Rust v. Wilson, Kirby (Conn.)* 364; *Warren v. Powers*, 5 Conn. 380.

Illinois. — *Hite v. Wells*, 17 Ill. 88; *McConnell v. Kibbe*, 29 Ill. 483; *Collins v. Waggoner*, 1 Ill. 51.

Indiana. — *Yeatman v. Cullen*, 5 Blackf. (Ind.) 240; *Wells v. Teall*, 5 Blackf. (Ind.) 306.

Kentucky. — *Pollard v. Taylor*, 2 Bibb (Ky.) 234; *Harris v. Paynes*, 5 Litt. (Ky.) 105.

Maine. — *Pease v. McKusick*, 25 Me. 73.

Maryland. — *Richardson v. Hall*, 21 Md. 399.

Massachusetts. — *Larned v. Bruce*, 6

Mass. 57; *Sibley v. Brown*, 4 Pick. (Mass.) 137.

Michigan. — *Caldwell v. Gale*, 11 Mich. 77.

Mississippi. — *Fiser v. Mississippi, etc., R. Co.*, 32 Miss. 359; *McGavock v. Whitfield*, 45 Miss. 452; *Shoults v. Kemp*, 57 Miss. 218.

Montana. — *Gentry v. Barnett*, 6 T. B. Mon. (Ky.) 114.

New Hampshire. — *Thompson v. Fellows*, 21 N. H. 425; *Breck v. Blanchard*, 22 N. H. 303.

New Jersey. — *Bradley v. Johnson*, 45 N. J. L. 487; *Holmes v. Seashore Electric R. Co.*, 57 N. J. L. 502; *Berry v. Cahanan*, 7 N. J. L. 77; *Wilson v. Johnson*, (N. J. 1894) 29 Atl. Rep. 419.

New York. — *Benjamin v. De Groot*, 1 Den. (N. Y.) 151; *Dutton v. Holden*, 4 Wend. (N. Y.) 643; *Griswold v. National Ins. Co.*, 3 Cow. (N. Y.) 96; *Spencer v. Southwick*, 10 Johns. (N. Y.) 259; *Shippey v. Henderson*, 14 Johns. (N. Y.) 178; *Troup v. Smith*, 20 Johns. (N. Y.) 33.

North Carolina. — *Governor v. Hanrahan*, 4 Hawks (N. Car.) 44.

Pennsylvania. — *Burk v. Huber*, 2 Watts (Pa.) 306.

South Carolina. — *Tappan v. Harwood*, 2 Spears L. (S. Car.) 536; *Allen v. Mayson*, 3 Brev. (S. Car.) 207; *Lindsay v. Jamison*, 4 McCord L. (S. Car.) 93.

Tennessee. — *Haley v. McPherson*, 3 Humph. (Tenn.) 104.

Virginia. — *Beach v. Trudgain*, 2 Gratt. (Va.) 219.

United States. — *Wilson v. Codman*, 3 Cranch (U. S.) 193; *Burdell v. Denig*, 15 Fed. Rep. 397.

England. — *Brine v. Great Western R. Co.*, 2 B. & S. 402, 110 E. C. L. 402; *De Roo v. Foster*, 12 C. B. N. S. 272, 104 E. C. L. 272; *Bartlett v. Wells*, 1 B. & S. 836, 101 E. C. L. 836; *Meyer v. Haworth*, 8 Ad. & El. 467, 35 E. C. L. 442; *Wilders v. Stevens*, 15 M. & W. 208; *Perry v. Smith, C. & M.* 554, 41 E. C. L. 301.

Replications which are made to perform the offices of new special counts of complaint, by introducing matter already counted on and blending it

(6) *Duplicity*. — The replication must not contain two distinct matters, either of which would be an answer to the same plea, or it will be void for duplicity.¹ Several facts, however, may be

with issues tendered upon the entire complaint, are bad. *Highland Ave., etc., R. Co. v. South*, 112 Ala. 643.

1. *Owen v. Henderson*, 7 Ala. 641; *Hereford v. Crow*, 4 Ill. 423; *Rogers v. Burk*, 10 Johns. (N. Y.) 400; *McElroy v. Railroad Co.*, 7 Phila. (Pa.) 206; *Louisville, etc., R. Co. v. Sowell*, 90 Tenn. 17; *Craig v. Brown, Pet.* (C. C.) 443; *U. S. v. Gurney*, 1 Wash. (U. S.) 446; *Valarino v. Thompson*, 28 Fed. Cas. No. 16,810a; *Burnham v. Webster, Davies* (U. S.) 236, 4 Fed. Cas. No. 2,178; *Hart v. Rose, Hempst.* (U. S.) 238.

Denial of Promise and Release. — Where the defendants pleaded that a promise alleged in the declaration was made jointly by them and a third party, and not by them solely, and that the plaintiff had released the third party, a replication denying that the promise was made by the defendant solely, and denying the release, was held bad for duplicity, as a denial of either of these matters was sufficient to sustain the plaintiff's right to recover and to destroy the defense. *Tubbs v. Caswell*, 8 Wend. (N. Y.) 129.

Tender of Distinct Issues. — Replications presenting several distinct grounds in avoidance of a plea, totally independent of each other, tender distinct issues and compel several traverses and therefore are open to demurrer. *Phillips v. Willeson*, 2 Brev. (S. Car.) 478; *Downer v. Rowell*, 26 Vt. 397.

Denying Two Facts of Plea. — To a plea alleging that a note and an assignment were made without consideration, the plaintiff replied that neither the note nor the assignment was made without consideration. It was held on demurrer that the plaintiff could not traverse both allegations of the plea, but must take issue on the one or the other, both of the grounds taken in the defense being essential to the sufficiency of the plea. *McClintick v. Johnston*, 1 McLean (U. S.) 414.

Distinct Matters in Avoidance. — Where a replication contains two distinct matters in avoidance of a plea, either of which is a good and perfect answer, the defendant is not bound to demur for duplicity or to answer to both matters, but may take issue upon

either. *Gould v. Ray*, 13 Wend. (N. Y.) 633.

Negation of Allegations of Plea. — A replication is not open to the charge of duplicity where it simply denies the facts stated in the plea. *Calhoun v. Wright*, 4 Ill. 74.

It Is Unnecessary that the Averment Should Be Sufficient to Constitute a Defense in order to render the replication double. Where the defendant pleaded a prior suit in which he was summoned as trustee of the plaintiff, the replication was that he had commenced suit before the trustee process was served and also that the prior suit was not pending when the defendant's plea was filed. The replication was held double although one of the allegations did not contain matter enough to constitute a defense. *Wadleigh v. Pillsbury*, 14 N. H. 373.

One Answer in Replication. — Where but one answer is set up by the replication, the replication will not be held bad for duplicity. *Jordan v. Gillen*, 44 N. H. 65.

Safe Test of Duplicity. — The only safe test of duplicity is to see whether a single issue can be made to controvert the pleading by denying any one material fact. In an information charging the defendants with the usurpation of banking privileges the replication alleged that the evidences of debt issued by them were in the similitude of bank bills and also that they were intended to circulate as bank bills. It was held that no single rejoinder would dispose of the whole replication and that it was open to the objection of duplicity. *People v. River Raisin, etc., R. Co.*, 12 Mich. 389.

To a Plea of Performance of the Conditions of a Bond conditioned to keep a fair register of all warrants that might come into the hands of the defendant, and to furnish the plaintiff in certain months with a true copy of such register, the plaintiff replied that the defendant had not furnished the said copies at the times agreed, but had on the contrary fraudulently furnished the plaintiff with a false writing purporting to be properly abstracted from a fair register kept by him. The replication was held double because it

placed in issue by it where they amount to but one connected proposition,¹ and in such case the facts must have a relation to each other, and be so dependent and connected as to render it necessary to state them all so as to make out the point.²

assigned as many breaches as there were omissions to furnish the copies at the times agreed. It seemed to the court that it was to be considered a double plea if one issue could not determine all the issuable matters contained in it. The court said: "If that rule should be applied to the case at bar it seems to us to be clear that all the issuable matter in this replication could not have been determined by any single issue that could have been framed." *Austin v. Parker*, 13 Pick. (Mass.) 222.

Practice in Federal Courts. — Where the state practice permits it the plaintiff may have leave to reply double in the federal courts. *Valarino v. Thompson*, 28 Fed. Cas. No. 16,870a.

Duplicity — Vermont. — The common-law rule that plaintiff must confine himself to a denial of a single material fact was altered by Acts Vt. 1856, No. 8, § 3 (now Stat. Vt., § 1151); he may now deny all material facts alleged against him. *Austin v. Chittenden*, 32 Vt. 168; *Paddock v. Jones*, 40 Vt. 474.

General Denial of Several Pleas — Vermont. — A replication to several pleas denying "each and every material fact so by the said defendant pleaded as aforesaid" is not aided by force of Stat. Vt., § 1151. Such denial is permitted only as against matters pleaded in confession and avoidance. *Dibble v. Deerfield River Co.*, 69 Vt. 482.

1. *Owen v. Henderson*, 7 Ala. 641; *Tucker v. Ladd*, 7 Cow. (N. Y.) 450; *Patcher v. Sprague*, 2 Johns. (N. Y.) 466; *Pilcher v. Hart*, 1 Humph. (Tenn.) 526; *Clearwater v. Meredith*, 1 Wall. (U. S.) 25.

Facts Showing Fraud. — In an action of debt on a judgment the defendant pleaded a discharge under an insolvent act. The replication alleged fraud in procuring the discharge, fraud in concealing debts due to the defendant not inserted in his inventory, and perjury in swearing that the inventory was true. Any one of these fraudulent acts would, under the insolvent act, have invalidated the discharge, and therefore they could not in any aspect be considered as dependent or con-

nected facts. *Cooper v. Heermance*, 3 Johns. (N. Y.) 315.

Breaches of Condition of Bond. — Where the plaintiff, in his replication, assigns several distinct breaches of the condition of a bond, the replication is bad at common law. *Mooney v. Demeritt*, 1 N. H. 187; *African Co. v. Mason*, cited in *Stibbs v. Clough*, 1 Stra. 227; *Cornwallis v. Savery*, 2 Burr. 772.

Double Pleading — Mississippi. — By the Pleading Act of 1850 the rules of the common law in relation to double pleading were radically changed, and the provisions of that act prevented all objection to a replication denying generally or particularly each allegation contained in an answer setting forth new matter. *Joslin v. Caughlin*, 32 Miss. 104.

2. *Strong v. Smith*, 3 Cai. (N. Y.) 162; *Cooper v. Heermance*, 3 Johns. (N. Y.) 315.

Leading Case. — In *Robinson v. Raley*, 1 Burr. 316, which was an action of trespass, the defendant claimed a right of common, averring that the cattle alleged to be trespassing were his own, and that they were *levant* and *couchant* upon the premises and were commonable cattle. The replication traversed these facts, and was demurred to as being double. Lord Mansfield said: "'Tis true, you must take issue upon a single point; but it is not necessary that this single point should consist only of a single fact. Here the point is the cattle being entitled to common. This is the single point of the defense. But in fact they must be both his own cattle, and also *levant* and *couchant*, which are two different essential circumstances of their being entitled to common, and both of them absolutely requisite."

Facts Constituting One Ground of Reply to Plea of Statute of Limitations. — Where the replication alleged as an excuse for delay in not prosecuting a writ of error that the plaintiff was not a resident of the state at the time of the rendition of judgment, but that he was a resident of another state and had no notice of the original judgment, it was held that though these were several distinct facts they constituted but

Plea Divisible into Parts. — Where the plea is divisible in its nature the replication may contain distinct answers to the different parts of it.¹

Surplusage. — Averments in the replication which if pleaded separately would not be sufficient to avoid the plea are not considered as rendering the replication double, but as mere surplusage which will not vitiate the replication, because it may be struck out without injury.²

(7) *Alleging and Denying Legal Conclusions* — **Replication Must**

one ground of reply to a plea of the statute of limitations, and unless all these allegations had been set forth in the replication it would have been defective as furnishing no answer to the plea. *Galusha v. Cobleigh*, 13 N. H. 79.

To Plea of Accord and Satisfaction. — Where there was a plea of accord and satisfaction by the sale and conveyance of a tract of land, which it was alleged the plaintiff accepted and received in full discharge and satisfaction of his claim, the replication denied both the conveyance and the acceptance. It was held not improper to deny both, because the gist of the plea was the satisfaction of the claim; the substance of the replication was the denial of the satisfaction. *Deut v. Coleman*, 10 Smed. & M. (Miss.) 83.

Replication to Plea of Former Suit. — Where the replication was that the defendants were not impleaded to the number and term alleged; that the parties were not the same; that the former suit was not still depending, it was held that the replication was not double in the proper sense of the rule against duplicity. *Hosie v. McCann*, 2 Penny. (Pa.) 133.

In Quo Warranto Proceeding. — In an information in the nature of quo warranto to forfeit the charter of a corporation, it was held that setting out several distinct facts in the replication afforded no ground for a demurrer for duplicity, where all the facts aimed to make out the one ultimate fact of a violation of corporate duty. *Coon v. Plymouth Plank Road Co.*, 31 Mich. 178.

1. *Owen v. Henderson*, 7 Ala. 641.

Several Facts Set Up in Plea. — Where an agreement set up in a plea consists of several facts which, taken all together, constitute but one point in the defense, the replication will not be double for denying the agreement collectively as a single independent fact.

Holland v. Kibbe, 16 Ill. 133; *Steward v. Miller*, 17 Ill. App. 660.

2. *Kellogg v. Miller*, 6 Ark. 468; *Pilcher v. Hart*, 1 Humph. (Tenn.) 524.

Plea of Former Suit. — Where the defendant pleaded a former suit pending for the same cause of action, a replication which alleged both the ineffectuality of the former suit and its discontinuance after plea was held not chargeable with duplicity, because the point was that the former suit was ineffectual, and the rest was merely inducement and explanatory matter. *National Express, etc., Co. v. Burdette*, 7 App. Cas. (D. C.) 551.

Immaterial Averment Considered Surplusage. — Where the replication averred the refusal of the defendant to pay certain costs incurred by the plaintiffs, which was a sufficient reply to the plea, and then averred that afterwards the plaintiffs offered to receive principal and interest due on a note, which the defendant refused to pay, it was considered that the latter averment was immaterial and surplusage, which should never vitiate a plea in other respects good. *Hampshire Manufacturers Bank v. Billings*, 17 Pick. (Mass.) 87.

Immateriality of Date of Assignment. — Where the assignee of a duebill sued the maker thereof there was a plea of payment on November 18, before the assignment, and that the assignment did not take place as alleged on November 17, but after that. A replication averring that there was no payment by the defendant on November 18, before the assignment of the bill, and before it became due, and reiterating that the assignment did take place on November 17, as set forth, was held not open to a demurrer on the ground of duplicity, because, as it did not appear when the bill was due, the allegation that the assignment took place on November 17 was not material. *Hereford v. Crow*, 4 Ill. 423.

Allege Facts. — The replication must be a statement of facts, not merely the pleader's legal conclusions.¹

Traversing Matter of Law. — It is an invariable rule that the replication may not traverse a matter of law,² but there may be a

1. *McClellan v. Perry*, 37 Ill. App. 157.

Replication Treated as Demurrer. — In reply to a plea of coverture the plaintiff set up that "the cause of action set forth in the complaint is for the tort alleged to have been committed by the defendant, and if she be a married woman, as alleged in the plea, she is liable for said tort, and said plea is no answer to this action." This, though a mere conclusion or proposition of law, was proved upon and by the face of the complaint itself, and was held to emasculate the plea of coverture. *Britt v. Pitts*, 111 Ala. 401.

2. *Calvert v. Lowell*, 10 Ark. 147; *Rose v. Ruyle*, 46 Ill. App. 17; *Roberts v. Albright*, 2 *Greene* (Iowa) 120; *Holmes v. Seashore Electric R. Co.*, 57 N. J. L. 502; *Stickle v. Richmond*, 1 *Hill* (N. Y.) 77; *Richardson v. Orford*, 2 H. Bl. 182.

Reason for Rule. — "A denial of the law involved in the precedent pleading is, in other words, an exception to the sufficiency of that pleading in point of law, and is therefore within the scope and proper province of a demurrer and not of a traverse." *And. Steph. Pl.*, § 129.

Replication Admitting Facts but Denying Inference of Law. — To a declaration on a bond executed by the defendant there was a plea that the bond was given in a proceeding exclusively cognizable in bankruptcy by the District Court of the United States for the Eastern District of Pennsylvania, the defendant having been adjudicated a bankrupt in said court. The plaintiff replied specially denying that the proceeding was exclusively cognizable by the said District Court and averring that another District Court had jurisdiction to require of the defendant the execution of the said bond, and concluding to the country. It was held that the issue raised by the replication was one of law and not of fact, and could be regarded only as an informal demurrer. *Hubert v. Horter*, 81 Pa. St. 39.

Denial that Claims Could Be Subject of Set-off. — Where the plea was that certain demands contained in the first

count of a declaration had been pleaded as a set-off upon which judgment was recovered before a justice, a replication denying that the said demands were at the time of the commencement of the said action "such demands as by law could be set off in the said suit or action" was held bad for putting in issue matter of law instead of matter of fact. *Baldwin v. Walsworth, Hill & D. Supp.* (N. Y.) 340.

Averment that Certain Acts Were Not Criminal. — A defendant sued for false imprisonment pleaded that he made complaint under oath, setting forth certain facts, and that thereupon the justice issued his warrant, etc. In his replication the plaintiff averred that when the defendant made such oath he knew that the facts stated did not constitute a nuisance or other indictable offense. It was held that such replication was demurrable, it being the duty of the justice to construe the facts in point of law. *Booth v. Kurrus*, 55 N. J. L. 370.

Mistake of Sheriff. — In a suit upon a sheriff's bond, the first breach assigned in the declaration was that the defendant had goods out of which the sheriff could have levied the money and that he neglected and refused so to do. The second and third breaches were that having made a levy upon the goods, the sheriff neglected and refused to sell the same. It was set up in the plea that the plaintiffs made a suggestion under the statute that the sheriff could have collected the money thereon if he had exercised due diligence in executing the writ, and upon this suggestion an issue was formed and tried by jury, who returned a verdict for the defendant upon which judgment was rendered. The replication was that the matters, neglects, and defaults in the said three breaches assigned in the declaration were not the same as those mentioned in the plea in respect of which the defendant had recovered judgment. The court said: "We think the replication is bad on the ground that it raises an issue of law rather than one of fact. The matters in all three of the breaches were necessarily involved in the question of

traverse of an averment which consists of law and fact.¹

(8) *Traverses* — (a) *In General*. — There should be no traverse of matter that is not alleged except when the matter may be necessarily implied.²

Negative Pregnant. — The traverse should not be in such a form as to carry within it an affirmative, and thus leave it doubtful what is the gist of the issue tendered.³

due and proper diligence on the part of the sheriff in the execution of the *fi. fa.*" *Chapman v. Smith*, 16 How. (U. S.) 114.

Statute of Limitations. — A replication that a statute of limitations is not a bar to the plaintiff's right of action tenders an issue of law. *Tennessee Bank v. Armstrong*, 12 Ark. 602.

Consolidation of Railroad Stock. — Where a declaration averred that the defendant had agreed that stock of a particular railroad should be worth a certain price at a certain time and in a certain place, and the plea set up that, under a statute authorizing connecting railroad corporations to consolidate their stock and make one joint company of the roads thus connected, the stock of the railroad named was consolidated by the consent of the plaintiff with a second railroad named, it was held that a replication tendering an issue upon the question of the destruction of the first corporation and the rendering of the said stock worthless was bad, because if with the consent of the plaintiff there had been a consolidation of the roads, then it followed as a conclusion of law that the stock was destroyed and of no value. *Clearwater v. Meredith*, 1 Wall. (U. S.) 25.

Where There Is a Question of Law the replication should not transform it into an issue of fact. *Rosenberg v. McKain*, 3 Rich. L. (S. Car.) 145.

1. *Mystery of Grocers v. Canterbury*, 3 Wils. C. Pl. 214. In this case the plea was that owing to certain circumstances the right of presentation at the second turn to a certain church when vacant belonged to a certain body corporate. A replication which denied that it belonged to the said body corporate to present to the said church at the second turn when the same became vacant was held good, because the traverse was not to a mere matter of law, but rather to matter of right resulting from facts.

"*By Reason Whereof*." — Where the expression "by reason whereof," or

one to the like effect, in a plea introduces a consequence from the matter preceding, it is not traversable; for if it is the pleader's intention to question the facts from which the inference is drawn, the negation should apply to the facts themselves; and if the inference is in doubt, the proper course is to demur. *Beal v. Simpson*, 1 Ld. Raym. 408.

2. *Griswold v. National Ins. Co.*, 3 Cow. (N. Y.) 96; *Rex v. Kilderby*, 1 Saund. 312d, note 4; *Powers v. Cook*, 1 Ld. Raym. 63; *Gilbert v. Parker*, 2 Salk. 629.

Necessary Inference. — That which is necessarily understood, intended, and implied is traversable as much as if it were expressly alleged. *Meriton v. Briggs*, 1 Ld. Raym. 39; *Chambers v. Jones*, 11 East 406; *Haight v. Holley*, 3 Wend. (N. Y.) 258.

3. *Myn v. Cole*, Cro. Jac. 87; *Aubery v. James*, 1 Vent. 70.

Petition for Partition. — To a petition for partition of land there was a plea by the defendants that they were seized in fee in moieties. A replication that they were not seized in fee in moieties was held bad in that it did not directly deny such an interest as would entitle them to defend. *Loring v. Gay*, 9 Pick. (Mass.) 66.

Time Not Material. — Where a replication denies that a warrant is issued on a particular day, it tacitly admits that one was issued on some other day, and, if the day is not material, is bad as a negative pregnant. *Thompson v. Fellows*, 21 N. H. 425.

Attachment under Process. — Where the defendant justified taking certain goods under a writ of attachment directed to him as an officer, there was a replication that the defendant did not attach the goods by virtue of the writ. It was held bad, as it left the defendant uncertain as to whether the attachment or the writ would be contested. *Briggs v. Mason*, 31 Vt. 433.

Modern Doctrine. — In *Bell v. Tuckett*, 1 Dowl. N. S. 458, it was said by

Immaterial Allegations. — There should be no traverse of matter in the plea which is irrelevant¹ or insufficient in law.² And such is the rule where matter alleged in the plea is in inducement,³ even where the denial in the *absque hoc* of a special traverse of a plea is sufficient in law; but where such denial is insufficient in law, the inducement may be traversed.⁴

(b) **Traversable Allegations Not Denied.** — Where traversable matter is alleged in the plea and is not traversed by the replication, it is considered confessed.⁵

(c) **Protestation.** — Where traversable matter is passed over without a traverse, in order to enable the plaintiff to deny it in another suit, the pleader should make a statement that the matter is untrue, collateral to his plea.⁶

Coitman, J.: "With regard to the negative pregnant, although undoubtedly greater strictness was formerly exacted, a great relaxation with regard to such matters has been allowed recently."

1. *Thurman v. Wild*, 11 Ad. & El. 453, 39 E. C. L. 145; *Thompson v. Fellows*, 21 N. H. 425; *Rogers v. Burk*, 10 Johns. (N. Y.) 400, which was an action of covenant on an agreement to put up and inclose the frame of a house on or before October 1. The defendant pleaded that he did put up the frame on or before October 1, to wit, on June 1, and was ready and willing, and tendered and offered the plaintiff, to inclose, etc.; but that the plaintiff did not furnish the necessary materials to inclose the building. The plaintiff replied that he did furnish the materials according to his agreement, and did and performed all things on his part (as before stated in his declaration), yet the defendant, at the time and place mentioned in his plea, did not put up and raise the frame of the house, nor did he tender or offer to inclose, etc. On special demurrer this replication was held bad for traversing the time and place stated in the plea, which were immaterial.

Replications simply avoiding immaterial allegations of pleas are bad. *Highland Ave., etc., R. Co. v. South*, 112 Ala. 642.

2. *And. Steph. Pl.*, § 137.

3. *Wetherell v. Clerkson*, 12 Mod. 597; *Nelson v. Wheelock*, 46 Ill. 25.

4. *Wheelwright v. Beers*, 2 Hall (N. Y.) 391; *Hubbard v. Mutual Reserve Fund L. Assoc.*, 80 Fed. Rep. 681.

Insufficient Traverse of Inducement. — To an action of trespass for fishing in

the plaintiff's fishery, the defendant pleaded that the *locus in quo* was an arm of the sea, in which every subject of the realm had the liberty and privilege of free fishing. The plaintiff replied a prescription for the sole and several right of fishing, and traversed that every subject had the liberty and privilege of free fishing in the *locus in quo*. This was a bad traverse. *Richardson v. Orford*, 2 H. Bl. 182.

5. *Simmons v. Jenkins*, 76 Ill. 479, holding that where the defendant in replevin pleaded property in a third person and justification under execution, the absence of a traverse confessed the truth of the pleas.

6. *And. Steph. Pl.*, § 132.

Effect of Protestando. — The effect of the *protestando* is that in case the party making it succeeds in the point to be tried, he thereby saves to himself the liberty of disputing in any other suit the truth of the allegation which is protested against. *Richards v. Allen*, 1 Bibb (Ky.) 189; *Dills v. Stobie*, 81 Ill. 202.

Protestation Does Not Compel Defendant to Prove What Replication Confesses and Avoids. — In assumpsit on a promissory note the defendant pleaded infancy and the general issue. The replication to the plea of infancy was: "The plaintiff, protesting that defendant was not an infant as alleged in his plea, says that after he came of age he promised to pay said note," etc. It was held that under the issues formed there must be evidence in support of the replication showing a subsequent promise, because "the sole object of special pleading is to narrow the matters in dispute to a single point; but this object can never be attained if parties are

(d) **Tender of Issue.** — Wherever the replication is by way of traverse it should at the same time tender issue,¹ which should not be too narrow in its comprehension,² although on the other hand it must not be broader than the plea.³

(e) **Common Traverse.** — The common traverse should deny the allegation in the plea in the manner and form in which it is made, and it must be expressed negatively or affirmatively according to whether the plea is in the negative or affirmative.⁴

permitted to evade the effect of an admission, by a protestation against the truth of the very matter necessary to be admitted, before it can be avoided." *Dockery v. Day*, 7 Port. (Ala.) 518.

Contradictions Between an Averment and a Protestation afford no ground for a demurrer. *Hapgood v. Houghton*, 8 Pick. (Mass.) 451.

1. And. Steph. Pl., § 135.

Where a replication is demurrable on the ground that though it tenders an issue it is insufficiently pleaded, and the plaintiff elects to stand on it and not answer over, he has no right to take judgment on other issues until an appellate court has passed on the lower court's decision on the demurrer and reversed it. *Jordan v. Mewborn*, 8 Ark. 502.

2. And. Steph. Pl., § 139.

Traverse Too Narrow. — In an action of trespass on a common named, there was a plea that there were two commons lying open to each other and a prescriptive right in the defendant in both commons. A replication traversing the prescription in one common was held to be too narrow. *Morewood v. Wood*, 4 T. R. 157. See also *Hanna v. Rust*, 21 Wend. (N. Y.) 149.

3. *Griswold v. National Ins. Co.*, 3 Cow. (N. Y.) 96.

Traverse Too Extensive. — In an action on a bond conditioned for the payment of fifteen hundred pounds the defendant pleaded that part of the sum mentioned in the condition, "*scilicet* fifteen hundred pounds," was won by gaming, contrary to a statute, by which the bond became void. The plaintiff replied that the bond was given for a just debt, and traversed that the fifteen hundred pounds was won by gaming. On demurrer it was objected that the replication was bad because it made the sum parcel of the issue and obliged the defendant to prove that the whole sum of fifteen hundred pounds was won by gaming, whereas the statute avoided the bond

if any part of the consideration were on that account. It was held that there was no color to maintain the replication, for that the material part of the plea was that part of the money for which the bond was given was won by gaming, and that the "*scilicet* fifteen hundred pounds" was only form, of which the replication ought not to have taken any notice. *Coleborne v. Stockdale*, 8 Mod. 58.

4. And. Steph. Pl., §§ III, 128; *Martin v. Smith*, 6 East 555.

Replication to Plea of Nul Tiel Record.

— As the existence of a record is denied by a plea of *nul tiel record*, the replication should aver its existence. *Beale v. Buchanan*, 9 Pa. St. 123.

Replication Dealing with Negative Plea.

— In an action of debt upon two promissory notes the plea averred that both notes were executed by the defendant upon his subscription to the capital stock of a bank, and that at the time of the commencement of the suit there were no debts existing against the bank nor against its assignees. The replication, which admitted the averment of the plea as to execution, but said "it is not true that at the time of the commencement of this suit there were no debts," etc., as alleged in the plea, was held bad for the reason that it attempted to throw on the defendant the proof of the negative, and sought to traverse a negative by a negative. *Ryan v. Vanlandingham*, 25 Ill. 128.

Assertion of Denial in Plea. — It seems that in *Maryland* a replication which asserts what the plea denies in the very language of the plea is bad. *State v. Logan*, 33 Md. 1.

Proof under Denial. — Where a replication not only traversed an allegation of property in the defendant in attachment, but averred the property to be in the plaintiff, it was held unnecessary to show absolute property in the plaintiff in support of the replication, as the averment was merely surplusage, the traverse being complete with-

(f) **Special Traverse.** — A special traverse, instead of simply denying or affirming and tendering issue, must have an inducement and a denial.¹

Inducement. — The inducement may consist either of new affirmative matter inconsistent with the plea² or of a mere repetition of the allegations of the declaration coupled with an allegation that they occurred of the defendant's own wrong.³ It must be in itself a sufficient answer in substance to the plea, that is, it must necessarily involve a negative of the fact traversed,⁴ but it must not consist of a direct denial, nor should it be in the nature of a confession and avoidance.⁵

out it. *Outcalt v. Durling*, 25 N. J. L. 443.

1. And. Steph. Pl., § 123.

Definition of Special Traverse. — In *Day v. Essex County Bank*, 13 Vt. 97, the court, in holding that an informal replication was good enough for a bad plea, said: "The special inducement of the traverse and the negative or *absque hoc* clause, instead of being, as they should be, the one the affirmative and the other the negative of the same proposition, are wholly independent of each other. A special traverse in its simplest form is not very unlike some of the Eastern forms of speech found in the Holy Scriptures: 'Thou shalt die and not live;' 'He shall see for himself and not another.' There are found many modes of speech among the ancient Greeks not very dissimilar. It consists of an affirmative not compatible with the adversary's former pleading, and a negative in direct contradiction to it."

Approved Precedents of the special traverse will be found in *Wilcox v. Kinzie*, 4 Ill. 218; *Haviland v. Fidelity Ins., etc., Co.*, 108 Pa. St. 236.

2. And. Steph. Pl., § 123.

Replication Setting Up New Matter. — In an action against an executor for services rendered to the testator, the defendant pleaded specially that the claim had been presented by the plaintiff and disallowed in the Orphans' Court on a settlement of the executor's account. To this plea the plaintiff made a special traverse, alleging as inducement his withdrawal of the claim from the court before it had been considered, *absque hoc* the allegation in the plea that the claim was disallowed. The replication was held good, as it consisted in substance of new matter, properly set up, against the adjudication upon the claim, which if legally

sufficient constituted a good reply to the plea. *Haviland v. Fidelity Ins., etc., Co.*, 108 Pa. St. 236.

The Substance of a Special Traverse is the matter contained in its inducement, which always consists of new matter constituting a full defense to the pleading which it assumes to answer, and which new matter the plaintiff must be ready to prove. *McWilliams v. King*, 32 N. J. L. 21.

3. And. Steph. Pl., § 123.

4. And. Steph. Pl., § 126.

Insufficient Inducement. — Where the matter alleged by way of inducement is insufficient of itself to support the traverse, the replication will be bad. *State Mut. F. Ins. Co. v. Arthur*, 30 Pa. St. 315.

5. Instance of Improper Denial. — In *Hubbard v. Mutual Reserve Fund L. Assoc.*, 80 Fed. Rep. 681, the plea alleged that in and by an application for insurance it was inquired of the assured: "State fully your occupation, profession, or trade. State kind of business and duties." To which the assured answered as follows: "Banker and broker." "Whereas the defendant avers that in truth and in fact the occupation, business, and trade of said George W. Hubbard [the assured] was not, at the date of said application, that of a banker and broker." The replication was: "And the said plaintiff saith that for everything by the said defendant corporation secondly above pleaded *precludi non*, because she says that the occupation, profession, and trade of said Hubbard at said time was that of a banker and broker (without this, said answers are by said certificate of membership or policy of insurance warranties on the part of said Hubbard), and of this the said plaintiff puts herself on the country." It was held that the inducement con-

Certainty. — There does not appear to be the same necessity for certainty in an inducement as there is in pleadings generally, because it is seldom traversable, the defendant being compelled to adhere to his own allegation which has been traversed.¹

Denial. — The negative portion of the special traverse commences with the words "without this," being the literal translation of *absque hoc*, which is the technical name of this part of the special traverse.²

Necessity of Joining Issue. — If the special traverse is good, there must be a joinder of issue thereon.³

(g) **Traverse de Injuria.** — A traverse *de injuria* is different from the simple form in that it denies generally, not in the words of the averment traversed,⁴ and puts in issue all those facts set forth in the plea which are material to the defense,⁵ thereby throwing upon the defendant the burden of proving so much of the plea

sisted of a direct denial and that the special traverse was improper.

Confession and Avoidance. — Where the replication does not confess the contract stated in the plea, but confesses a contract differing in a material part from that pleaded, it cannot be open to a demurrer assigning for cause that the replication confesses and avoids and yet traverses the contract with an *absque hoc*. *Grover v. Gaunt*, 6 Smed. & M. (Miss.) 317.

1. *Kinzie v. Farmers', etc.*, Bank, 2 Dougl. (Mich.) 105, holding that where the plea alleged that the indorsement on a promissory note was made in Illinois, and that the measures required by the laws of that state to charge an indorser had not been taken, a replication which averred in its inducement that the contract of indorsement was made in another state, and merely admitted that the defendant wrote his name on the back of the note in Illinois, not that the contract of indorsement was made there, was sufficient.

2. And. Steph. Pl., § 123.

Similar Expressions may be used to introduce the negation. *Bennet v. Filkins*, 1 Saund. 21; *Walters v. Hodges*, 2 Lutw. 1625.

Effect of Insufficient Traverse. — A replication without a proper denial under the *absque hoc* is merely a common traverse in effect. *Hubbard v. Mutual Reserve Fund L. Assoc.*, 80 Fed. Rep. 681.

Traverse Must Be to Material Point. —

To a declaration in trespass for false imprisonment, the defendant justified under an execution upon a judgment alleged to be in full force at the time

when execution issued. The replication was that the judgment had been previously paid, concluding with a special traverse, "without this, that at the time when the arrest was made the said judgment was in full force and in no part satisfied." It was held bad because the traverse was not taken to a material point. *Breck v. Blanchard*, 20 N. H. 323.

Immaterial Traverse. — Where the traverse is not to the substance of the action and is informal, it may be disregarded in the replication. *Wheelwright v. Beers*, 2 Hall (N. Y.) 391.

3. *Thomas v. Black*, 8 Houst. (Del.) 507.

4. And. Steph. Pl., § 122.

The Ordinary Language of This Traverse is in trespass that the defendant, etc., "of his own wrong, and without the cause by him in his said plea alleged, committed the said trespasses in the introductory part of that plea mentioned," etc., and in point of form it would be defective unless the words "without the cause alleged" be added. In assumption the merely formal words should be changed. 1 Chitty on Pleading 639.

5. *Ruckman v. Ridgefield Park R. Co.*, 38 N. J. L. 98; *Wallace v. Hibbs*, 4 Phila. (Pa.) 154, 17 Leg. Int. (Pa.) 397; *Downer v. Woodbury*, 19 Vt. 329; *George v. West*, 52 Vt. 645; *Braley v. Burnham*, 47 Vt. 717; *Clark v. Downing*, 55 Vt. 259; *Erskine v. Hohnbach*, 14 Wall. (U. S.) 613; *Phillips v. Howgate*, 5 B. & Ald. 220, 7 E. C. L. 74; *Barnes v. Hunt*, 11 East 451; *Lucas v. Nockells*, 10 Bing. 157, 25 E. C. L. 71; *Renno v. Bennett*, 3 Q. B. 768, 43 E. C.

as constitutes a defense to the action,¹ and permitting the plaintiff to produce evidence that tends to disprove any of the facts alleged in the plea.²

Multiplicity. — It is not good when it would cause the issue at bar to be multifarious by being put in as an answer to more than one distinct and independent issue.³

(9) *Confession and Avoidance.* — The confession and avoidance must give color, that is, confess the matter adversely alleged, to such extent at least as to admit some apparent right in the opposite party which requires to be encountered and avoided by the allegation of new matter.⁴ Where the replication attempts to

L. 965; Davis v. Chapman, 2 M. & G. 921, 40 E. C. L. 693; Crogate's Case, 8 Coke 66.

Assault and Battery. — Where the plea averred that the assault and battery were committed in defense of the possession of the dwelling house of the defendant, and the plaintiff replied *de injuria*, it was argued that this traverse put in issue the defendant's title and his seizin of the dwelling house; but it was not considered that the title was material, because the replication only denied the defendant's possession and that the assault and battery were committed in defense of his possession. Sampson v. Henry, 11 Pick. (Mass.) 379.

1. Downer v. Woodbury, 19 Vt. 329; Erskine v. Hohnbach, 14 Wall. (U. S.) 613.

Questions of Law and Fact. — Where the plaintiff complained of an aggravated assault committed on him by the defendant, the mate of a ship, in which the plaintiff was one of the crew, the defendant pleaded that he was bound to obey the orders of the ship's master, which were executed by him without unnecessary violence. It was held that *de injuria* was proper, because the plea involved mixed questions of law and fact material to the defense. Frost v. Hammatt, 11 Pick. (Mass.) 70.

2. Ayres v. Kelley, 11 Ill. 17; Ambrose v. Root, 11 Ill. 497.

Plea Son Assault Demesne. — By replying *de injuria* the plaintiff is enabled to show that the battery of the defendant was excessive. Fisher v. Bridges, 4 Blackf. (Ind.) 518; Curtis v. Carson, 2 N. H. 539.

Plea Molliter Manus Imposuit. — Under *de injuria* it is competent for the plaintiff to show that the defendant used an excess of force. Bennett v. Appleton,

25 Wend. (N. Y.) 371; Hannen v. Edes, 15 Mass. 347.

Pleading in Short. — Where pleading in short is permitted, if a party to a suit chooses to receive the word "replication" instead of a replication, it will be held equivalent to a replication suitable to the defense made; thus, where the defendant pleaded *son assault demesne*, the word "replication," instead of a full replication *de injuria* with a conclusion to the country, was held sufficient. Boyers v. Pratt, 1 Humph. (Tenn.) 90.

3. Wallace v. Hibbs, 4 Phila. (Pa.) 154, 17 Leg. Int. (Pa.) 397; Berry v. Cahanan, 7 N. J. L. 77, holding that it is good only where a number of facts pleaded, when combined or grouped together, are necessary to make up the issue upon one point, or where a number of facts are stated, all of which taken together are necessary to make up a single issue for trial; Crogate's Case, 8 Coke 66; Selby v. Bardons, 3 B. & Ad. 2, 23 E. C. L. 9; Purchell v. Salter, 1 Q. B. 197, 41 E. C. L. 501, holding that this form of replication cannot be objected to as multifarious if the facts stated in the plea, though they are several, constitute one ground of defense, for the rule of pleading is not that the issue must be joined on a single fact, but that it must be joined on a single point of defense.

More Latitude than in an Ordinary Traverse is allowed in *de injuria*. It seems to be "meant to bring many different but not diverging rays into one legal focus." Curry v. Hoffman, 5 Clark (Pa.) 274.

4. Dunklee v. Goodenough, 65 Vt. 257.

Replication to Plea of Former Recovery. — Where the replication to a plea of former recovery admitted the judgment, but attempted to give to it a

avoid the facts asserted in the plea, the replication may set up as many facts as are necessary to make up the point which avoids the plea.¹

(10) *New Assignment*. — The new assignment must specially designate a cause of action within the scope of the declaration and other than the one covered by the plea.²

Certainty Required. — Since in some aspects a new assignment may be considered as a fresh declaration, the plaintiff should be as particular in framing it as in framing the declaration, if not more particular.³

more limited effect than was claimed for it by the defendant, and then, whatever its character might have been, avoided it wholly by alleging a discontinuance, it was held to be more like a denial and avoidance than a confession and avoidance, which is not allowable. *Dunklee v. Goodenough*, 65 Vt. 257.

Immaterial Matter Set Up in Avoidance.

— To a plea setting up a recovery for the same causes of action as specified in a declaration, a replication is bad if it virtually concedes that the plea is true, but sets up entirely immaterial matter to avoid its effect. *Baldwin v. Walsworth, Hill & D. Supp.* (N. Y.) 340.

Admission of Plea of Justification. — In an action for false imprisonment the replication admitted the arrest and imprisonment to have been made under color of process as alleged in the plea, but it set up new matter which if true showed that the plaintiff was not liable to be arrested, and thereby avoided the plea. It was held that a traverse was not necessary. *Love v. Humphrey*, 9 Wend. (N. Y.) 204.

Informal Confession. — Where the defendant pleaded a discharge from his debts under a statute, setting out the provisions thereof and the proceedings under it, and that the debts sued for were contracted in New York after the statute went into operation, and that the defendant had ever since resided there, the replication was that at the time of contracting the debt and making the pretended discharge the plaintiffs were residents in New Jersey. The defendant demurred specially that the replication attempted to deny matter alleged in the plea and also to allege new matter in avoidance thereof, and that it neither confessed nor denied the matter contained in the plea. It was held that a more formal confession was unnecessary; constructively

the plea was confessed. *Ballantine v. Haight*, 16 N. J. L. 196.

1. *Russell v. Rogers*, 15 Wend. (N. Y.) 351; *Selby v. Bardons*, 3 B. & Ad. 2, 23 E. C. L. 9.

Replication Containing More Facts than Necessary. — Where it was necessary for the plaintiffs either to deny certain facts or such of them as would defeat the defense or to set up other facts in avoidance of the pleas to maintain the cause of action set forth in the declaration, it became necessary for them to state facts which would show fraud. It was held that though possibly the replication contained more facts than necessary, yet a superfluity did not vitiate. *Russell v. Rogers*, 15 Wend. (N. Y.) 353.

2. *Spencer v. Bemis*, 46 Vt. 29.

Not Substitution of New Grievance. —

A new assignment does not substitute a new cause of action, but merely states the original one with more particularity, or assigns as a substantive ground for damages what the declaration has alleged only as aggravation. *Warner v. Hoisington*, 42 Vt. 94.

As Waiver. — A new assignment is a waiver of the cause of action justified by the plea to which the new assignment is made, but such waiver will be regarded only in considering the questions arising on those pleadings, and cannot be used as causes of demurrer or as matter of evidence in issues joined on other pleadings. *Bartlett v. Prescott*, 41 N. H. 493.

3. *Bac. Abr.*, tit. Trespass, I, 4, 2; 1 *Chitty on Pleading* 667; *And. Steph. Pl.*, § 134.

Evasive Plea. — Where there is an evasive plea the plaintiff may avoid the effect of it by restating his cause of action with more particularity and certainty, and so as to meet and thwart the particular defense set up. *Troup v. Smith*, 20 Johns. (N. Y.) 33; *Berry v. Vreeland*, 21 N. J. L. 183.

Necessary Allegation. — It must be specifically alleged that the grievances of which complaint is made in the new assignment are other than and different from those mentioned in the plea;¹ and while a new assignment does not necessarily amount to an admission of the facts covered by the plea, it should be an assertion that the matter of it is not that in respect of which the plaintiff is seeking to recover.²

Pleas to New Assignment. — As the parties are in the same position as if the pleadings were begun *de novo*, the defendant should plead to the new assignment as to an original declaration, leaving out of question his previous plea.³

d. CONCLUSION — (1) *In General.* — Replications may either conclude to the country or with an offer to verify. If the conclusion be to the country it should be, "and this he the said plaintiff prays may be inquired of by the country;"⁴ if with an offer to verify, "and this he the said plaintiff is ready to verify."⁵

1. *Berry v. Vreeland*, 21 N. J. L. 183; *Hanna v. Rust*, 21 Wend. (N. Y.) 149.

Reaffirmation of Declaration. — Where the new assignment does not distinguish the real cause of complaint as being different from the one covered by the plea, and merely reaffirms those causes of complaint set up in the declaration, it will be useless and improper. *Berry v. Vreeland*, 21 N. J. L. 183.

Replication Denying Plea. — In trespass for false imprisonment, the plea professed to justify every specification of trespass laid in the declaration. In the replication the plaintiff alleged that the defendant discharged the plaintiff from arrest and then detained him, and in substance denied that the claimed justification of the defendant covered all the trespasses set forth in the declaration. It was held that this was not, either in form or substance, a new assignment of another and different trespass from that which the declaration set forth. *Kent v. Miles*, 65 Vt. 582.

2. *Brancker v. Molyneux*, 1 M. & G. 710, 39 E. C. L. 615; *Norman v. Westcombe*, 2 M. & W. 349.

3. *Lambert v. Stroother*, Willes 225; *Heydon v. Thompson*, 1 Ad. & El. 210, 28 E. C. L. 71; *Dana v. Bryant*, 6 Ill. 104; *Tribble v. Frame*, 7 T. B. Mon. (Ky.) 529.

Several Pleas. — Where several pleas are allowed, it seems that the defendant, having the original rights of a de-

fendant restored to him by the new assignment, may plead as many pleas as he thinks necessary. *Crockett v. Lashbrook*, 5 T. B. Mon. (Ky.) 530.

Plea of Not Guilty. — The plea of "not guilty" to a new assignment raises precisely the same issue as if the matter newly assigned had been set out in the declaration and "not guilty" pleaded thereto. *Brunswick v. Pepper*, 2 C. & K. 685, 61 E. C. L. 685.

4. *Archbold's Civ. Pl.* 252.

Informal Conclusion. — Where the replication concluded with, "of this he puts himself on the country," instead of, "this he prays may be inquired of by the country," it was held to be informal, but the plaintiff was allowed to amend "without any terms." *Hartwell v. Hemmenway*, 7 Pick. (Mass.) 117.

5. *Archbold's Civ. Pl.* 252.

An Offer to Verify or an averment is synonymous with verification at common law, but in order to avoid confusion with the more modern use of verification, which is that the truth of the pleading should be sworn to, the expression "offer to verify" or "averment" is used herein when intended to be in opposition to "to the country."

Use of "Certify" for "Verify." — Where the conclusion was, "this he is ready to certify," it was held that *certificare* was equivalent to *verificare*. *Harvey v. Stokes*, Willes 6.

Formal Conclusion Unnecessary. — In *Maryland* it seems that a replication is sufficient regardless of mere form, and

Prayer for Judgment. — There should be a general prayer for judgment in some form.¹

Statutory Requirements. — Where it is required by statute that the replication should be signed, or that it should be accompanied by an affidavit of its truth, those requirements should be complied with.²

Difficulty in Selecting Proper Conclusion. — In many cases no certain rule can be laid down for selecting the proper conclusion. It may therefore be taken as a safe rule that where a defendant cannot take any new or other issue in his rejoinder than the matter that he had theretofore pleaded without departing from his plea, or where the issue on the rejoinder would be in substance the same as on the plea, the plaintiff should conclude to the country.³

that it is not necessary that there should be any formal conclusion. *Cumberland, etc., R. Co. v. Slack*, 45 Md. 161.

1. *Vivian v. Jenkin*, 3 Ad. & El. 741, 30 E. C. L. 198. It was said by Lord Denman, C. J., in this case: "No case seems to have doubted but there must be a prayer of judgment in some form, though many cases have occurred as to distinctions in what form it is to be."

Informal Prayer. — If the prayer be informal, as where damages are not prayed, the court will *ex officio* give such judgment on the whole record as ought to be given, without regard to imperfections in the prayer. *Pitt v. Knight*, 1 Saund. 98; *Barnes v. Gladman*, 2 Lev. 19; *Shelley v. Wright*, Willes 9; *Le Bret v. Papillon*, 4 East 502.

Absence of Prayer. — At common law an omission to pray judgment on the replication was a cause of special demurrer. *Vivian v. Jenkin*, 3 Ad. & El. 741, 30 E. C. L. 198.

Hilary Rules. — It is said that under the Hilary Rules, where the replication is in maintenance of the whole action, it is unnecessary to use any prayer for judgment. *Vivian v. Jenkin*, 3 Ad. & El. 741, 30 E. C. L. 198.

2. **Counsel's Signature.** — Where it was required by statute that the signature of counsel should be attached to special pleas, it was held that general replications merely repeating allegations of the declaration and not alleging new facts need not be signed. *Manhattan Co. v. Miller*, 2 Cai. (N. Y.) 60; *Alexander v. Miller*, 10 Wend. (N. Y.) 603; *Pumpelly v. Crosby*, 8 Johns. (N. Y.) 322.

Affidavits of Truth of Replications —

Kentucky. — Under Acts Ky. 1801 and 1812, requiring pleas traversing the execution and assignment of notes to be sworn to, it was held that where the plea set off a claim on a note to the plaintiff's demand, unless the replication was sworn to the defendant need not prove the execution and assignment of the note on which he claimed a set-off. *Black v. Crouch*, 3 Lit. (Ky.) 226.

Sworn Replication to Plea of Usury. —

Under a statute of *Tennessee* a plea of usury properly verified by oath was considered evidence for the defendant unless a replication denying the truth of the plea was sworn to. *Williams v. Hickman*, 1 Yerg. (Tenn.) 494.

Replications of Non Est Factum. — It has been held that where it is provided by statute that no plea of *non est factum*, unaccompanied by an affidavit of truth, shall be permitted, the statute does not apply to replications setting up *non est factum*. *Parks v. Greening*, Minor (Ala.) 178.

Replication in Effect Plea of Non Est

Factum — Tennessee. — In a suit brought by the shipper of a horse against the carrier for injury, the latter pleaded specially a contract limiting the value of the horse to one hundred dollars. A replication which in effect was a plea of *non est factum* was put in but was not sworn to, and was held bad for that reason among others. *Louisville, etc., R. Co. v. Sowell*, 90 Tenn. 17.

3. *Patcher v. Sprague*, 2 Johns. (N. Y.) 462, holding that where the replication admitted the first of three dependent facts making but one defense, and took issue directly upon the other facts, a conclusion to the country had

(2) *To the Country*. — Where there is an affirmative in the plea and a negative in the replication, or *vice versa*, the conclusion of the replication must be to the country,¹ though the affirmative and negative are not in express words but only tantamount thereto.²

Denial of Substance of Plea. — Wherever the whole substance of the plea is denied in the replication it seems that it must conclude to the country,³ even though it has an introductory inducement and an *absque hoc*.⁴

Matter of Fact and Law. — Where matter of record mixed up with matter *in pais* is alleged in the replication and is used only as an inducement to the facts relied on in avoidance of the plea, the conclusion should be to the country.⁵

been very properly adopted by the plaintiff. Had he concluded with a verification it would only have led to prolixity, and the issues must eventually have been substantially the same. The action was in trespass, and the plea was justification in that the goods were taken by an officer under a warrant regularly issued and delivered to him and that the defendant acted in aid and by the command of the officer. *Citing Strong v. Smith*, 3 Cal. (N. Y.) 160.

1. *Boone v. Shackelford*, 4 Bibb (Ky.) 67; *Morris v. Wadsworth*, 11 Wend. (N. Y.) 100; *Charleton v. Finney*, T. Raym. 98; *Trapaud v. Mercer*, 2 Burr. 1022.

The Reason for the Rule is that otherwise the pleading would continue *ad infinitum* and would end in the absurdity of never resulting in any triable issue. *Charleton v. Finney*, T. Raym. 98.

Exception to Rule. — In an action of debt on bond against heirs and devisees the defendants pleaded *riens per descent* under a statute. The replication that the defendants had assets before suit commenced concluded with a verification. There was a demurrer thereto, contending that where there was an affirmative on one side and a negative on the other, the conclusion should be to the country. It was held that this was an exception to the general rule, and that although the replication negated one of the periods in the plea, it must conclude with a verification. *Labagh v. Cantine*, 13 Johns. (N. Y.) 272.

2. *Carthrae v. Clarke*, 5 Leigh (Va.) 268; *Alexander v. Lane*, Yelv. 137.

Contradictory Affirmatives. — Although

two affirmatives make an issue when the second is so contrary to the first that it cannot in any way be true, it is a most awkward and unsatisfactory way of making up an issue. Thus, where the plea was that the defendant had diligently and without fraud or waste discharged the duties of an administrator, and the plaintiff replied that the defendant had been guilty of negligence in his duties and concluded with a verification, the replication was held bad. Regularly the plaintiff should have negated the affirmation of diligence and have concluded to the country. *Walker v. Johnson*, 2 McLean (U. S.) 92.

3. *Sampson v. Henry*, 11 Pick. (Mass.) 386; *Snyder v. Croy*, 2 Johns. (N. Y.) 428; *Morris v. Wadsworth*, 11 Wend. (N. Y.) 100; *Spencer v. Bemis*, 46 Vt. 29; *Clarke v. Glass*, cited in *Robinson v. Raley*, 1 Burr. 319; *Boyce v. Whitaker*, 1 Dougl. 94.

4. *Snyder v. Croy*, 2 Johns. (N. Y.) 428; *Haywood v. Davies*, 1 Salk. 4; *Robinson v. Raley*, 1 Burr. 317.

5. *Share v. Becker*, 8 S. & R. (Pa.) 239; *Com. v. Jackson*, 2 Va. Cas. 501; *Peter v. Stafford*, Hob. 244; *Eshler v. Smallite*, Say. 268.

Another Action Pending — Different Causes of Action. — Where a replication denying the existence of a record relied on by the plea as a defense in effect affirmed that if there was another suit the record of which would show it to be identical, in point of fact the causes were different, it was held that the conclusion should be to the country so as to permit the plaintiff to show that the causes were dissimilar. *Williams v. Spears*, 11 Ala. 138.

On a Plea of Former Recovery in an

(3) *Offer to Verify*. — When one of several facts alleged in the plea is selected and denied, the replication must conclude with an averment.¹

Special Traverses in Replication. — Replications which substantially adopt the form of a special instead of a common traverse must conclude with an averment.²

New Affirmative Matter in Replication. — Whenever the replication contains new affirmative matter material to support the plaintiff's action, it should conclude with an averment,³ in order that the

action of trespass, the plaintiff replied that the trespasses mentioned by the defendant in his plea and the trespasses charged by the plaintiffs were not the same trespasses, but different ones, and concluded to the country, and the replication was held good. *Snyder v. Croy*, 2 Johns. (N. Y.) 428.

1. *Smith v. Dovers*, 2 Dougl. 428, holding, in an action on a bill of exchange where the plea consisted of two distinct allegations, first, that there was a corrupt agreement, and, second, that the bill was given in consideration of that corrupt agreement, and where the replication denied only one fact, viz., that there was such a corrupt agreement, that the replication should conclude with an averment. *Citing Baynham v. Matthews*, 2 Stra. 871; *Clarke v. Glass*, cited in *Robinson v. Raley*, 1 Burr. 319; *Sandford v. Rogers*, 2 Wils. C. Pl. 113.

2. *McWilliams v. King*, 32 N. J. L. 21, an action of trespass *quare clausum fregit*, where the first plea averred that the plaintiff was the defendant's tenant at will and the second that he was his tenant at sufferance, and each of them stated that the defendant, such tenancy having expired, took proceedings before a justice under statute and turned the plaintiff out of the premises in question under a writ of possession. The replications set forth a lease of the premises from the defendant to the plaintiff for a term of years which had not expired, denying the tenancies respectively alleged in the pleas. It was held that a conclusion with a verification was proper. The court said: "The substance of a pleading of this character is the matter contained in the inducement, and which always consists of new matter constituting a full defense to the case made by the pleading which it assumes to answer, and such new matter the party who avers it must tender himself ready to prove. Upon general principles this

was the rule, and the practice so prevailed until it was altered by rule of court in England."

Reason of Rule. — The reason is that in such special traverses "as contain new matter in the inducement the introduction of that new matter will give the opposite party a right to be heard in answer to it if the *absque hoc* be immaterial, and consequently makes a tender of issue premature; and on the other hand, with respect to such special traverses as contain no new matter in the inducement, they seem in this respect to follow the analogy of those first mentioned, though they are not within the same reason." And. Steph. Pl., § 135.

Rule Not Universally True. — Many instances may be mentioned where the conclusion in a replication of this character should be to the country; for example, where to a plea of accord and satisfaction the replication denies that the plaintiff received any satisfaction, there must be a conclusion to the country. *Hayman v. Gerrard*, 1 Saund. 103, note 1. See *McWilliams v. King*, 32 N. J. L. 21.

Hilary Rules. — It was provided by rules of court, 4 Wm. IV., that "all special traverses, or traverses with an inducement of affirmative matter, shall conclude to the country. Provided, that this regulation shall not preclude the opposite party from pleading over to the inducement when the traverse is immaterial."

3. *Frohock v. Pattee*, 38 Me. 103; *Metcalf v. Grover*, 55 Miss. 145; *McWilliams v. King*, 32 N. J. L. 21; *Hallett v. Slidell*, 11 Johns. (N. Y.) 56; *Hanna v. Rust*, 21 Wend. (N. Y.) 149; *Treasury Com'rs v. Brevard*, 1 Brev. (S. Car.) 11; *Wilson v. Codman*, 3 Cranch (U. S.) 193; *Smith v. Tanner*, 1 M. & G. 802, 39 E. C. L. 663; *Henderson v. Withy*, 2 T. R. 576; *Chandler v. Roberts*, 1 Dougl. 60; *Filewood v. Popplewell*, 2 Wils. C. Pl. 65; *Cowper*

defendant may have an opportunity to answer it.¹

Negative Nature of New Matter. — Where the new matter set up in the replication is merely negative there need be no averment,

v. Towers, 1 Lutw. 101; *Curry v. Stephenson*, 4 Mod. 376.

Replication Setting Up Statutory Liability. — To a declaration on a bond made by a woman, the plea was coverture. The replication set up facts which it was supposed would render her chargeable by force of a statute imposing upon married women a liability to answer for their contracts, and concluded to the country. It was held that a conclusion with an averment was necessary. *Bradley v. Johnson*, 45 N. J. L. 487.

Nonapplication of Rule. — Where the defendant cannot without a departure traverse or answer the new matter in the replication, it is said, in 1 Chitty on Pleading 672, that the replication may, *non obstante* the introduction of new matter, tender an issue to the country; as, in an action of debt on an award, if there be a plea of no award and a replication of an award, setting forth a breach, there may be a conclusion to the country, though one with an averment is most usual. *Citing Veale v. Warner*, 1 Saund. 327, note; *Seal v. Crowe*, 3 Lev. 165.

Replication Containing No New Matter. — The declaration in an action on the case stated that the defendant was negligent in failing to cover a hole dug by him in the street and not placing near it a fence to prevent accidents. The plea was that a sufficient fence was placed by the defendant. The replication contained the same facts as were stated in the declaration and concluded with an averment. It was held that it stated no new matter and should have concluded to the country. *Bindon v. Robinson*, 1 Johns. (N. Y.) 516.

New Assignment. — Where the replication is by way of new assignment it should conclude with an averment that the wrongs and causes of complaint alleged in it are other and different from those in the plea. *Berry v. Vreeland*, 21 N. J. L. 183.

Rule Not Affected by Statute—Virginia. — The provision of a statute requiring that special traverses shall conclude to the country does not in any way affect the rule that where new matter is introduced in the replication it must conclude with an averment. *Virginia F. & M. Ins. Co. v. Saunders*, 84 Va. 210.

1. *Filewood v. Popplewell*, 2 Wils. C. Pl. 65; *Henderson v. Withy*, 2 T. R. 576; *Curry v. Stephenson*, 4 Mod. 376; *Cowper v. Towers*, 1 Lutw. 101; *Hayman v. Gerrard*, 1 Saund. 103, note 1.

Form Prescribed by Statute. — Where a plaintiff corporation declared in assumpsit there was a plea of *nil tiel corporation*, to which there was a reply that it was incorporated by statute and still was a corporation, concluding to the country. It was held on special demurrer that such a replication, although in a form prescribed by statute, would preclude the defendants from setting forth in a rejoinder an ouster or dissolution of the corporation, and that the conclusion should have been with an averment. *Onondaga County Bank v. Carr*, 17 Wend. (N. Y.) 443.

Confession and Avoidance. — A replication not denying but admitting and alleging new matter in avoidance which the defendant has a right to traverse properly concludes with an averment. *Hampshire Manufacturers Bank v. Billings*, 17 Pick. (Mass.) 87.

New Matter in Avoidance of Plea of Justification. — In trespass for an assault the defendant pleaded a justification in that the plaintiff was making a disturbance in his public house and that he was requested to depart, which he wholly refused to do, whereupon the defendant directed his servant to put him out. The replication was that he did not wholly refuse to depart and that he remained no longer in the house, after being requested to leave, than was necessary for the purpose mentioned in the plea, and the conclusion was to the country. It was held on demurrer that the replication should have properly concluded with an averment so as to give to the defendant an opportunity to answer the new matter contained in the replication. *Hanna v. Rust*, 21 Wend. (N. Y.) 149.

Bar to Statute of Limitations. — A replication setting up a bar to the running of the statute of limitations should conclude with an averment so that the defendant may traverse the matter in bar. *Com. Dig., tit. Pleader, § 32*; *Curry v. Stephenson*, 4 Mod. 376; *Metcalf v. Grover*, 55 Miss. 145.

because a negative cannot be proved.¹

Matter of Record in Issue. — Where the existence of a record is in issue and the record itself is the foundation of the action, the replication should conclude with an averment and a prayer for the inspection of the record,² and where the record is of the same court a day is given to the parties to hear judgment.³

(4) *Either Form Allowable.* — It is often difficult to say whether there is any such introduction of new matter as will make a conclusion to the country improper, and there are precedents which will warrant a conclusion either way.⁴

1. *Harvey v. Stokes*, Willes 5.

2. *Whitman v. Rook*, Say. 299;
Share v. Becker, 8 S. & R. (Pa.) 239;
Williams v. Spears, 11 Ala. 138.

Another Suit Pending. — Where a plea in abatement alleged the arrest of the defendant and the pendency of another suit, a replication that they were part of the proceedings in the same suit as that to which the plea of abatement related was held properly concluded with an averment. *Massey v. Walker*, 8 Ala. 167.

Quo Warranto Proceeding. — To a plea to an information in the nature of a quo warranto a replication which presented an issue as to the illegality of certain ballots was held not open to a demurrer assigning that the averment simply stated that the attorney-general was ready to verify by the register of qualified voters and the poll list of persons who voted, since the registry and poll list were public records admissible in evidence as proof of the facts therein stated, which should be taken as true unless in some way impeached. If disputed the respondent should by his rejoinder give to the relator notice of his defense thereto. *Atty.-Gen. v. May*, 97 Mich. 568.

A Replication to a Plea of Nul Tiel Record concludes with these words: "And this he the said plaintiff is ready to verify by the said record when, where, and in such manner as the court here shall order, direct, and appoint. And he prays that the said record may be seen and inspected by the said court now here." *Archbold Civ. Pl.* 255a.

Formal Defect in Conclusion. — Where the plaintiff replied "there is such a record" to a plea of *nul tiel record*, the omission to add that he was ready to verify the replication by the record was held to be ground for a special demurrer. *Hawley v. Hanchet*, 1 Cow. (N. Y.) 152.

Conclusion to Country. — To a declaration in debt upon a bond given in a suit for an injunction there was a plea that the suit was still pending in the Court of Appeals on a bill of review, concluding with an averment. The replication was that the bill of review mentioned in the plea had been decided by the Court of Appeals, concluding to the country. It was held that this conclusion was right, because whether the cause was pending or decided was a question of fact. *White v. Clay*, 7 Leigh (Va.) 68.

3. *Bobyshall v. Oppenheimer*, 4 Wash. (U. S.) 388, holding that if the record be of another court the replication may either conclude by giving to the defendant a day to bring in the record or with a verification and prayer of debt and damages.

No Issue Necessary. — In *Jackson v. Wickes*, 2 Marsh. 354, 7 Taunt. 30, 2 E. C. L. 30, the declaration alleged that a judgment had been recovered in the same court and was unsatisfied, to which there was a plea that no ca. sa. had been issued after recovery of the judgment. The replication set out the ca. sa., concluding with a verification by the record and a prayer for inspection thereof. A demurrer thereto assigned for cause that, though no issue had been joined as to the existence of such a record, the replication concluded with a prayer that the record might be inspected. The replication was held good on the ground that there was no need to join issue where the record was in the same court. *Citing Cremer v. Wicket*, 1 Ld. Raym. 550.

4. *Hayman v. Gerrard*, 1 Saund. 103, note 1; *And. Steph. Pl.*, § 135.

Conclusion with Verification Held Correct. — In debt on a bond conditioned to render a full account to the plaintiff of all such sums of money and goods as were belonging to W. N. at the time

5. Demurrers and Other Objections—*a.* FOR WRONG CONCLUSION. — Where the conclusion of a replication is incorrect the defendant, instead of taking issue, must demur specially,¹ and if the demurrer is sustained leave to amend will be given.²

b. WRONG USE OF DE INJURIA. — The wrong use of a traverse *de injuria* is merely a defect in form and is cured by verdict.³

c. DUPLICITY. — Duplicity is a defect of form and cannot be reached by general demurrer in those jurisdictions where special demurrers are permitted.⁴

of his death, the defendant pleaded that no goods or sums of money came to his hands. The plaintiff replied that a silver bowl which belonged to the said W. N. at the time of his death came to the hands of the defendant, viz., on such a day and year; "and this he is ready to verify," etc. On demurrer it was contended that the replication ought to have concluded to the country, there being a complete negative and affirmative, but the court thought it well concluded, as new matter was introduced. *Hayman v. Gerard*, 1 Saund. 102.

Conclusion to the Country Allowed. — In an action of debt on a bond the plea was that the plaintiff won money of the plaintiff at cards and that the bond was given to secure it. The replication stated that the bond was on good consideration and for securing a debt justly due and not as alleged in the plea, and concluded to the country. It was held on demurrer that the conclusion was proper either way. *Hedges v. Sandon*, 2 T. R. 439.

1. *Hartwell v. Hemmenway*, 7 Pick. (Mass.) 117; *Frohock v. Pattee*, 38 Me. 103; *Metcalf v. Grover*, 55 Miss. 145; *Hanna v. Rust*, 21 Wend. (N. Y.) 149; *Hawley v. Hanchet*, 1 Cow. (N. Y.) 152; *White v. Clay*, 7 Leigh (Va.) 68; *Carthrae v. Clarke*, 5 Leigh (Va.) 268; *Walker v. Johnson*, 2 McLean (U. S.) 92.

Defective Conclusion. — It is proper to overrule a general demurrer to a replication in estoppel that is defective in its conclusion, where the substance of the matter stated is an estoppel. *Cecil v. Early*, 10 Gratt. (Va.) 198.

Criminal Proceeding. — In *Virginia* it seems to have been held that in a criminal case a defect in the conclusion can be reached by a general demurrer. *Com. v. Jackson*, 2 Va. Cas. 501.

2. *Metcalf v. Grover*, 55 Miss. 145; *Northrop v. Flaig*, 57 Miss. 754.

3. *Harding v. Brooks*, 5 Pick. (Mass.) 244; *Franklin F. Ins. Co. v.*

Martin, 40 N. J. L. 568; *Lytle v. Lee*, 5 Johns. (N. Y.) 112; *Erschine v. Hohnbach*, 14 Wall. (U. S.) 613; *Banks v. Parker*, Hob. 76; *Collins v. Walker*, T. Raym. 50.

Demurrer. — Formerly an objection might be taken by general demurrer. *Fursdon v. Weeks*, 3 Lev. 65; *Hooker v. Nye*, 4 Tyrw. 777; *Coffin v. Bassett*, 2 Pick. (Mass.) 357.

Special Demurrer. — Being merely a formal defect, the cause must be assigned specially. *Parker v. Riley*, 3 M. & W. 230; *Curtis v. Headfort*, 6 Dowl. 502; *Bolton v. Carlisle*, 2 H. Bl. 262; *Isaac v. Farrar*, 1 M. & W. 65; *Solly v. Neish*, 2 C. M. & R. 355; *Allen v. Kimball*, 23 Pick. (Mass.) 477; *Mason v. Peters*, 4 Vt. 101.

4. *National Express, etc., Co. v. Burdette*, 7 App. Cas. (D. C.) 551; *Phillips v. Willeson*, 2 Brev. (S. Car.) 477; *Downer v. Rowell*, 26 Vt. 397; *Carpenter v. McClure*, 40 Vt. 108; *Green v. Seymour*, 59 Vt. 459; *Onion v. Clark*, 18 Vt. 363.

Traverse of Immaterial Matter in Plea. — Where the replication traverses two averments in the plea, one of which is of no importance, there can be no demurrer on the ground of duplicity. *Elminger v. Drew*, 4 McLean (U. S.) 388.

Insufficient Demurrer. — A demurrer "that the replication is double, because it is two replications to a single plea," was held insufficient in *Carpenter v. McClure*, 40 Vt. 108.

General Demurrer — Alabama. — Where special demurrers were abolished by statute it was held that the fault of duplicity was one of substance and not of form, and could be reached by a general demurrer. *Stiles v. Lacy*, 7 Ala. 17.

Motion to Strike Out — District of Columbia. — It seems that the proper course where there seems to be duplicity in the replication is, where special demurrers are abolished, to strike out

d. ARGUMENTATIVENESS. — Where the replication is argumentative, it has been held that it will be open only to a special demurrer.¹

e. EFFECT OF DEMURRER. — Where the replication seems to be insufficient on demurrer, if the plea also be bad the replication will be considered a good answer to it,² and the court, upon a consideration of the whole record, should give judgment for the plaintiff.³

Replication Showing No Cause of Action. — If, however, though the plea be imperfect, the replication discloses that the plaintiff has no cause of action, there should be judgment for the defendant.⁴

f. MOTIONS TO STRIKE OUT. — A motion to strike out a

the replication. *National Express, etc., Co. v. Burdette*, 7 App. Cas. (D. C.) 557.

1. *Carpenter v. McClure*, 38 Vt. 375; *Tinker v. Rockford*, 36 Ill. App. 460; *Smith v. Oliphant*, 2 Sandf. (N. Y.) 306.

Objections Must Be Specific. — It will not be sufficient to say that the replication is "argumentative." The precise and particular defects complained of should be pointed out, and the pleader should, as it is said, lay his finger on the very spot to which he objects. *Carpenter v. McClure*, 38 Vt. 375. 40 Vt. 108; *Tinker v. Rockford*, 36 Ill. App. 460.

Replication Denying Former Recovery.

— Where the replication concluded, "that there remains no record of any proceedings, * * * nor of any judgment recovered thereon, and no judgment remaining in full force and effect * * * for the same grievances and cause of action in the declaration in this cause stated," it was held to be an argumentative denial that the causes of action sued on were the same as those embraced in the former recovery and, though informal, sufficient to save the replication on a general demurrer. *Weber v. Morris, etc., R. Co.*, 36 N. J. L. 213.

2. See generally article DEMURRERS AT COMMON LAW AND UNDER THE CODES, vol. 6, p. 331, and see the following cases:

Alabama. — *Williams v. Moore*, 32 Ala. 506.

Florida. — *Wade v. Doyle*, 17 Fla. 522; *Oxford Lake Line v. Pensacola First Nat. Bank*, (Fla. 1898) 24 So. Rep. 480.

Illinois. — *Louisville, etc., R. Co. v. Carson*, 169 Ill. 247; *Illinois F. Ins. Co. v. Stanton*, 57 Ill. 354; *Mt. Car-*

bon Coal, etc., Co. v. Andrews, 53 Ill. 176; *Tipton v. Carrigan*, 10 Ill. App. 318.

Indiana. — *Puntenny v. Paddock*, 1 Blackf. (Ind.) 415.

Iowa. — *Wile v. Matherson*, 2 Greene (Iowa) 184.

Maine. — *Palister v. Little*, 6 Me. 350.

Maryland. — *Morgan v. Morgan*, 4 Gill & J. (Md.) 395.

Massachusetts. — *Frost v. Hammatt*, 11 Pick. (Mass.) 75.

New York. — *Halliday v. Noble*, 1 Barb. (N. Y.) 137.

Pennsylvania. — *Barnett v. Barnett*, 16 S. & R. (Pa.) 51.

Virginia. — *Day v. Pickett*, 4 Munf. (Va.) 104.

West Virginia. — *Hoke v. Hoke*, 3 W. Va. 561.

United States. — *Townsend v. Jemison*, 7 How. (U. S.) 706; *Baltimore, etc., R. Co. v. Harris*, 12 Wall. (U. S.) 65.

Nonapplication of Rule. — Where there is an insufficient replication interposed to several pleas of which one is good, the rule does not apply. *Williams v. Moore*, 32 Ala. 506.

3. *Baird v. Mattox*, 1 Call (Va.) 261; *Kirtley v. Deck*, 3 Hen. & M. (Va.) 388; *Callis v. Waddy*, 2 Munf. (Va.) 511; *Day v. Pickett*, 4 Munf. (Va.) 104; *Baltimore, etc., R. Co. v. Harris*, 12 Wall. (U. S.) 65.

4. *Com. Dig.*, tit. Pleader, M 3; *State v. Redding*, 1 Fla. 279; *Reynolds v. Torrance*, 3 Brev. (S. Car.) 49.

Filing Further Replication — After Demurrer Sustained. — Where, after demurrer sustained to a replication, the plaintiff replies *de novo*, he waives any right that he might have had to question the correctness of the court's decision on the demurrer. *Clearwater v. Meredith*, 1 Wall. (U. S.) 25.

replication as being frivolous or inappropriate is not proper unless it is clear that the replication is an insult to the court or an improper paper to be on file,¹ but if the replication is to a plea not on the record a motion to strike out is proper.²

g. NONCOMPLIANCE WITH RULE TO REPLY. — Where a rule is laid on the plaintiff to reply by a particular time, the replication will not be received after such time except on terms of a continuance.³

6. Objections Waived. — An objection to the insufficiency of the replication to put the averments of the plea in issue cannot be raised after verdict.⁴

Notwithstanding Leave to File Several Replications, an objection to the sufficiency of the matters mentioned in the replication can be raised, because such permission merely allows the party to put the matters in the record to become the subject of examination.⁵

7. Withdrawal of Replication. — It seems that the plaintiff may move the court for leave to withdraw his replication and either to file a new one or to demur to the plea; and the court's decision upon such motion is not assignable as error.⁶

1. *Martin v. Wilson*, (Ct. App.) 3 How. Pr. (N. Y.) 195, holding that the proper remedy is to demur.

As to Frivolous Pleading, see article SHAM AND FRIVOLOUS PLEADINGS.

2. *Gardner v. Russell*, 78 Ill. 292, holding that the fact the plea is imaginary is no ground for demurrer.

3. *Veatch v. Harbaugh*, 1 Cranch (C. C.) 402.

As to Rules to Reply, see article TIME TO PLEAD.

4. *Erskine v. Hohnbach*, 14 Wall. (U. S.) 613.

Immaterial Issue. — Where the replication does not contain a defective statement of matter which, if properly stated, would have been good in avoidance of the plea, but the matter set up is itself insufficient, the issues formed will be immaterial and a verdict thereon will not cure the defect. *Denton v. Brownlee*, 24 Ark. 557; *Young v. Paris*, 69 Ill. App. 449.

General Replications Aided by Verdict. — Replications denying all the facts contained in the plea, although the plea be special, are aided by verdict. *Ellett v. Vaughan*, 6 Call (Va.) 77.

Replication in Short. — A replication in the words "issue to second plea" with the names of the plaintiff's counsel opposite, has been held sufficient on appeal when not objected to at the trial. *Pickett v. Ford*, 4 How. (Miss.) 246.

Consent to Rely "in Short" Presumed. — Where there was a distinct state-

ment in the record that issue was joined, but the form of pleading by which the issue was made up did not appear, the court held that if a formal traverse of the plea was not filed, it might be inferred that it was entered short on the docket by verbal consent at the time, which would be a waiver of more regular pleading. *Soper v. Jones*, 56 Md. 503.

5. *Andreae v. Redfield*, 15 Int. Rev. Rec. 105, 1 Fed. Cas. No. 368.

6. *U. S. v. Buford*, 3 Pet. (U. S.) 12; *Miles v. Danforth*, 37 Ill. 156.

Withdrawing Replication After Term at Which It Is Filed. — In an action on a bond brought within five years from the time when a statute of limitations took effect (the statute being no bar to an action commenced within that time), the defendant pleaded the statute; the plaintiff replied that at the time when the cause of action accrued, and ever since, he was a nonresident of the state, and the cause was continued without joining issue until a subsequent term. At the next term the plaintiff asked to withdraw his replication and demur on the grounds that the plea tendered an immaterial issue and was demurrable. It was held that leave to withdraw should have been given. *Lucas v. Tunstall*, 6 Ark. 443.

Withdrawal After Demurrer — Missouri. — It was held in Missouri, before the code, that under an act regulating practice at law a plaintiff might, after

8. Amendments. — If defective, either in form or in substance, the replication may be amended on terms,¹ and after a replication has been successfully demurred to the plaintiff should, in order to avoid a final judgment against him, obtain leave to amend.²

9. Defects in Plea Waived by Replication. — Where a plea is demurrable because it is faulty in form, the plaintiff waives objection by replying to it,³ and he cannot afterwards make any objection thereto on appeal.⁴

the issues were made up, withdraw his replication if the plea were immaterial, and demur. *Buford v. Byrd*, 8 Mo. 240.

Leave to Withdraw Plea. — After permitting the plaintiff to withdraw his general replication and file a general demurrer the court will give leave to the defendant to withdraw his plea and file another. *McGill v. Sheehee*, 1 Cranch (C. C.) 49.

1. *Wakefield v. Littlefield*, 52 Me. 21; *Metcalf v. Grover*, 55 Miss. 145.

Amendment in Substance. — Where the legality of the organization of a township was involved in an information in the nature of a quo warranto, the plea alleged the due organization of the township. The replication denied the legality of the proceedings for the reason that the written and necessary application was not signed by the requisite number of freeholders, nor was proper notice given. On demurrer to the replication it was held that if the objection was that the persons signing such application were in fact not freeholders, and that therefore no proper application or proper notice was ever made or given, this fact should be distinctly set forth in the replication and not left to inference, and leave was given to amend the replication. *Atty.-Gen. v. Page*, 38 Mich. 286.

Replication Confessing Plea. — Where the replication neither alleged new matter in avoidance of the plea nor traversed any averment thereof, but in fact admitted the plea, it was held to be a confession of the plea in bar which should have entitled the defendant to judgment unless the plaintiff should amend, which was thereupon allowed. *Thomas v. Com.*, 8 B. Mon. (Ky.) 372.

2. *Com. v. Jackson*, 2 Va. Cas. 501; *Wakefield v. Littlefield*, 52 Me. 21; *Ross v. Sims*, 27 Miss. 359; *Memphis, etc., v. R. Co. v. Orr*, 52 Miss. 542;

Scharff v. Lisso, 63 Miss. 213; *Metcalf v. Grover*, 55 Miss. 145.

Defect in Replication Supplied by Declaration. — Where the replication to a plea of a statute of limitations was defective in not averring a new promise, a demurrer thereto was sustained, but it was held that an amendment should be allowed, as the declaration contained the necessary averment. *Morris v. Lyon*, (Va. 1887) 2 S. E. Rep. 515.

Leave to Amend—Mississippi. — Where the plaintiff, after a demurrer to a replication has been sustained, asks leave to amend, he should be permitted so to do under the statute of amendments. *Scharff v. Lisso*, 63 Miss. 213.

3. *State v. Bodly*, 7 Blackf. (Ind.) 355; *Fellheimer v. Hainline*, 65 Ill. App. 384; *Warner v. Bledsoe*, 4 Dana (Ky.) 73.

Waiver of Sworn Plea. — The filing of a replication admitting the truth of a plea in abatement, and relying on matter in avoidance, is a waiver of the necessity of verifying the plea by oath. *Gordon v. Phelps*, 6 J. J. Marsh. (Ky.) 218.

After Replication Plea Must Stand. — The plea cannot be disregarded by the plaintiff *ex mero motu* when he has once replied; if necessary he should apply to the court for relief. *Gaines v. Travis*, Abb. Adm. 297.

After Amendment of Plea. — If the plea is amended after a replication has been filed, the repliant may stand on his replication, if it is applicable to the amended plea, or he may avail himself of the right to reply anew to the amended plea. By replying *de novo*, within the prescribed period, any former replication applicable to the amended plea is abandoned. *Bacon v. Green*, 36 Fla. 325.

4. *Craig v. Blow*, 3 Stew. (Ala.) 448; *Johnson v. Wren*, 3 Stew. (Ala.) 172; *Mitchell v. Chaires*, 2 Fla. 18; *Mitch-*

IV. REPLICATIONS IN EQUITY — 1. General Replication. — In most jurisdictions, according to modern equity practice, the replication, if used at all, is general and of a formal character,¹ and its only office is to put the cause at issue.² It is unnecessary that it be signed by counsel,³ and it is usually, in practice, put in by the clerk and master.⁴

2. Special Replication. — In ancient equity practice, when the defendant introduced into his plea or answer new matter which made it necessary for the plaintiff to put in issue some additional fact on his part in avoidance thereof, the replication thereto was a special one.⁵ In modern practice, however, these replications have gone quite out of use, if they have not been abolished by statute, and in their place a complainant either anticipates the defense by his original bill or amends the bill.⁶

ell v. Cotten, 2 Fla. 136; Proctor v. Hart, 5 Fla. 465; Patrick v. Conrad, 3 A. K. Marsh. (Ky.) 613; Carson v. Osborne, 10 B. Mon. (Ky.) 156.

1. Jameson v. Conway, 10 Ill. 227.

2. Rodney v. Hare, Mosely 296; Jameson v. Conway, 10 Ill. 227.

3. Allen v. Allen, 3 Tenn. Ch. 145, following the practice in England that a general replication need not be either signed or prepared by counsel. See also Cooper's Eq. Pl. 331.

4. Lea v. Vanbibber, 6 Humph. (Tenn.) 19.

5. Cooper's Eq. Pl. 329.

6. White v. Morrison, 11 Ill. 361; Bryan v. Wash, 7 Ill. 557; Shaeffer v. Weed, 8 Ill. 511; Tarleton v. Vietes, 6 Ill. 470; Newton v. Thayer, 17 Pick. (Mass.) 129; Chouteau v. Rice, 1 Minn. 106; McClane v. Shepherd, 21 N. J. Eq. 76; Cowart v. Perrine, 21 N. J. Eq. 101; Anonymous, Hopk. (N. Y.) 27; Storms v. Storms, 1 Edw. (N. Y.) 358; Boyd v. Hawkins, 2 Dev. Eq. (N. Car.) 195; Elliot v. Trahern, 35 W. Va. 634; Vattier v. Hinde, 7 Pet. (U. S.) 252; Southern Pac. R. Co. v. U. S., 168 U. S. 1; Duponti v. Mussy, 4 Wash. (U. S.) 128.

In West Virginia, by Statute, in cases where new matter is alleged in an answer constituting a claim for affirmative relief, there must be a special reply in writing, denying such allegations of the answer as the plaintiff does not admit to be true and stating any facts constituting a defense thereto. Enoch v. Mining, etc., Co., 23 W. Va. 374; Chalfant v. Martin, 25 W. Va. 394; Dower v. Seeds, 28 W. Va. 113; Kilbreth v. Root, 33 W. Va. 600; Elliot v. Trayhern, 35 W. Va. 634; Harrison

v. Brewster, 38 W. Va. 294; Douglass Merchandise Co. v. Laird, 37 W. Va. 704; Paxton v. Paxton, 38 W. Va. 616; Hickman v. Painter, 11 W. Va. 386; Smith v. Turley, 32 W. Va. 14; Briggs v. Enslow, 44 W. Va. 499.

If Material Allegations of Such an Answer Be Not Denied as required, they will, for the purposes of the suit, be taken as true. Newlon v. Wade, 43 W. Va. 283.

Federal Courts. — Under Equity Rule 45 no special replication to any answer may be filed, but if any matter in the answer shall make it necessary for the plaintiff to amend the bill he may have leave therefor. Wilson v. Stolley, 4 McLean (U. S.) 275.

The Effect of This Rule is that a general replication is always sufficient to put in issue every material allegation of an answer or amended answer, unless the rules of pleading imperatively require an amendment of the bill. Southern Pac. R. Co. v. U. S., 168 U. S. 1.

New Matter in Replication Surplusage. — Where the bill charged an infringement of certain patents and required a sworn answer to interrogatories regarding the acts constituting the alleged infringement, the acts were admitted by the defendants, who set up that the complainant, before procuring the patents, assumed to sell and did sell to the grantor of the defendants other patents, covering the same invention, standing in a third person's name. The replication traversed the answer, but added new matter to meet the special defense thereof. It was argued that the replication, being special, was void under the above rule,

3. Necessity and Advisability of Replication — *a.* IN GENERAL. — Replications are not necessary to answers containing indistinct and improper allegations,¹ nor to pleas containing immaterial matter;² and it would seem that there should be no replication to a plea of another suit pending,³ nor to a plea of disclaimer.⁴

b. TO ANSWER. — Whenever a complainant wishes to prove any facts in the bill not admitted in the answer, there should be a replication filed so as to give an opportunity to a defendant to be heard on the question of the existence of those facts.⁵ But where the complainant, after an answer has been filed, amends

but the court held that the excess should be treated as surplusage, leaving the regular part of the replication standing as a traverse. *Wren v. Spencer Optical Mfg. Co.*, 5 B. & A. Pat. Cas. 61, 30 Fed. Cas. No. 18,062.

1. *Suydam v. Bartle*, 10 Paige (N. Y.) 94, holding that in a case where a bill to foreclose a mortgage to secure payment of a bond is filed, and an answer is put in charging generally that the transaction stated in the answer is tainted with usury, to which there is no replication, to render it necessary to file a replication the answer should do more than state upon information and belief that there is usury in a transaction which *per se* is not usurious. See also *Briggs v. Enslow*, 44 W. Va. 499.

Foreclosure Deficiency. — In *Michigan* it has been held that where on a petition for execution for a deficiency on foreclosure the answer does not set up proper matter discharging the deficiency, it is unnecessary to reply thereto. *Wallace v. Field*, 56 Mich. 3.

2. *Johnson v. Harrison*, Litt. Sel. Cas. (Ky.) 226.

3. *Jones v. Segueira*, 1 Phil. 82, holding that the proper course is for the plaintiff to obtain an order referring the plea to a master to inquire whether the two suits are for the same matter.

Striking from Files. — If, however, a general replication should be filed it can do no harm, and a motion to strike it from the files may be denied. *Allen v. Allen*, 3 Tenn. Ch. 145.

4. *Williams v. Longfellow*, 3 Atk. 582.

Costs of Replication to Disclaimer. — If the complainant replies to a disclaimer and the defendant is, in consequence, compelled to go into evidence in support of his plea, the complainant must pay the costs thereof. *Ford v. Chesterfield*, 16 Beav. 520.

5. *Mills v. Pittman*, 1 Paige (N. Y.)

490; *Dale v. M'Evers*, 2 Cow. (N. Y.) 118; *Rogers v. Mitchell*, 41 N. H. 154.

Statute Dispensing with Replication. — In *Tennessee*, by statute, no replication is allowed to an answer. *Cheatham v. Pearce*, 89 Tenn. 668.

Effect of Statute. — The effect of a statute declaring that it shall be unnecessary to file a replication to an answer is that it makes up, *proprio vigore*, an issue on the facts alleged therein. *Forrest v. Robinson*, 2 Ala. 215.

Petition to Put in Proof Without Replication. — Where a complainant presented a petition stating that the defendant's answer had been put in and that he was anxious to bring the case to a hearing upon bill and answer, but that it would be necessary to prove the issuance and return of an execution, of which the defendant in his answer denied all knowledge, and asked leave to prove it at the hearing without filing a replication, the petition was dismissed, as the facts stated did not show that the complainant had any grounds for an exception to the general rule. *Mills v. Pittman*, 1 Paige (N. Y.) 490.

Impropriety of Taking Exception. — An exception to the answer on the ground that material matters contained therein were at issue and adjudicated at a former term is not proper, but there should be a replication, because whether the matters alleged were at issue is a matter of evidence on which the defendant has a right to be heard. *Thrifts v. Fritz*, 101 Ill. 457.

Reply to Amended Answer. — While leave to amend an answer to an original bill is pending and not filed, the complainant is not bound to reply to the original answer, and a dismissal of the bill for default in filing a replication should be set aside. *Holbrook v. Prettyman*, 44 Ill. 311.

Under Equity Rule 66 of the United States Supreme Court there must be a

his bill, it seems that it is irregular to file a replication until the expiration of the time for answering the amendment.¹

Omitting to File Replication.—Should the complainant not file a replication, not only all facts responsive to the bill, but also all those pertinent to the matter in controversy which have been introduced into it as a defense, are as a general rule to be taken as true at a hearing on bill and answer;² and a final decree may be rendered on it.³

c. TO PLEA.—After a plea to the whole bill has been held sufficient in law to bar a recovery, the complainant, if he wishes to disprove the facts alleged in the plea, must file a replication.⁴

d. TO PLEA AND ANSWER.—Where there is a plea supported by answer the replication should be to the plea and answer.⁵

4. Effect of Replication—*a.* TO ANSWER.—The result of a replication to an answer is that all facts alleged in the answer,

general replication to the answer, when sufficient, of every defendant, without reference to the state of the cause or of the pleadings in regard to any other defendant. *Coleman v. Martin*, 6 Blatchf. (U. S.) 291.

Replication Must Be Directed to Answer.—The replication cannot put in issue a matter of defense not relied on in the answer. *Cochran v. Couper*, 1 Harr. (Del.) 200, *per* Harrington, J.

1. *Richardson v. Richardson*, 5 Paige (N. Y.) 58.

2. *Farrell v. McKee*, 36 Ill. 225; *Contee v. Dawson*, 2 Bland (Md.) 264; *Hall v. Clagett*, 48 Md. 223; *Brinckerhoff v. Brown*, 7 Johns. Ch. (N. Y.) 217; *Slason v. Wright*, 14 Vt. 208; *Gates v. Adams*, 24 Vt. 70; *Dyer v. Dean*, 69 Vt. 370; *The Mary Jane*, Blatchf. & H. Adm. 390, 16 Fed. Cas. No. 9,215; *Brown v. Pierce*, 7 Wall. (U. S.) 212; *Parker v. Concord*, 39 Fed. Rep. 718. And see generally, as to hearing on bill and answer, article ANSWERS IN EQUITY PLEADING, vol. I, p. 924.

3. *Carrow v. Adams*, 65 N. Car. 32; *Cleggett v. Kittle*, 6 W. Va. 452; *Henry v. Ohio River R. Co.*, 40 W. Va. 234.

4. *Flagg v. Bonnel*, 10 N. J. Eq. 82.

Statute Abolishing Replications to Answers.—It has been held that a statute providing that no replication or other pleading shall be allowed after answer filed merely abolishes replications to answers and does not abolish replications to pleas. Thus, it is necessary to file a replication to a plea denying the grounds of relief set forth in a bill to set aside fraudulent transfers of prop-

erty. *Cheatham v. Pearce*, 89 Tenn. 668.

Federal Practice.—It was laid down by the United States Supreme Court, speaking by Blatchford, J., in *U. S. v. Dalles Military Road Co.*, 140 U. S. 599, that the effect of Rule 33 of the Rules of Practice in Equity, providing that a plaintiff may set down a plea for argument or take issue upon it, is not that the plaintiff is to make thereby such a conclusive election that "if he sets down the plea to be argued and it is sustained on the argument, he cannot afterwards take issue on it," for the object of having a plea set down for hearing "is to induce the present tation to the court, as a question of law, of the matters set up in the plea so that, assuming those matters to be true in point of fact, the whole controversy may, perhaps, be determined as a question of law. But this practice would be discouraged if the plaintiff were not to be allowed, in case the plea be sustained in matter of law, to take issue upon it as matter of fact, * * * There is no restriction put upon the right of the plaintiff to take issue upon a plea after it is allowed on a hearing; and such is the view which has been adopted by this court." *Citing Rhode Island v. Massachusetts*, 14 Pet. (U. S.) 210.

5. *Nichol v. Wiseman*, 1 Eq. Cas. Abr. 43.

Reason for Rule.—It was held in *Crump v. Perkins*, 18 Fla. 353, that a replication to the answer alone is inadmissible, because the plea and answer are but one pleading "mutually dependent upon each other."

whether they are in avoidance or in bar, are put in issue,¹ and that the defendant will be compelled to sustain the material allegations of his answer by proof.² But new matter which is contained in the replication is not thus put in issue.³

Sufficiency of Answer Waived by Replication. — A replication will be treated as a waiver of all objections to the sufficiency of the answer and of any mere technical objection.⁴

1. Anonymous, Hopk. (N. Y.) 27; O'Hare v. Downing, 130 Mass. 16; Roberts v. Birgess, 20 N. J. Eq. 139.

Fact Not in Issue. — In a cause where a replication is filed, if the question turns upon a particular fact not alleged by the bill and a surprise to the defendants, who have consequently no opportunity of rebutting the complainant's evidence, an inquiry as to that fact should be directed before making a decree, for "the defendants are entitled to have the opportunity of disproving, if they can, the particular act of notice of which the plaintiffs have given evidence, without specially alleging it in their bill." *Per Romilly, M. R.*, in *Weston v. Empire Assur. Corp.* L. R. 6 Eq. 23.

Effect on Cross-claim in Answer. — Where an answer claims the benefits of a cross-bill under a rule providing that a defendant may have all the benefits of a cross-bill on an answer containing proper averments and prayers, a general replication puts the original case as made by bill and answer at issue, but does not traverse the averments in the answer which are the basis of the cross-claim. *Coach v. Adsit*, 97 Mich. 563.

Effect of Replication upon Defective Answer. — The rule that where the plaintiff takes issue upon a plea and the defendant proves the allegations of the plea the bill must be dismissed, however defective in form or substance the plea may be, does not apply to an answer. The defendant must stand by his answer and can claim no more than he has set up in it; and if the answer is defective in substance, the replication does not make it better. *Everts v. Agnes*, 4 Wis. 356; *Miller v. Fraley*, 21 Ark. 22.

2. *Jameson v. Conway*, 10 Ill. 227; *Tunstall v. McClelland*, Hard. (Ky.) 528; *Neale v. Hagthorpe*, 3 Bland (Md.) 551; *Hagthorpe v. Hook*, 1 Gill & J. (Md.) 270; *Lovett v. Demarest*, 5 N. J. Eq. 113; *Dickey v. Allen*, 2 N. J. Eq. 40; *Naglee's Estate*, 52 Pa. St. 154; *Seim v. O'Grady*, 42 W. Va. 77.

A Replication Denying Any Knowledge or Information of the matters alleged in the defendant's answer sufficient to form a belief puts those allegations in issue so as to cast on the defendant the burden of proof. *Gilchrist v. Stevenson*, 9 Barb. (N. Y.) 9.

Former Suit Pleaded as Estoppel. — To a bill to set aside a conveyance to a wife as in fraud of creditors of the husband, the wife answered *inter alia* that there had been a former suit and a decree thereon. It was held that the defendant was put to proof of the matter alleged in estoppel. *Humes v. Scruggs*, 94 U. S. 22.

Deed and Collateral Facts in Issue. — Where an answer alleged the existence of a deed, together with the facts relied on to give it validity, and claimed certain benefits under it, it was held that the replication had the effect of putting in issue every circumstance stated in its support as well as the facts recited in the deed itself. *Boyd v. Hawkins*, 2 Dev. Eq. (N. Car.) 195.

Case Submitted on Facts Agreed After Replication. — Where after a general replication the parties submit the case on an agreed statement of facts, the allegations in the answer are not therefore to be taken as true further than they are supported by the facts agreed. *Taunton v. Taylor*, 116 Mass. 254.

3. In *Walker v. Wootten*, 18 Ga. 126, to a bill for an accounting and settlement the defendant pleaded in bar a settlement in full. To this plea the plaintiff replied admitting the settlement, but insisting in general terms that there had been fraud, accident, or mistake in the settlement, but stating no particulars. The court held that the question whether there was error in the settlement occasioned by the defendant was not in issue, and that the replication was anomalous.

4. *Ringgold v. Patterson*, 15 Ark. 209; *McKim v. Mason*, 2 Md. Ch. 510; *Lorton v. Seaman*, 9 Paige (N. Y.) 609; *Slater v. Maxwell*, 6 Wall. (U. S.) 268.

Waiver of Exceptions. — If the complainant replies to an answer which

b. TO PLEA. — If the complainant replies to a plea, denying the facts alleged therein, he thereby admits that it is sufficient in form and substance as a defense to the entire bill, and if the allegations of the plea are established the bill must be dismissed without reference to the equities arising from facts therein averred which are not met by the plea; and this result will follow even though the averment of facts would not have authorized a judgment, had the plea been set down for argument.¹

is insufficient, instead of excepting thereto, he necessarily waives the exceptions, and the facts specially inquired about stand neither admitted (unless peculiarly within the defendant's knowledge) nor denied. *Ringgold v. Patterson*, 15 Ark. 209; *Cochran v. Couper*, 1 Harr. (Del.) 200.

Effect of Replication upon Admission in Answer. — Where a bill alleged that a testator bequeathed to the defendant certain property in trust for the complainant during his life, and the answer admitted this allegation, but alleged that after the termination of the life estate there was a remainder in fee to the defendant, it was held that a replication which generally denied the allegations of the answer did not deprive the complaint of the benefits of its admissions. *Cavender v. Cavender*, 3 McCrary (U. S.) 158. See also *Candee v. Lord*, 2 N. Y. 269.

1. *Arkansas.* — *Peay v. Duncan*, 20 Ark. 85; *Miller v. Fraley*, 21 Ark. 22.

Indiana. — *Clem v. Durham*, 14 Ind. 263; *Sampson v. Hendricks*, 8 Blackf. (Ind.) 288.

Maryland. — *Daniels v. Taggart*, 1 Gill & J. (Md.) 311; *Parker v. Alcock*, 1 Y. & J. 432; *Rouskulp v. Kershner*, 49 Md. 521.

Michigan. — *Little v. Stephens*, 82 Mich. 596; *Hurlbut v. Britain*, Walk. (Mich.) 455.

New Hampshire. — *Bellows v. Stone*, 8 N. H. 285.

New Jersey. — *Meeker v. Marsh*, 1 N. J. Eq. 198.

New York. — *Allen v. Randolph*, 4 Johns. Ch. (N. Y.) 693; *Bogardus v. Trinity Church*, 4 Paige (N. Y.) 178; *Dows v. McMichael*, 6 Paige (N. Y.) 139; *Tompkins v. Anthon*, 4 Sandf. Ch. (N. Y.) 97.

Wisconsin. — *Ely v. Wilcox*, 20 Wis. 523.

United States. — *Gallagher v. Roberts*, 1 Wash. (U. S.) 320; *Myers v. Dorr*, 13 Blatchf. (U. S.) 22; *Bean v. Clark*, 24 Blatchf. (U. S.) 264; *Sharon v. Hill*,

22 Fed. Rep. 28; *Cottle v. Krementz*, 25 Fed. Rep. 494; *Matthews v. Lalance*, etc., Mfg. Co., 2 Fed. Rep. 233; *Theberath v. Rubber*, etc., *Harness-Trimming Co.*, 3 Fed. Rep. 151; *Korn v. Wiebusch*, 33 Fed. Rep. 51; *Burrell v. Hackley*, 35 Fed. Rep. 834; *Birdseye v. Heilner*, 26 Fed. Rep. 147; *Rhode Island v. Massachusetts*, 14 Pet. (U. S.) 210; *Farley v. Kittson*, 120 U. S. 303; *Beals v. Illinois*, etc., R. Co., 133 U. S. 290; *Hughes v. Blake*, 6 Wheat. (U. S.) 472.

England. — *Harris v. Ingledeu*, 3 P. Wms. 94; *Brownsword v. Edwards*, 2 Ves. 247; *Wilson v. Wilson*, 5 Ir. Eq. 514.

United States Equity Practice. — In federal practice this rule has been modified by equity rule 33, providing that "if upon an issue the facts stated in the plea be determined for the defendant, they shall avail him as far as in law and equity they ought to avail him." This rule is held to take from the establishment of the plea the effect it had under the old law. Under the existing rule the court may upon final hearing do at least what under the old rule might have been done when the benefit of a plea was saved to the hearing in each case. The decision of the cause does not rest upon proof of the matter of the plea, but the plaintiff may avoid it by other matter which he is at liberty to adduce. *Pearce v. Rice*, 142 U. S. 28; *Green v. Bogue*, 158 U. S. 499; *Elgin Wind Power*, etc., Co. v. *Nichols*, 24 U. S. App. 542.

But long before the equity rule above referred to, Chief Justice Marshall, notwithstanding a replication to a plea, examined the plea to see whether it was good in substance, holding that "the only questions before this court are upon the sufficiency of the plea to bar the action and the sufficiency of the testimony to support the plea as pleaded." *Stead v. Course*, 4 Cranch (U. S.) 403.

Plea Good in Part. — In *Moore v. Holt*,

Necessity of Proof. — Where all the allegations of the plea are denied by the replication, the plea must be supported by evidence.¹

5. Dismissal for Want of Replication. — The bill may be dismissed on motion for want of prosecution, if after the answer has been put in and held sufficient no replication is filed within the time required by statute or rule of court;² but on such motion, filing a replication forthwith will have the effect of preventing a dismissal of the bill, as of course, for a failure to prosecute the suit.³

Delay in Moving for Dismissal. — If the defendant has neglected for a long time to take advantage of the rule, he will be deemed to have waived his right to a dismissal, and a further time to reply may be allowed.⁴

3 Tenn. Ch. 143, it was held that if the complainant replies to a plea, and the defendant proves the truth thereof, it puts an end to the suit in so far as it is a good defense, because a plea may be good to a part of the bill, although it does not cover the whole as intended.

1. Seebold v. Lockner, 30 Md. 133; Little v. Stephens, 82 Mich. 596; Geron v. Boccaline, 2 Wash. (U. S.) 199; Stead v. Course, 4 Cranch (U. S.) 403; Reissner v. Anness, 13 Off. Gaz. 7, 20 Fed. Cas. No. 11,687.

Time for Proof Fixed by Rule. — In the federal courts the plea must be supported by proof taken within the time provided for the taking of testimony under equity rule 69 of the Supreme Court of the United States. Sharon v. Hill, 22 Fed. Rep. 29; Wenham v. Switzer, 48 Fed. Rep. 612.

Right to Open and Close. — Where there is a replication to a plea, the examination of witnesses will take place in the same way as in case of a replication to an answer, and it will be the complainant's right to begin and close the proofs. Reissner v. Anness, 13 Off. Gaz. 7, 20 Fed. Cas. No. 11,687.

2. See article DISMISSAL, DISCONTINUANCE, AND NONSUIT, vol. 6, p. 904 *et seq.*

A Replication Filed After Motion to Dismiss is "good cause" against the motion, but the costs of the application should be paid by the complainant. Griswold v. Inman, Hopk. (N. Y.) 86.

United States Equity Rules. — Under Rule 66 of the Equity Rules of the Supreme Court of the United States, the defendant shall, as of course, be entitled to an order of dismissal upon failure of the plaintiff to reply, unless the court

upon cause allows a replication to be filed *nunc pro tunc* upon terms. Robinson v. Satterlee, 3 Sawy. (U. S.) 134; Heyman v. Uhlman, 34 Fed. Rep. 686; La Vega v. Lapsley, 1 Woods (U. S.) 428.

Under Rules 61 and 66 the complainant has until the next succeeding rule day after the answer of the defendant has been deemed sufficient to file his replication. In a case where an answer was filed on the April rule day it was held that the complainant had until the May rule day to determine whether or not he would file exceptions thereto. Failing to take exceptions, the answer stood admittedly sufficient. He then, however, had until the first Monday in June in which to file his replication. Hendrickson v. Bradley, 85 Fed. Rep. 508.

Negotiations for a Settlement pending after the filing of an answer have been held a sufficient excuse. Robinson v. Randolph, 4 B. & A. Pat. Cas. 317, 20 Fed. Cas. No. 11,963.

Laches in Making Application. — Where the application under this rule was not made for nearly five years after dismissal, and no excuse for the delay was offered, it was held too late. Robinson v. Satterlee, 3 Sawy. (U. S.) 134, 20 Fed. Cas. No. 11,967.

Under Rules 66 and 69 it is within the discretionary power of the court to direct a replication filed too late and without leave of the court to stand as if filed within the prescribed time. Fischer v. Hayes, 19 Blatchf. (U. S.) 26. 3. Vermillya v. Odell, 1 Edw. (N. Y.) 617.

4. Sayles v. Erie R. Co., 2 N. J. L. J. 212.

Leave May Be Given to file a replication after the proper time where any reasonable excuse for the delay is shown, and it appears that the defendant has not been prejudiced by the delay;¹ but it should be shown to the satisfaction of the court that compelling the complainant to bring the cause to a hearing upon the bill and answer would work an injustice to him.²

6. Waiver of Replication. — The objection that no replication has been filed is waived by setting the cause down for hearing on the bill and answer or by taking proof without raising the objection, and the court, if necessary, may direct a replication to be filed *nunc pro tunc*,³ or a replication may be expressly waived

1. *Jameson v. Conway*, 10 Ill. 230; *Smith v. West*, 3 Johns. Ch. (N. Y.) 363; *Peirce v. West*, Pet. (C. C.) 351; *Donegall v. Warr*, 1 Eq. Cas. Abr. 43; *Cooper's Eq. Pl.* 331.

Not a Matter of Right. — Where the complainant, with a full knowledge of what he was doing, set the case for hearing on bill and answer, and the cause was actually heard, and great inconvenience would have been suffered by the defendants, leave to file a replication was rightfully refused after the trial court had directed a dismissal of the bill. *Snyder v. Martin*, 17 W. Va. 284, *distinguishing* *Peirce v. West*, Pet. (C. C.) 351, in which case the cause had only been set for hearing, and the failure to reply was caused by mistake of counsel, and no inconvenience would result to the defendants. And the court said in the main case that to hold that a plaintiff could as a matter of right reply under such circumstances would be "not only to disregard the rules of chancery practice, but would result in great inconvenience to the Circuit Courts, requiring them to hear and determine causes twice."

Inadvertence of Attorney. — Where, at the hearing, the complainant's attorney discovered for the first time that the execution of an assignment of a mortgage under which the plaintiff claimed was not admitted in the answer, it was held that his proper course was to ask to let the hearing stand over to a subsequent day, to enable him to apply for leave to file a replication and to prove the execution of the assignment. *Latting v. Hall*, 9 Paige (N. Y.) 383.

Mistake in Practice. — Where the omission to reply was evidently inadvertent and from a mistaken view of the practice, the court did not dismiss the bill, but allowed the complainant to reply and introduce proofs on proper

terms. *Hardwick v. Bassett*, 25 Mich. 149.

Insufficient Reason for Omission. — Where the cause was brought to a hearing by the plaintiff upon bill and answer, it appeared that the answer contained a sufficient denial of the allegations of the bill, which accordingly was dismissed. The plaintiff then petitioned to be allowed to file a general replication, but did not suggest that he had made a mistake or acted inadvertently in electing to try his cause upon bill and answer, and the petition was dismissed. *Bullinger v. Mackey*, 14 Blatchf. (U. S.) 355.

2. *Sea Ins. Co. v. Day*, 9 Paige (N. Y.) 247.

Merits Not Considered. — At the hearing of the motion the merits of the case itself will not be considered, but only the grounds for moving. *La Roque v. Davis*, 2 Edw. (N. Y.) 599.

3. *Illinois.* — *Jones v. Neeley*, 72 Ill. 449; *Buckley v. Bouteillier*, 61 Ill. 293; *Chambers v. Rowe*, 36 Ill. 171; *Stark v. Hillibert*, 19 Ill. 344; *Jameison v. Conway*, 10 Ill. 227; *Webb v. Alton M. & F. Ins. Co.*, 10 Ill. 223.

Indiana. — *Earnhart v. Robertson*, 10 Ind. 8; *Bunts v. Cole*, 7 Blackf. (Ind.) 265; *Demarece v. Driskill*, 3 Blackf. (Ind.) 115.

Maryland. — *Hal! v. Clagett*, 48 Md. 223; *Maryland, etc., Coal, etc., Co. v. Wingert*, 8 Gill (Md.) 178.

Massachusetts. — *Cobb v. Rice*, 130 Mass. 231; *Doody v. Pierce*, 9 Allen (Mass.) 141.

Michigan. — *Brooks v. Mead*, Walk. (Mich.) 389.

New Jersey. — *Gaskill v. Sine*, 13 N. J. Eq. 130.

New York. — *Lyon v. Tallmadge*, 14 Johns. (N. Y.) 501; *Smith v. West*, 3 Johns. Ch. (N. Y.) 363; *Wiser v. Blachly*, 1 Johns. Ch. (N. Y.) 607.

by stipulation of the parties.¹

Presumption on Appeal. — An objection to the absence of a replication cannot be raised for the first time in an appellate court, for it will be presumed that a replication was filed.²

7. Essentials of Replication — *a.* **GENERAL REQUISITES.** — In modern practice the replication should generally deny the truth of the plea or answer of the defendant and the sufficiency of the matter alleged therein as a bar to the suit, and should assert the

North Carolina. — *Armistead v. Bozman*, 1 Ired. Eq. (N. Car.) 117.

Virginia. — *Jones v. Degge*, 84 Va. 685.

United States. — *In re Thomas*, 45 Fed. Rep. 787; *Fischer v. Wilson*, 16 Blatchf. (U. S.) 220; *Peirce v. West*, Pet. (C. C.) 351; *Jones v. Brittan*, 1 Woods (U. S.) 667.

England. — *Rodney v. Hare*, Mosely 296.

Reason for Rule. — The reason for admitting the truth of the answer fails where a cause has been brought to hearing upon bill, answer, and depositions, and the replication should be considered as a matter of form; for when the case has been heard in this way without objection there is no danger of surprising the defendant by giving full weight to the depositions. *Scott v. Clarkson*, 1 Bibb (Ky.) 277.

Submitting to Trial without objection is presumed to be a waiver of replication. *Jones v. Neely*, 72 Ill. 449; *Marple v. Scott*, 41 Ill. 50; *Long v. Perine*, 41 W. Va. 314.

Replication Waived by Orator. — The orator, by filing a motion to set the cause for hearing on bill and answer, waives a replication which he has filed; otherwise the defendant cannot have his answers taken as true nor a chance to prove them true, and would be deprived of his defense. *Dascomb v. Marston*, 80 Me. 223.

1. *Smith v. West*, 3 Johns. Ch. (N. Y.) 363; *Glenn v. Hebb*, 12 Gill & J. (Md.) 271.

Replication Presumed by Stipulation. — Where a cause was submitted on bill, answer, and replication, but the latter was not filed, it was held that the answer was replied to and the facts set out in the answer as a defense were denied. *Glenn v. Hebb*, 12 Gill & J. (Md.) 272.

2. *Sneed v. Town*, 9 Ark. 535; *Crump v. Perkins*, 18 Fla. 353; *Hall v. Claggett*, 48 Md. 223; *Glenn v. Hebb*, 12 Gill & J. (Md.) 271; *Richardson v. Donehoo*,

16 W. Va. 686; *Moore v. Wheeler*, 10 W. Va. 35; *Forqueran v. Donnelly*, 7 W. Va. 114; *Coal River Nav. Co. v. Webb*, 3 W. Va. 438; *Martin v. Rellahan*, 3 W. Va. 480; *Argentine Min. Co. v. Terrible Min. Co.*, 122 U. S. 478; *Clements v. Moore*, 6 Wall. (U. S.) 299.

Reasons for Rule. — In *Scott v. Clarkson*, 1 Bibb (Ky.) 277, it was held that "the want of a replication cannot *per se* be cause for reversing a decree," because "it would be a surprise and iniquity" on appeal to say that the answer is to be taken as true or that the cause should be sent back for replication where the cause has been heard without objection upon bill, answer, and depositions. *Citing Hind's Prac.*, tit. Replication 289.

Presumption as to Time of Filing. — In *Lyon v. Tallmadge*, 14 Johns. (N. Y.) 501, it was held on appeal that where there appears to be a replication the court "is bound to intend it was filed in season unless the contrary be proved," because a replication is mere matter of form and the court below would permit one to be filed *nunc pro tunc* where the parties have proceeded as if the cause was properly at issue.

Consent to Issuance of Commission to Take Testimony. — The issuance of a commission to take testimony generally, by consent, is regarded as an admission that the issues are made up and that a replication has been entered. *Maryland, etc., Coal, etc., Co. v. Wingert*, 8 Gill (Md.) 179, in which case it was said: "To reject, at the instance of the defendant, the testimony taken under such circumstances, would work surprise upon the plaintiff. And to permit such an objection, when not taken in the court below, to be raised in the appellate court, where its omission cannot be remedied, would, in its consequences, however unintentional, be permitting a defendant to practice a fraud upon a complainant, which might be fatal to his interests."

truth and sufficiency of the bill.¹

6. CONSISTENCY. — In framing the replication, care must be taken not to depart from the statements of the bill, or it may be demurred to, though leave to amend may be given.²

Amendment Must Be Consistent. — If the proposed amendment shows that an entirely new case will be made, leave to amend will be refused.³

8. Withdrawal of Replication. — After filing a replication it may be withdrawn, as of course, on the complainant's motion, if the object is to expedite the cause by setting it for hearing on bill and answer;⁴ and it may also be withdrawn for the purpose of amending the bill,⁵ or where the plaintiff has replied inadvertently.⁶

What Motion Should Show. — Some reason that may induce the court to grant the indulgence, so that the plaintiff may amend his bill, must appear in the application.⁷

1. Cooper's Eq. Pl. 329.

Informal Replication. — Where interrogatories were propounded to the plaintiff by the defendant at the conclusion of his answer, and the complainant made the same document a replication and an answer to interrogatories, it was considered irregular, but as the matters set up by the answer rendered a replication proper, and the defendant did not except to the paper on the ground that it was serving a double purpose, the replication was permitted. *Graham v. Stephen*, 15 Tex. 88.

2. *Vattier v. Hinde*, 7 Pet. (U. S.) 252. In this case the bill set out a title to real property in the wife of one of the complainants, by direct descent from her brother. The answer resisted the claim because the complainants had conveyed the land, before institution of the suit, to a third party. The replication admitted the conveyance to the third party, but averred that it was in trust to be conveyed to the husband to hold for the benefit of the wife and her children, which trust had been executed. The deed of the third party was exhibited, but did not show the alleged trust. It was held that the replication was a departure from the statement of the bill which the rules of chancery would not permit, and that the complainants should have applied for leave to amend their bill.

3. *Minor v. Woodbridge*, 2 Root (Conn.) 277, holding that where the bill was for redemption on the ground of fraud in not executing a bond of defeasance agreed upon, and the replica-

tion showed that the bond was executed, but was lost and could not be produced, an amendment could not be permitted, for it would result in the making of a new case.

4. *Cowdell v. Tatlock*, 3 Ves. & B. 19; *Rogers v. Goore*, 17 Ves. Jr. 130; *Brown v. Ricketts*, 2 Johns. Ch. (N. Y.) 425.

5. *Pott v. Reynolds*, 3 Atk. 565; *Kilcoursy v. Ley*, 4 Madd. 212; *Motteux v. Mackreth*, 1 Ves. Jr. 142.

6. *Greene v. Harris*, 9 R. I. 401; *Hughes v. Blake*, 6 Wheat. (U. S.) 453.

7. *Pott v. Reynolds*, 3 Atk. 565.

Materiality of Amendment. — The petition should show the materiality of the amendment, and why the matter to be introduced by it was not stated sooner. *Longman v. Calliford*, 3 Anstr. 807; *Brown v. Ricketts*, 2 Johns. Ch. (N. Y.) 425; *Thorn v. Germand*, 4 Johns. Ch. (N. Y.) 363.

Insufficient Grounds. — *Amendment in Matter of Form.* — A petition stated that the bill was materially defective, but the affidavit of the plaintiff's solicitor stated that matters which he at first thought had been omitted were fully charged and that the only amendment desired was one of form and required no further answer. It was held that no sufficient ground was shown for a withdrawal. *Brown v. Ricketts*, 2 Johns. Ch. (N. Y.) 425.

Prior Knowledge of Subject of Amendment. — Where it was proved by the defendants, and not denied by the plaintiffs, that one of the latter knew at the time of filing the bill of the existence of the matter sought to be

When Withdrawal Is Not Allowed. — There can be no withdrawal, however, after witnesses have been examined,¹ and it is not usual to grant leave to withdraw for the purpose of excepting to the answer.²

V. CODE REPLIES — 1. Office and Nature of Reply. — The office of a reply is to deny the facts alleged as defenses or to allege facts in avoidance of such defenses,³ and, while not abandoning the cause of action as originally pleaded, to fortify it by the new facts rendered necessary by the allegations of the answer.⁴

2. Necessity and Advisability of Reply — a. PROVISIONS OF CODES. — The states in which code pleading prevails may be divided into two classes, those in which no reply is required⁵

added in amendment, the application to withdraw was denied. *Thorn v. Germard*, 4 Johns. Ch. (N. Y.) 363.

1. *Gascoyne v. Chandler*, 3 Swanst. 418, citing *Anonymous*, Barn. 222.

Danger of Altering Issues. — In *Horton v. Brocklehurst*, 29 Beav. 503, the plaintiffs sought to withdraw a replication and amend their bill, which charged two trustees severally with trust moneys retained with their privacy by third parties, so as to charge the defendants for moneys which they had jointly allowed the third parties to retain. The motion was denied, the court remarking that it never knew a case in which plaintiff was allowed, after all the evidence had been taken, to alter the issue before the hearing; "it would be extremely dangerous to allow it."

Leave Granted During Time for Taking Evidence. — In a case where the complainant discovered a grave error in the allegation of facts in the bill during the time for taking testimony, and it appeared that there had not been such want of diligence on his part as to preclude an amendment, leave was given to withdraw the replication on terms. *Champneys v. Buchan*, 3 Drew. 5.

2. *Cooper's Eq. Pl.* 328.

Delay in Discovering Defects in Answer. — Where the object of the motion to withdraw was to except to the answer, the petition failed to state wherein the answer was defective, or why the defects in it, if any, were not discovered sooner, it being three months since the application was filed. The motion was denied, as it would be granting an unreasonable indulgence. *Brown v. Ricketts*, 2 Johns. Ch. (N. Y.) 425.

3. *Colorado Fuel, etc., Co. v. Chap-pell*, (Colo. App. 1898) 55 Pac. Rep.

606; *Chrisman v. Chenoweth*, 81 Ind. 401; *Marder v. Wright*, 70 Iowa 42; *Kinthead v. McCormack Harvesting Mach. Co.*, 106 Iowa 222; *Piper v. Woolman*, 43 Neb. 280; *Lillienthal v. Hotaling Co.*, 15 Oregon 371.

Where a Reply Does Neither it is bad on demurrer or should be stricken out. *Chrisman v. Chenoweth*, 81 Ind. 401; *Piper v. Woolman*, 43 Neb. 280.

4. *Shirts v. Irons*, 47 Ind. 445; *Paxton Cattle Co. v. Arapahoe First Nat. Bank*, 21 Neb. 621; *Savage v. Aiken*, 21 Neb. 605; *School Dist. v. Caldwell*, 16 Neb. 68.

England. — Under the Judicature Acts the statement of claim must be supported by the reply without raising any new ground of claim. 3 Steph. Com. 527.

Where facts which might be set out by way of estoppel in the reply appear affirmatively in the answer, it is unnecessary for the plaintiff to reiterate them. *Scott v. Luther*, 44 Iowa 570.

5. See generally the provisions of the various codes, and see the following cases:

California. — *Herold v. Smith*, 34 Cal. 122; *Doyle v. Franklin*, 40 Cal. 106; *Curtiss v. Sprague*, 49 Cal. 301; *Colton Land, etc., Co. v. Raynor*, 57 Cal. 588; *Grangers' Business Assoc. v. Clark*, 84 Cal. 201; *Moore v. Copp*, 119 Cal. 429.

Louisiana. — Replies are not admissible, and all the allegations of the answer are open to any objection of law and fact. Therefore the plaintiff may show nonage, coverture, violence, fraud, prescription, and the like, without pleading them. *Flood v. Shamburgh*, 3 Mart. N. S. (La.) 622; *Planters' Bank v. Allard*, 8 Mart. N. S. (La.) 136; *Bayly v. Stacey*, 30 La. Ann. 1210; *Hickman v. Dawson*, 33 La. Ann. 438;

and those in which the codes provide for a reply under certain circumstances.¹

Peculiar Provisions of Codes.—In those states in which a reply is permitted it is provided in substance that new matter alleged in the answer may be replied to, but the language of the various codes varies. Thus in some states provision is made for a reply to matter alleged in the answer to which the plaintiff claims to have a defense by reason of some fact which avoids the matter alleged in the answer;² in others, to new and affirmative matter in the answer;³ and in others, to new matter in the answer which

Second *v. Landry*, 1 Rob. (La.) 335; Holliday *v. Marionneaux*, 9 Rob. (La.) 504; Riley *v. Wilcox*, 12 Rob. (La.) 648.

Nevada.—State *v. Yellow Jacket Silver Min. Co.*, 14 Nev. 220.

Cross-complaint—California.—In California there must, however, be an answer to a cross-complaint. Herold *v. Smith*, 34 Cal. 122; Doyle *v. Franklin*, 40 Cal. 106; Grangers' Business Assoc. *v. Clark*, 84 Cal. 201; Moore *v. Copp*, 119 Cal. 420.

Reply to Counterclaims and Set-offs.—See generally article SET-OFF, RECOUPMENT, AND COUNTERCLAIM.

1. *Arkansas*.—Cannon *v. Davies*, 33 Ark. 56; Abbott *v. Rowan*, 33 Ark. 593; Lusk *v. Perkins*, 48 Ark. 238; Burlington Ins. Co. *v. Miller*, 60 Fed. Rep. 254; St. Louis, etc., R. Co. *v. Higgins*, 44 Ark. 293.

Montana.—Unless the answer states facts entitling the defendant to affirmative relief, no reply is necessary. Caruthers *v. Pemberton*, 1 Mont. 111; Babcock *v. Maxwell*, 21 Mont. 507.

New York.—Putnam *v. De Forest*, (Supm. Ct. Spec. T.) 8 How. Pr. (N. Y.) 146; Van Nest *v. Talmage*, (Supm. Ct. Gen. T.) 17 Abb. Pr. (N. Y.) 99; Equitable L. Assur. Soc. *v. Cuyler*, 75 N. Y. 511; Cockerill *v. Loonam*, 36 Hun (N. Y.) 353; Maricle *v. Brooks*, (Supm. Ct. Gen. T.) 5 N. Y. Supp. 210; Farrell *v. Amberg*, (C. Pl. Gen. T.) 23 Civ. Pro. (N. Y.) 434, 8 Misc. (N. Y.) 220.

North Carolina.—Jones *v. Cohen*, 82 N. Car. 75; Fitzgerald *v. Shelton*, 95 N. Car. 519; Askew *v. Koonce*, 118 N. Car. 526.

North Dakota.—Heebner *v. Shepard*, 5 N. Dak. 56.

South Carolina.—Price *v. Richmond*, etc., R. Co., 38 S. Car. 199; Davis *v. Schmidt*, 22 S. Car. 132; Egan *v. Bissell*, 54 S. Car. 80.

South Dakota.—Seiberling *v. Mortinson*, 10 S. Dak. 644.

Texas.—It is not necessary to deny any special matter of defense pleaded by the defendant, but such matter is regarded as denied unless especially admitted. Martin *v. Teal*, (Tex. Civ. App. 1895) 29 S. W. Rep. 691; McKinney *v. Nunn*, 82 Tex. 44; Meyer *v. Opperman*, 76 Tex. 105; Bauman *v. Chambers*, 91 Tex. 108; Byers *v. Carll*, 7 Tex. Civ. App. 423; Coles *v. Kelsey*, 2 Tex. 541, *overruling* Underwood *v. Parrot*, 2 Tex. 168, holding that a reply was admissible to new matter.

Wisconsin.—Wood *v. Lake*, 13 Wis. 85; Whitefoot *v. Leffingwell*, 90 Wis. 182.

Coverture of Female Defendant—Texas.—Where a female defendant sets up coverture, the fact is placed in issue without a general denial. Brooks *v. Pegg*, (Tex. 1888) 8 S. W. Rep. 595.

2. **Reply in Avoidance of Answer—Iowa.**—Higley *v. Burlington*, etc., R. Co., 99 Iowa 503; McQuade *v. Collins*, 93 Iowa 22; Hartley *v. Keokuk*, etc., R. Co., 85 Iowa 455; Chase *v. Kaynor*, 78 Iowa 449; Mills County Nat. Bank *v. Perry*, 72 Iowa 15; Walker *v. Sioux City*, etc., Town Lot Co., 65 Iowa 563; Meadows *v. Hawkeye Ins. Co.*, 62 Iowa 387; Des Moines University *v. Livingston*, 57 Iowa 307; Kirk *v. Woodbury County*, 55 Iowa 190; Davis *v. Payne*, 45 Iowa 194; Scott *v. Luther*, 44 Iowa 570; Williams *v. Wilcox*, 66 Iowa 65; Allison *v. King*, 25 Iowa 56; Kinkead *v. McCormack Harvesting Mach. Co.*, 106 Iowa 222.

3. **As to New Matter in the Answer**, see article ANSWERS in CODE PLEADING, vol. 1, p. 830 *et seq.*

Indiana.—Small *v. Kennedy*, 137 Ind. 299; Uhl *v. Harvey*, 78 Ind. 26; Webb *v. Corbin*, 78 Ind. 403; Walker *v. Woollen*, 54 Ind. 164; Barnes *v. Bates*, 28 Ind. 15; Ferris *v. Johnson*, 27

constitutes a defense or counterclaim.¹

b. DIRECTING REPLY TO BE MADE — (1) *In General.* — In some states the codes provide that where new matter constituting a defense by way of avoidance is contained in the answer the courts may in their discretion,² on the motion of the defendant,

Ind. 247; *McCarty v. Roberts*, 8 Ind. 150; *Lamson v. Falls*, 6 Ind. 309.

Kansas. — *Burton v. Harvey County Sav. Bank*, 28 Kan. 390; *Netcott v. Porter*, 19 Kan. 131; *Ballinger v. Lantier*, 15 Kan. 608; *Wilson v. Fuller*, 9 Kan. 176; *Ferguson v. Tutt*, 8 Kan. 370.

Kentucky. — A reply is necessary only to affirmative allegations of the answer. *Ermert v. Dietz*, (Ky. 1898) 44 S. W. Rep. 138; *Collins v. Partin*, (Ky. 1897) 42 S. W. Rep. 1111; *Smith v. Louisville, etc., R. Co.*, 95 Ky. 11; *Wise v. Covington, etc., St. R. Co.*, 91 Ky. 537; *Brown v. Ready*, (Ky. 1893) 20 S. W. Rep. 1036; *Evans v. Stone*, 80 Ky. 78.

Minnesota. — *Olson v. Tvete*, 46 Minn. 225; *Hastings First Nat. Bank v. Rogers*, 22 Minn. 231. See also *Webb v. O'Donnell*, 28 Minn. 369, holding that the statute requiring a reply to an answer containing new matter is not applicable to the Municipal Court of St. Paul, because by a special statute a reply is required in that court only when the answer contains a counterclaim.

Missouri. — *Farrell v. Farmers' Mut. F. Ins. Co.*, 66 Mo. App. 153; *State v. Rau*, 93 Mo. 126.

Nebraska. — *Dillon v. Russell*, 5 Neb. 484; *Williams v. Evans*, 6 Neb. 216; *Payne v. Briggs*, 8 Neb. 75; *Prall v. Peters*, 32 Neb. 832; *Bouscaren v. Brown*, 40 Neb. 722; *National Lumber Co. v. Ashby*, 41 Neb. 292; *Johnson v. Reed*, 47 Neb. 322; *Van Etten v. Kosters*, 48 Neb. 152; *Scofield v. Clark*, 48 Neb. 711; *McCann v. McLennan*, 2 Neb. 286.

Ohio. — *Fanning v. Hibernia Ins. Co.*, 37 Ohio St. 344; *Simmons v. Green*, 35 Ohio St. 104; *Fewster v. Goddard*, 25 Ohio St. 276; *Corry v. Campbell*, 25 Ohio St. 134; *Dayton Ins. Co. v. Kelly*, 24 Ohio St. 345; *Hoffman v. Gordon*, 15 Ohio St. 211.

Wyoming. — *Iba v. Central Assoc.*, 5 Wyo. 355.

1. *Sylvis v. Sylvis*, 11 Colo. 319; *Allensbach v. Wagner*, 9 Colo. 127; *Meyer v. Binkleman*, 5 Colo. 262; *Persee v. Gaffney*, 23 Colo. 245; *Benicia*

Agricultural Works v. Creighton, 21 Oregon 495.

2. Defenses Not Containing Admissions.

— Where the defense set up does not admit that the plaintiff would be entitled to judgment but for the fact of the avoiding matter, the case is not one within the meaning or language of statutes so authorizing a reply to be ordered. *O'Gorman v. Arnoux*, (Supm. Ct. Spec. T.) 63 How. Pr. (N. Y.) 159.

Allegation of Statutory Limited Partnership.

— Where the defendant was sued as a general partner the answer, admitting the contract, denied a general partnership and alleged that the defendant was a special partner in a limited partnership, formed as provided by statute. It was held proper to require the plaintiff to reply, in order to raise a precise and definite issue as to what class of partnership liability he might be claimed to be subject to. *Williams v. Kilpatrick*, (Supm. Ct. Spec. T.) 21 Abb. N. Cas. (N. Y.) 61; *Hartford Nat. Bank v. Beinecke*, (Supm. Ct. App. Div.) 26 Civ. Pro. N. Y.) 226, 15 N. Y. App. Div. 474.

False Statements in Application for Insurance Policy.

— Where, in an action on an insurance policy, the answer alleged that the insured, in his application, made false statements and representations, and that the policy had lapsed by reason of the nonpayment of an assessment levied by the defendant, it was held that a reply to such new matter was proper. *Schwan v. Mutual Trust Fund L. Assoc.*, (Supm. Ct. Spec. T.) 9 Civ. Pro. (N. Y.) 82.

Answer Setting Up Res Judicata.

— Where the answer sets up an adjudication in another state, a motion requiring a reply should be denied. *New York, etc., R. Co. v. Robinson*, (Supm. Ct. Gen. T.) 25 Abb. N. Cas. (N. Y.) 116. See also *Winchester v. Browne*, (Supm. Ct.) 25 Abb. N. Cas. (N. Y.) 148; *Columbus, etc., R. Co. v. Ellis*, (Supm. Ct.) 25 Abb. N. Cas. (N. Y.) 150.

Replies Have Been Required to answers setting up by way of defense:

Decrees of Divorce. — *Brinkerhoff v.*

direct the plaintiff to reply to such new matter.¹

(2) *Grounds for Granting Motion.* — The question whether a motion to compel a reply should be granted or denied usually depends upon the further question whether a reply is necessary in order to prevent surprise; but no hard and fast rule can be laid down making this the only test.²

Brinkerhoff, (Supm. Ct. Spec. T.) 8 Abb. N. Cas. (N. Y.) 207.

Countercharges of Adultery. — Leslie v. Leslie, (C. Pl. Spec. T.) 11 Abb. Pr. N. S. (N. Y.) 314.

A Discharge in Bankruptcy. — Poillon v. Lawrence, 43 N. Y. Super. Ct. 385.

Statutes of Limitations. — Hubbell v. Fowler, (Supm. Ct. Spec. T.) 1 Abb. Pr. N. S. (N. Y.) 1; Cavanagh v. Oceanic Steamship Co., (Supm. Ct. Gen. T.) 30 N. Y. St. Rep. 532. *Contra*, Perls v. Metropolitan L. Ins. Co., 15 Daly (N. Y.) 517; Avery v. New York Cent., etc., R. Co., (Buffalo Super. Ct. Gen. T.) 6 N. Y. Supp. 547.

Affirmative Defenses Generally. — Rogers v. Mutual Reserve Fund L. Assoc., (Supm. Ct. Spec. T.) 1 How. Pr. N. S. (N. Y.) 194; McGin v. Sorrens, 4 N. Y. L. Bul. 29; Watson v. Phyfe, 20 N. Y. Wkly. Dig. 372.

Though no counterclaim be pleaded a reply may be ordered to matters of defense set up in the answer; the matter is entirely within the discretion of the court. James v. Western North Carolina R. Co., 121 N. Car. 530.

1. *Mercantile Nat. Bank v. Corn Exch. Bank*, 73 Hun (N. Y.) 78; *Cavanagh v. Oceanic Steamship Co.*, (Supm. Ct. Gen. T.) 9 N. Y. Supp. 198; *Cauchois v. Proctor*, 79 Hun (N. Y.) 388; *Gull River Lumber Co. v. Keefe*, 6 Dak. 160; *Jones v. Cohen*, 82 N. Car. 75; *Fitzgerald v. Shelton*, 95 N. Car. 510.

Plaintiff Cannot Obtain Order. — Unless directed by the court on the motion of the defendant, the plaintiff may not reply. *Sterling v. Metropolitan L. Ins. Co.*, (Supm. Ct. Gen. T.) 6 N. Y. St. Rep. 96; *Simmons v. Simmons*, (Supm. Ct.) 21 Abb. N. Cas. (N. Y.) 469.

Voluntary Reply Should Be Disregarded. — If the defendant does not ask that the plaintiff be required to reply, the plaintiff may interpose any defense he may have, but he cannot voluntarily, nor upon his own application to the court, interpose a reply. "Such application must come from the defendant only. A reply, then, voluntarily interposed will be disregarded by

the court." *Gull River Lumber Co. v. Keefe*, 6 Dak. 160. See also *Avery v. New York Cent., etc., R. Co.*, (Buffalo Super. Ct. Gen. T.) 6 N. Y. Supp. 547; *Dillon v. Sixth Ave. R. Co.*, 46 N. Y. Super. Ct. 21.

Waiver of Right to Compel Reply. — Where the defendants moved to strike the cause from the calendar because of the failure of the plaintiff to reply to new matter, on the theory that the cause was not at issue, McAdam, J., stating that the defendants had misconceived the practice, said: "No order had been made requiring a reply to the new matter, and it was optional with the plaintiff to serve one. If without an order a reply was proper, the only effect of a failure to make it was to render unnecessary proof of the facts which should have been met by reply." *Gilbert v. McKenna*, (N. Y. Super. Ct. Gen. T.) 25 Civ. Pro. (N. Y.) 143, 15 Misc. (N. Y.) 25.

Cross-notice of Trial. — The service of a cross-notice of trial is not necessarily such an expression of satisfaction with the condition of the pleadings as of itself to preclude a motion for reply. *Cavanagh v. Oceanic Steamship Co.*, (Supm. Ct. Gen. T.) 30 N. Y. St. Rep. 532.

2. *Cavanagh v. Oceanic Steamship Co.*, (Supm. Ct. Gen. T.) 30 N. Y. St. Rep. 532, holding that if a question of law is likely to arise it may be "to the advantage of both parties to have this question of law settled in advance."

It Is Not Every Case of Confession and Avoidance which calls for the exercise of the court's discretionary power, and where the answer contains a lengthy and detailed statement, partly of facts and partly of evidence of facts, it would be oppressive to put upon the plaintiff the burden of going minutely over this elaborate recital and of admitting, denying, ignoring, or explaining every component part of it. *Scofield v. Demorest*, 55 Hun (N. Y.) 254, holding that where it is plain from the nature of the case that the defendant cannot well be surprised at the trial by the way in which the plaintiff may seek

(3) *Obedience to Order.* — When the plaintiff is ordered to file a reply, it should contain a general or specific denial of each material allegation that it controverts, or of any knowledge or information thereof sufficient to form a belief, and the plaintiff should not seek to avoid a full compliance with the order by alleging ignorance as to whether the facts are correctly set forth in the answer.¹

(4) *Noncompliance with Order.* — Should the plaintiff, on being ordered to reply, fail to comply with the order, the defendant may, upon notice, move for judgment as in the case of failure to reply to a counterclaim.²

c. SUFFICIENCY OF NEW MATTER TO REQUIRE REPLY. — Whether matter is or is not new must be determined by the matter itself, the test being whether it operates as a traverse or by way of confession and avoidance.³ Any fact which the plaintiff is not bound to prove in the first instance to establish his cause

to meet the new matter, the motion should be denied as an attempt to require a reply to the defendant's evidence.

1. *Steinway v. Steinway*, 74 Hun (N. Y.) 423, holding that where a reply was required "because the defense did not appear to tender an issue of fact, but rather an issue which would be fatal to plaintiff unless its legal effect could be avoided," a denial generally of "knowledge or information sufficient to form a belief" as to whether a writing was correctly set forth in the answer was insufficient and not a denial of each of its material allegations as required by the code. The plaintiff's proper course would have been to demand an inspection of the original writing.

Where the plaintiff is directed to reply to new matter in the answer constituting a defense by way of avoidance, the reply is subject to the same rules as in the case of a counterclaim. Thus his reply must contain a general or specific denial of each material allegation controverted by the plaintiff, or any knowledge or information thereof sufficient to form a belief, and it may set forth in ordinary and concise language, without repetition, new matter not inconsistent with the complaint, constituting a defense to the counterclaim. If no such denial be interposed the new matter is admitted. *Winchester v. Browne*, (Supm. Ct. Spec. T.) 26 Abb. N. Cas. (N. Y.) 387.

2. *Motion at Chambers.* — It seems that in *New York* the motion should be made in court, not at chambers.

Aymar v. Chace, 12 Barb. (N. Y.) 301.

As to the practice on failure to reply to counterclaims, see article SET-OFF, RECOUPMENT, AND COUNTERCLAIM.

3. *Frisch v. Caler*, 21 Cal. 71, holding that an answer averring payment of a promissory note which was the cause of action was not new matter to which a reply was necessary, because, although it was an affirmative allegation, its effect was only a denial of an essential allegation of the complaint, viz., the nonpayment of the note.

Matter in Answer Capable of Proof under General Denial. — Where the allegations of the answer merely put in issue the plaintiff's right to recover, and the matter set up might be proved under a general denial, no reply is necessary. *Frisch v. Caler*, 21 Cal. 71; *Brown v. Orr*, 29 Cal. 120; *Walker v. Sioux City, etc., Town Lot Co.*, 66 Iowa 752; *Corry v. Campbell*, 25 Ohio St. 134; *Simmons v. Green*, 35 Ohio St. 104; *Iba v. Central Assoc.*, 5 Wyo. 355.

Rule for Distinguishing Denial and New Matter. — "Whatever facts are alleged in the answer that might have been proved under a specific denial of the allegations of the complaint may be considered as and are equivalent to a specific denial of such allegations, and require no replication; for such an answer forms an issue, and whatever averments of the answer amount to an admission of the allegations of the complaint, and tend to establish some circumstance or fact not inconsistent with all such allegations, constituting a defense or counterclaim, and which could not be proved under a specific

of action and which goes in avoidance or discharge of it is new matter.¹

Answer Admitting All or Some Allegations of Complaint. — If all essential allegations of the complaint are either directly or inferentially admitted as true by the answer, and it sets forth facts from which

denial, are new matter and require a replication." *Mauldin v. Ball*, 5 Mont. 96.

Answer Equivalent to Plea in Confession and Avoidance. — An answer of new matter requiring a reply is in the nature of a plea in confession and avoidance. *Craig v. Cook*, 28 Minn. 232; *Olson v. Tvette*, 46 Minn. 225.

New Matter Must Be Material. — The allegation of new matter, to render a reply requisite, must be sufficient as a valid defense and material to it. *West v. Cameron*, 39 Kan. 736; *Jamison v. Springfield*, 53 Mo. 224; *Davis v. Clark*, 2 Mont. 310.

1. *McCarty v. Roberts*, 8 Ind. 150; *State v. Williams*, 48 Mo. 210; *Kersey v. Garton*, 77 Mo. 645; *State v. Rau*, 93 Mo. 126; *Hudson v. Wabash Western R. Co.*, 101 Mo. 13; *Nelson v. Wallace*, 48 Mo. App. 193; *Robinson v. Suter*, 15 Mo. App. 599; *Stoddard v. Onondaga Annual Conference*, 12 Barb. (N. Y.) 573.

Evidential Matter in Answer. — Where the matter alleged is merely evidence it does not require a reply. *Helena Nat. Bank v. Rocky Mountain Tel. Co.*, 20 Mont. 379.

Misrepresentation by Assured. — In *Texas Mut. L. Ins. Co. v. Davidge*, 51 Tex. 244, it was held that if, as an answer to the defense of misrepresentation by the assured as to his habits of temperance, the plaintiff sought to establish that those habits were known to the agent who acted for the company in negotiating the contract, that knowledge should have been pleaded in reply to the defense. *Citing Texas Banking, etc., Co. v. Stone*, 49 Tex. 5.

Ratification of a Contract should be replied to a plea of insanity or infancy, to warrant the introduction of evidence to establish it. *Elston v. Jasper*, 45 Tex. 409; *Hollingsworth v. Holshousen*, 17 Tex. 46.

Fraud and Want of Consideration have been permitted to be shown without replying. *Corbin v. Beebee*, 36 Iowa 336; *Barger v. Farris*, 34 Iowa 228; *Noble v. The Steamboat Northern Illinois*, 23 Iowa 109; *Reinhard v. Brown*, (Ky. 1897) 39 S. W. Rep. 705;

Carter v. Goodman, 11 Bush. (Ky.) 233; *Dambman v. Schulting*, 4 Hun (N. Y.) 50; *New York L. Ins. Co. v. Aitkin*, 125 N. Y. 660.

Settlement. — It has been held unnecessary to reply to an answer setting up a settlement. *Higley v. Burlington, etc., R. Co.*, 99 Iowa 503; *Maricle v. Brooks*, (Supm. Ct. Gen. T.) 5 N. Y. Supp. 210.

Payment by Note. — Where the plaintiff did not mention that promissory notes were given for the price of goods sold, and the defendant alleged that three promissory notes were given for the price of the goods, which were sold on credit, and that the notes had not matured, it was held to be an answer containing new matter requiring a reply from the plaintiff to put it in issue. *Ballinger v. Lantier*, 15 Kan. 608.

Usury. — Where the execution of a note is admitted, but there is an averment of want of consideration, because it was to secure the payment of usurious interest on previous loans, a reply is necessary under a code provision that material allegations must be controverted or taken as true. *Babcock v. Farmers', etc., Bank*, 46 Kan. 548.

Offer to Confess Judgment. — Where the answer expresses a willingness to confess judgment in favor of the plaintiff, a reply is not necessary. *Barnes v. Bates*, 28 Ind. 15.

Prior Action Pending. — Where there is a plea of another suit pending the plaintiff may, having dismissed it, set up that fact by way of reply. *Page v. Mitchell*, 37 Minn. 368.

Unlawful Taking. — Where there were several plaintiffs in an action in detinue, an answer denying the joint ownership of the plaintiffs was held to aver material matter necessitating a reply. *Walrod v. Bennett*, 6 Barb. (N. Y.) 144.

Allegation of Conspiracy. — Where the answer alleged a conspiracy to prevent the defendant's bringing in a set-off, it was held that inasmuch as debts set off must be mutual between the parties, and it did not appear that the defendant was within the exceptions to this rule, there need be no reply. *Wool-*

it results that, notwithstanding the truth of the allegations of the complaint, no cause of action existed in the plaintiff at the time when the action was brought, such facts are new matter;¹ but if they only show that some essential allegation of the complaint is not true, they are not new matter, but are only a traverse.²

Affirmative Allegations in Effect Denials. — Where the legal effect of the affirmative allegations in an answer is a mere denial of the averments in the petition, such allegations cannot be regarded as

man *v.* Capital Nat. Bank, 2 Colo. App. 454.

Objection Not Available on Appeal. — The action of the court in refusing to allow the plaintiff to file a reply to an answer confessing the cause of action is no ground of error. Walker *v.* Steele, 121 Ind. 436.

1. Goddard *v.* Fulton, 21 Cal. 430.

Conclusions of Law. — Where the matter alleged is not a statement of fact, but a conclusion of law drawn from facts already stated, the answer sets up no matter to which a reply is necessary. Dix *v.* German Ins. Co., 65 Mo. App. 34; State *v.* Williams, 77 Mo. 463.

2. Goddard *v.* Fulton, 21 Cal. 430.

Illustration. — Where the plaintiff in an action for divorce alleged that he left the defendant because of certain acts committed by her, and the defendant alleged that the plaintiff left her without cause, it was held not to be new matter, but merely matter inconsistent with the complaint and in effect a denial. Sylvis *v.* Sylvis, 11 Colo. 319.

No Affirmative Justification or Defense.

— Where new facts amount only to a denial of the cause of action alleged in the complaint, and not to an affirmative justification or defense, no reply is necessary. Ferris *v.* Johnson, 27 Ind. 247; Webb *v.* Corbin, 78 Ind. 403; Uhl *v.* Harvey, 78 Ind. 26; Cooke *v.* Williamson, 11 Ind. 242; Netcott *v.* Porter, 19 Kan. 131; Wilson *v.* Fuller, 9 Kan. 177; Ferguson *v.* Tutt, 8 Kan. 370; Reed *v.* Arnold, 10 Kan. 104; Zane *v.* Zane, 5 Kan. 134; Bradbury *v.* Van Pelt, 4 Kan. App. 571; Pinger *v.* Pinger, 40 Minn. 417; McArdle *v.* McArdle, 12 Minn. 98; Conway *v.* Elgin, 38 Minn. 469; Jordan *v.* Buschmeyer, 97 Mo. 94; Van Gieson *v.* Van Gieson, 12 Barb. (N. Y.) 520; Brown *v.* Spear, (Supm. Ct. Spec. T.) 5 How. Pr. (N. Y.) 146.

Form of Statement in Answer Immaterial. — If the facts stated in the answer

simply show that those stated in the petition are untrue, the fact that the form of the statement is in the affirmative will not render a reply the more necessary. Engel *v.* Bugbee, 40 Minn. 492; State *v.* Rau, 93 Mo. 126; Blatz *v.* Lester, 54 Mo. App. 283.

Argumentative Denial of Petition. — In an action to recover damages for expenses incurred by the plaintiff in removing a cloud on the title to land bought from the defendant, the answer averred that the deed from the defendant conveyed good title to the land, and that the plaintiff remained in its possession undisturbed by any one. This was held to be an argumentative denial of the allegations of the petition and in no sense new matter. Luther *v.* Brown, 66 Mo. App. 227.

Where a petition alleged that the plaintiff's dwelling house and contents covered by the policy sued on were totally destroyed by fire, the answer of the defendant was that the plaintiff's loss was not caused directly by fire, but that the house was blown down and caught fire from the stove. It was held that the answer was in legal effect a denial of the allegation of the petition that the destruction was caused by fire, and did not amount to new matter, and that the replication should have been stricken out, since it was "a useless cumbrer of the ground." Farrell *v.* Farmers' Mut. F. Ins. Co., 66 Mo. App. 153.

Allegation of Present Indebtedness. — Where the complaint averred a sale of goods and that the defendant "is now indebted to the plaintiffs" therefor, the answer alleged that the sale was upon credit and that the credit had not expired. It was held that the answer did not contain new matter, the facts only amounting to a denial of the allegation in the complaint that the defendant "is now indebted." Gilbert *v.* Cram, (Supm. Ct. Spec. T.) 12 How. Pr. (N. Y.) 455.

matter which will be taken as true unless controverted by a reply.¹

d. IN JUSTICES' COURTS. — In some states no reply is necessary in proceedings before a justice of the peace.²

e. PENDING DEMURRER TO ANSWER. — Where a demurrer to the answer remains undecided, the plaintiff cannot be compelled to reply.³

f. MAKING FURTHER REPLY. — Where a traverse has been made of the affirmative averments of an answer afterwards withdrawn and then refiled, it is unnecessary to reply again;⁴ and when, after reply, an amended answer is filed setting up the original defense and also a new defense not previously interposed, the plaintiff may, if he choose, plead over or stand on his reply.⁵

1. *Indiana*. — *Riddle v. Parke*, 12 Ind. 89; *Cooke v. Williamson*, 11 Ind. 242; *Walker v. Woollen*, 54 Ind. 164.

Iowa. — *Bayliss v. Murray*, 69 Iowa 290; *Burroughs v. McLain*, 37 Iowa 189; *Kavalier v. Machula*, 77 Iowa 121; *Colby v. McOmber*, 71 Iowa 469; *Medland v. Walker*, 96 Iowa 175.

Kansas. — *Burrton v. Harvey County Sav. Bank*, 28 Kan. 390.

Kentucky. — *Deming v. Paynter*, (Ky. 1897) 42 S. W. Rep. 1112; *Smith v. Louisville, etc., R. Co.*, 95 Ky. 11; *Wise v. Covington, etc., St. R. Co.*, 91 Ky. 537; *Blalock v. Keys*, 13 Ky. L. Rep. 205; *Crow v. Crow*, 4 Ky. L. Rep. 909; *McCrocklin v. Hiatt*, 6 Ky. L. Rep. 745; *Ermert v. Dietz*, (Ky. 1898) 44 S. W. Rep. 138; *Roberts v. Hinkle*, (Ky. 1897) 43 S. W. Rep. 233.

Missouri. — *State v. Williams*, 48 Mo. 210; *Jordan v. Buschmeyer*, 97 Mo. 94.

Nebraska. — *Peaks v. Lord*, 42 Neb. 15. *New York*. — *Van Gieson v. Van Gieson*, 12 Barb. (N. Y.) 520.

Ohio. — *Hoffman v. Gordon*, 15 Ohio St. 215; *Corry v. Campbell*, 25 Ohio St. 134; *Long v. Hoban*, 7 Ohio Dec. (Reprint) 688; *Dayton Ins. Co. v. Kelly*, 24 Ohio St. 345; *Mehurin v. Stone*, 37 Ohio St. 49; *Simmons v. Green*, 35 Ohio St. 104.

South Carolina. — *Cave v. Anderson*, 50 S. Car. 293.

Wisconsin. — *Smith v. Coolbaugh*, 21 Wis. 427.

Verified Answer. — The mere fact that an answer is verified is immaterial. The verification will only compel the plaintiff to prove what otherwise would be admitted. *Burrton v. Harvey County Sav. Bank*, 28 Kan. 390.

2. *Turner v. Simpson*, 12 Ind. 413; *Kuhn v. American Automatic Knife, etc., Co.*, (C. Pl. Gen. T.) 9 Misc. (N.

Y.) 54; *Conklin v. Field*, (County Ct.) 37 How. Pr. (N. Y.) 455; *Hodges v. Hunt*, 22 Barb. (N. Y.) 150; *Wilcox v. Palmer*, 2 Hun (N. Y.) 517; *Bellingham Bay, etc., R. Co. v. Strand*, 1 Wash. 133.

New Assignment Not Allowable. — The only pleadings in the court of a justice being the complaint, answer, and demurrer, a new assignment cannot be allowed. *Stewart v. Wallis*, 30 Barb. (N. Y.) 344.

In Washington when the answer sets up a set-off by way of defense all other new matters in the answer constituting a defense are presumed to be denied. *Bellingham Bay, etc., R. Co. v. Strand*, 1 Wash. 133.

On Appeal from Justice. — As no reply is necessary in proceedings before a justice of the peace, on appeal therefrom the absence of a reply in the appellate court will not entitle the defendant to a judgment on the pleadings for failure to reply. *Turner v. Simpson*, 12 Ind. 413; *Blacker v. Dunbar*, 108 Ind. 217.

3. *Seits v. Sinel*, 62 Ind. 253.

4. *Henderson v. McClain*, (Ky. 1897) 43 S. W. Rep. 700; *Dreilling v. Battle Creek First Nat. Bank*, 43 Kan. 197.

5. *Stewart v. American Exch. Nat. Bank*, 54 Neb. 461, holding that if the plaintiff elects to adopt the course of standing on the reply filed, it will not be considered a reply to the new facts set up in the amended answer. See also *Cooper v. Davis Sewing Mach. Co.*, 37 Kan. 231.

Where an Original Reply Is Refiled subsequent to the filing of an amended answer, it is sufficient to put in issue the averments of new matter contained therein. *Crosby v. Bastedo*, (Neb. 1898) 77 N. W. Rep. 365.

g. CRIMINAL PRACTICE. — It seems that in some cases replies on the merits may be made after the overruling of demurrers to pleas.¹

h. ABSENCE OF REPLY — (1) *In General.* — Where a reply is necessary by reason of new matter in the answer, it is a general rule that all of its material allegations² which are not controverted must, for the purposes of the action, be taken as true.³ No evidence will be requisite to establish it, and none admitted to contradict it.⁴

Practice in Court of Appeal. — Where two replications appear of record as being on file at the trial of a cause, an appellate court will look upon the one as an amendment to the other. *Lee v. Keister*, 11 Iowa 480.

1. *State v. Barrett*, 54 Ind. 434; *Clem v. State*, 42 Ind. 420; *People v. O'Neill*, 107 Mich. 556; *Barton v. State*, 12 Neb. 260.

2. **What Is Material Allegation.** — As to what is a material allegation, see the codes of the various states.

3. See the various codes.

Action on Foreign Judgment. — Where the answer averred facts disclosing a want of jurisdiction in the court rendering the judgment against the defendant upon which action was brought, it was held that reply should be made or the averments would stand admitted. *Davis v. Grinnell First Nat. Bank*, (Neb. 1899) 77 N. W. Rep. 775.

Objection in Appellate Court. — A claim that certain allegations of the answer are admitted by a failure to deny them in the reply cannot be made for the first time in an appellate court. *Stockton Combined Harvester, etc., Works v. Glens Falls Ins. Co.*, 121 Cal. 167.

Written Instruments. — In *California* the genuineness and due execution of a written instrument recited in the answer are taken as admitted, unless the plaintiff expressly denies them under oath. *Clark v. Child*, 66 Cal. 87.

Denial of Partnership. — In *Texas* it has been held that where an answer alleges the existence of a partnership, the plaintiff must deny such allegation under oath or it will be taken as admitted. *Reed v. Brewer*, 90 Tex. 144; *Gill v. First Nat. Bank*, (Tex. Civ. App. 1898) 47 S. W. Rep. 751, in which latter case the court overruled *Wamego First Nat. Bank v. Oliver*, 16 Tex. Civ. App. 428.

4. *Colorado.* — *Briggs v. Bruce*, 9 Colo. 282; *Denver Circle R. Co. v. Nestor*, 10 Colo. 403.

Indiana. — *Adams v. Tuley*, 1 Ind. App. 490; *Bird v. Lanius*, 7 Ind. 615.

Iowa. — *Cassidy v. Caton*, 47 Iowa 22.

Kansas. — *Babcock v. Farmers'*, etc., Bank, 46 Kan. 548.

Kentucky. — *Brown v. Ready*, (Ky. 1893) 20 S. W. Rep. 1036; *Skinner v. Myers*, (Ky. 1897) 40 S. W. Rep. 919.

Minnesota. — *West v. Hennessey*, 58 Minn. 133.

Missouri. — *Mueller v. Putnam F. Ins. Co.*, 45 Mo. 84.

Montana. — *Anderson v. Perkins*, 10 Mont. 154; *McMillan v. Carter*, 6 Mont. 215.

Nebraska. — *National Lumber Co. v. Ashby*, 41 Neb. 292; *Scofield v. Clark*, 48 Neb. 711; *Hamilton L. & T. Co. v. Gordon*, 32 Neb. 663; *Van Etten v. Kosters*, 48 Neb. 152; *Dillon v. Russell*, 5 Neb. 484; *Steele v. Russell*, 5 Neb. 215; *Williams v. Evans*, 6 Neb. 216; *Payne v. Briggs*, 8 Neb. 75; *Davis v. Grinnell First Nat. Bank*, (Neb. 1899) 77 N. W. Rep. 775; *Consul v. Sheldon*, 35 Neb. 247; *Culbertson Irrigating, etc., Co. v. Cox*, 52 Neb. 684; *Stewart v. American Exch. Nat. Bank*, 54 Neb. 461; *Equitable Trust Co. v. O'Brien*, 54 Neb. 735; *Burnet v. Cavanagh*, 56 Neb. 190.

New York. — *Birch v. Hall*, (Supm. Ct. Gen. T.) 3 N. Y. Supp. 747; *Kiddle v. Degroot*, (Supm. Ct. Spec. T.) Code Rep. N. S. (N. Y.) 202; *Royce v. Brown*, (Supm. Ct. Spec. T.) 3 How. Pr. (N. Y.) 391; *Jewett v. Jewett*, (Supm. Ct. Gen. T.) 6 How. Pr. (N. Y.) 185; *McNamara v. Biteley*, (Supm. Ct.) 4 How. Pr. (N. Y.) 44; *Stoddard v. Onondaga Annual Conference*, 12 Barb. (N. Y.) 573.

Ohio. — *Maxwell v. Griftner*, 11 Ohio Cir. Ct. 210, 5 Ohio Cir. Dec. 323; *Fewster v. Goddard*, 25 Ohio St. 276.

Oregon. — *Minard v. McBee*, 29 Oregon 225; *Benicia Agricultural Works v. Creighton*, 21 Oregon 495; *Larsen v. Oregon R., etc., Co.*, 19 Oregon 240; *Grafton v. Sellwood*, 24 Oregon 118;

(2) *Omission to File Reply in Time.* — Where the time within which it is necessary to file a reply is fixed by statute or rule of court, and a reply is not so filed, the granting of permission to reply out of time or even at the trial rests largely in the legal discretion of the trial court,¹ but if it appears to be necessary a reply may be filed *nunc pro tunc* in aid of the verdict,² and an appellate court will not interfere with a ruling in that regard unless there has been an abuse of discretion.³

Cogswell v. Wilson, 11 Oregon 381; Fisher v. Kelly, 30 Oregon 1.

Washington. — Johnson v. Maxwell, 2 Wash. 482.

Wyoming. — Kearney Stone Works v. McPherson, 5 Wyo. 178.

Denial of Special Matter. — In *Texas* no replication is required as a basis for evidence in rebuttal of a special plea setting up failure of a consideration of a note sued on, under a statute providing that it is unnecessary to deny any special matter of defense pleaded. Fagan v. McWhirter, 71 Tex. 567.

Replications to New Matter. — Where a replication to new matter set up in the plea was required by statute, it was held in an action on a promissory note that a plea of payment was not new matter that required a replication and was not admitted by a failure to reply. Frisch v. Caler, 21 Cal. 71.

Absence of Reply in Avoidance. — The Code of *Iowa* provides that "where some matter is alleged in the answer to which the plaintiff claims to have a defense by reason of the existence of some fact which avoids the matter alleged in the answer," a reply so alleging must be filed. Code 1873, § 2665; Code 1897, § 3576. Under this statute, evidence tending to show a waiver of the conditions of a policy of insurance is not admissible in the absence of a reply. Zinck v. Phoenix Ins. Co., 60 Iowa 266.

The admission of testimony contradicting affirmative matter not replied to when it should be is improper. Johnson v. Maxwell, 2 Wash. 482.

1. McMillan v. Badley, 112 N. Car. 578; Hartford F. Ins. Co. v. Corey, 53 Neb. 209; Taylor v. Hosick, 13 Kan. 518. See also article TIME TO PLEAD.

Double Time to Reply. — It has been held in *New York* that where the defendant serves his answer by mail, the plaintiff has double the time to reply allowed in cases of personal service of the answer. Washburn v. Herrick, 4 How. Pr. (N. Y.) 15.

Delay Due to Mistake. — Where the

omission to file in proper time was owing to mistake of counsel for which the plaintiff could not be held responsible, and the giving leave to file, after trial had been commenced before a referee, would not cause great injustice to the defendant, leave was given to file a reply upon terms. Pardee v. Foote, (Supm. Ct. Spec. T.) 9 Abb. Pr. N. S. (N. Y.) 77.

Laches in Tendering Reply. — Where the plaintiff did not file a reply until several terms later than he should, and then accompanied it with an affidavit that sickness had prevented him from attending court and that he could not obtain an attorney, the reply was excluded and the action dismissed. It was held that since it was uncertain whether a reply was necessary, and it appeared that neither party was ready to submit the case, the judgment would be reversed notwithstanding the plaintiff's laches and the probable insufficiency of his excuse. Stuart v. Stamper, (Ky. 1892) 18 S. W. Rep. 13.

Indulgence to Defendant Preluding His Objection to Absence of Reply. — Where, by leave of the court, a defendant filed his answer after the statutory time had elapsed, on the day of trial, and no order for a reply had been made, it was held that he could not raise any objection on the ground of absence of a reply. Hartford F. Ins. Co. v. Corey, 53 Neb. 209.

2. Foley v. Alkire, 52 Mo. 317; Turner v. Butler, 126 Mo. 131; Rhine v. Montgomery, 50 Mo. 566; Hale v. Skinner, 33 Mo. 452; Cole v. Chicago, etc., R. Co., 47 Mo. App. 624; Blondeau v. Sheridan, 81 Mo. 545; Sheehan, etc., Transp. Co. v. Sims, 36 Mo. App. 224.

Proceedings Before Referee. — The same rules apply with equal force where the issues of fact have been tried by a referee. Turner v. Butler, 126 Mo. 131.

3. Whitney v. Preston, 29 Neb. 243; Storz v. Finklestein, 48 Neb. 27.

Question of Abuse of Discretion. — In Grant v. Pendery, 15 Kan. 236, the

(3) *Judgment for Failure to Reply.*—In many states the defendant may, upon the plaintiff's failure to file a necessary reply, move on notice ¹ for such judgment on the pleadings as he is entitled to,² or in some states he will be entitled to a judgment of nonsuit,³ or to have a verdict directed for him.⁴

court, refusing to reverse a ruling of the trial court on the admission at the trial of a reply, said: "The plaintiff was apparently guilty of gross laches in not filing his reply sooner. He had then been for more than four months in default for want of a reply; and he did not even then ask to file his reply until after the jury had been impaneled and sworn to try the cause. And the court then allowed him to file the reply without the slightest showing of diligence, without the slightest showing that his reply was true or that the defense which the reply put in issue was not true, and without the slightest terms of any kind whatever being imposed upon him. Some terms ought evidently to have been imposed upon him as a condition upon which he might file the reply—a verification by affidavit of the truth of the reply, a postponement of the trial, a continuance of the case, or a payment of the costs of the term or some portion thereof. But still we cannot say that the court below so abused its discretion that we must reverse the judgment on that account."

Reason for Delay Not Apparent of Record.—Where a reply was filed at the appearance term, but after a jury had been sworn and the case opened by the plaintiff, an appellate court refused to hold that the trial court "was guilty of abuse of discretion in allowing the reply to be filed, although no reason appears of record for the delay in filing the same." *Hall v. Cornett*, (Ky. 1897) 43 S. W. Rep. 706.

Error Waived by Consenting to Judgment.—If there was error in permitting a reply to be filed one day after it was due, the facts that the defendant afterwards consented to a judgment which was not entered, and that the reply stood unchallenged for nearly three years, waive any abuse of the court's discretion in permitting it to remain on file. *Burlingame v. Kansas Valley Nat. Bank*, 17 Kan. 407.

1. Requisites of Motion.—The motion should show the necessity of a reply and be accompanied with the summons, complaint, answer, and notice

of motion. *Brown v. Spear*, (Supm. Ct. Spec. T.) 5 How. Pr. (N. Y.) 146. See also generally article MOTIONS, vol. 14, p. 70.

Reply Must Be Necessary.—Before such a motion will be granted it must clearly appear that the matter set up requires a reply. *McAllister v. Welker*, 39 Minn. 535.

Motion Without Notice.—Where the motion is made without notice to the adverse party, the court should refuse to hear it until due notice has been given. *Watkins v. Southern Pac. R. Co.*, 38 Fed. Rep. 711.

2. *Kern v. Saul*, 14 Ind. App. 72; *Wells v. Dickey*, 15 Ind. 361; *Craig v. Cook*, 28 Minn. 232; *Smith v. St. Joseph*, 45 Mo. 449; *Henslee v. Canefax*, 49 Mo. 295; *Bowles v. Doble*, 11 Oregon 474; *Grafton v. Sellwood*, 24 Oregon 118.

Allegations Constructively Admitted.—Where the plaintiff's acceptance of a loan, on conditions set out in the answer, was neither denied nor answered, but constructively admitted to be true, it was held error to deny a motion for judgment. *Hamilton L. & T. Co. v. Gordon*, 32 Neb. 663, the court saying: "It is an acknowledged rule of pleading that if an affirmative plea be not controverted by a counterpleading, the action will be dismissed on motion, with judgment for the affirmative party."

Declining to Reply to One Sufficient Paragraph of an answer will authorize the entry of a judgment for the defendant, although other paragraphs of the answer are insufficient. *Adams v. Tuley*, 1 Ind. App. 490.

Appeal — Error Not Apparent of Record.—Where no statute prescribes the time within which a reply should be filed, and a rule of the trial court is relied on, a denial of a motion for judgment will not be considered on appeal unless the rule appears of record. *Waite v. Wingate*, 4 Wash. 324.

3. *Allenspach v. Wagner*, 9 Colo. 127, holding that on a good defense not traversed a judgment of nonsuit may be entered.

4. *Cordner v. Roberts*, 58 Mo. App. Volume XVIII.

Proper Time to Move. — The proper course is to ask for judgment for want of a reply before the trial,¹ or to ask at the trial that the allegations of the answer be taken as true.² Where the failure to reply is the result of accident or mistake, the judgment should be set aside on reasonable terms if application is made during the term.³

(4) *Waiver of Reply.* — If the defendant voluntarily goes to trial without a reply when he is not bound to do so, he thereby⁴

440, holding that although no evidence be introduced by the defendant it is proper to direct a verdict for him when it appears that the answer requires a reply. See also *Norton v. Norton*, (Ky. 1894) 25 S. W. Rep. 750.

Failure to Reply to a Bad Answer does not entitle the defendant to judgment. *Debord v. La Hue*, 26 Ind. 212.

1. *Ringle v. Bicknell*, 32 Ind. 369.

2. *Howell v. Reynolds County*, 51 Mo. 154; *St. Joseph F. & M. Ins. Co. v. Harlan*, 72 Mo. 202; *Heath v. Goslin*, 80 Mo. 318.

Motion Non Obstante Veredicto. — Where material matter is left undenied, the right of the defendant to a judgment cannot be affected by a failure to make the motion until after verdict. *Benicia Agricultural Works v. Creighton*, 21 Oregon 495; *Martindale v. Price*, 14 Ind. 115; *Henly v. Kern*, 15 Ind. 391; *Davis v. Engler*, 18 Ind. 312.

Contra. — Where a trial is had as if the facts were controverted, a motion for judgment on the pleadings for want of a reply is properly overruled. *France v. Nirdlinger*, 41 Ohio St. 298; *Lovell v. Wentworth*, 39 Ohio St. 614.

3. *Ennis v. Hogan*, 47 Mo. 513, holding that where a motion to set the judgment aside is not made for several terms after the judgment is rendered, it comes too late.

Inability of Attorney to File Reply. — Where a meritorious cause of action was stated in the petition, but no reply was put in, owing to the dangerous sickness of the wife of the plaintiff's attorney, it was held that a trial court properly vacated a judgment for the defendant. *Scott v. Smith*, 133 Mo. 618.

4. *California.* — *Crowley v. City R. Co.*, 60 Cal. 628.

Colorado. — *Quimby v. Boyd*, 8 Colo. 194; *Jerome v. Bohm*, 21 Colo. 322.

Indiana. — *Martindale v. Price*, 14 Ind. 115; *Preston v. Sandford*, 21 Ind. 156; *Shirts v. Irons*, 28 Ind. 458;

Ringle v. Bicknell, 32 Ind. 369; *Sutherland v. Venard*, 32 Ind. 483; *Henly v. Kern*, 15 Ind. 391; *Knowlton v. Murdock*, 17 Ind. 487; *Bender v. State*, 26 Ind. 285; *Garner v. Board*, 27 Ind. 323; *McAllister v. Howell*, 42 Ind. 16; *Irvinson v. Van Riper*, 34 Ind. 148; *Walker v. Woollen*, 54 Ind. 164; *Carriger v. Sicks*, 73 Ind. 76; *Harrison, etc., Turnpike Co. v. Roberts*, 33 Ind. 246.

Kansas. — *Hopkins v. Cothan*, 17 Kan. 173; *Cooper v. Davis Sewing Mach. Co.*, 37 Kan. 231; *Kepley v. Carter*, 49 Kan. 72; *Nooner v. Short*, 20 Kan. 624.

Missouri. — *Smith v. St. Joseph*, 45 Mo. 449; *Henslee v. Cannefax*, 49 Mo. 295; *Howell v. Reynolds County*, 51 Mo. 154; *St. Joseph F. & M. Ins. Co. v. Harlan*, 72 Mo. 202; *Young v. Glascock*, 79 Mo. 580; *Heath v. Goslin*, 80 Mo. 318; *Campbell v. Seeley*, 43 Mo. App. 23.

Ohio. — *Hudson v. Voight*, 15 Ohio Cir. Ct. 391, 9 Ohio Cir. Dec. 35.

Oregon. — *Minard v. McBee*, 27 Oregon 225.

Washington. — *Ritchie v. Carpenter*, 2 Wash. 512.

Objection to Evidence on Trial. — When the defendant objects on the trial to the introduction of evidence because there is no reply, and asks for a judgment in his favor on the pleadings, but the court rules against him and the trial is proceeded with, there is no waiver of the reply. *Higby v. Ayres*, 14 Kan. 331.

Failure to Object to Evidence. — The admission of testimony contradicting new matter, in an answer that required a reply, without objection by the defendant, is not conclusive evidence of the defendant's waiver of his right to a reply. *Walrod v. Bennett*, 6 Barb. (N. Y.) 144.

Error in Nunc pro Tunc Order. — Where no reply appeared of record, although the parties agreed that the answer should be traversed of record, an ap-

waives a reply and is regarded as consenting to go to the proof of the answer as if it were denied; and where a case is tried as if a replication had been filed and the evidence closed, it is error to instruct the jury that the allegations of new matter contained in the answer must be taken as true for want of a replication.¹

Waiver Presumed by Appellate Court.—Though a reply is necessary and none is made, yet, if the cause be tried as though there were a proper reply on file, no advantage can be taken of its absence in an appellate court.²

3. Reply and Demurrer to Same Answer.—It seems that in some cases there may be a demurrer and a reply at the same time.³

4. Sufficiency and Defects—*a.* IN GENERAL—**Provisions of Codes.**—In most of the codes general provisions are to be found as to the manner in which the reply must be made. As a rule the plaintiff may deny generally or specifically the allegations of the answer which he wishes to controvert; and by most of the codes he is permitted to allege concisely and in ordinary language and without repetition new matter not inconsistent with the petition constituting a defense to new matter set out in the answer.⁴

Reply Must Respond to Answer.—The reply, to be sufficient in law, must respond to the entire answer or such portions thereof as it professes to be addressed to.⁵ But a reply which fully meets

pellate court held that the trial court could not supply the omission by a *nunc pro tunc* order, and refused to sustain a judgment for the plaintiff. *Skinner v. Myers*, (Ky. 1897) 40 S. W. Rep. 919.

1. *Henslee v. Cannefax*, 49 Mo. 295; *Meador v. Malcolm*, 78 Mo. 550; *Robinson Reduction Co. v. Johnson*, 10 Colo. App. 135.

2. *Wilson v. Fuller*, 9 Kan. 177; *Bent v. Philbrick*, 16 Kan. 190; *Holden v. Clark*, 16 Kan. 346; *Kansas Pac. R. Co. v. Taylor*, 17 Kan. 566; *Hopkins v. Cothran*, 17 Kan. 173; *Netcott v. Porter*, 19 Kan. 131; *Russell v. Smith*, 14 Kan. 366; *Walker v. Armstrong*, 2 Kan. 198; *Bashor v. Nordyke*, 25 Kan. 222; *Thompson v. Brownlie*, (Ky. 1898) 45 S. W. Rep. 871; *Heath v. Goslin*, 80 Mo. 310; *Thompson v. Wooldridge*, 102 Mo. 505; *Woodward v. Sloan*, 27 Ohio St. 592; *Vaughan v. Howe*, 20 Wis. 497.

Motion Not Shown by Bill of Exceptions.—Where there was affirmative matter requiring a reply, which was not filed, and the defendant was thereby entitled to judgment on the pleadings, it was held on appeal that, as the bill of exceptions failed to show a motion for judgment on that ground, the court could not assume that a

question as to the sufficiency of the pleadings had been raised and that a right to a reply had been waived. *Louisville, etc., R. Co. v. Copas*, 95 Ky. 460.

In *Nebraska* it has been held that where the case is submitted on the pleadings the rule cannot be applied. *Western Horse, etc., Ins. Co. v. Timm*, 23 Neb. 526.

3. *Latimer v. Sullivan*, 30 S. Car. 111. **Defenses Not Separately Stated.**—Where the answer contains distinct grounds of defense, stated in form as one, there may be a demurrer to one defense and a reply to the other. *Bass v. Upton*, 1 Minn. 408.

Insisting on the Demurrer, however, will amount to a withdrawal of the reply as to the defense to which the demurrer is interposed. *Henley v. Henley*, 93 Mo. 95.

4. See the codes of the various states.

5. *Wilson v. Madison, etc., R. Co.*, 18 Ind. 226; *Bottles v. Miller*, 112 Ind. 584; *Kernodle v. Caldwell*, 46 Ind. 153; *Fordice v. Scribner*, 108 Ind. 85; *American Ins. Co. v. Leonard*, 80 Ind. 272; *Kinsey v. State*, 98 Ind. 351; *Collier v. Cunningham*, 2 Ind. App. 254; *Silvers v. Canary*, 109 Ind. 267; *Gerard v. Jones*, 78 Ind. 378; *Pouder v. Tate*,

and replies to all material facts stated in the answer, is not vitiated by a mere omission to notice a preliminary statement in the answer which is incontrovertible.¹

b. REPETITION OF ALLEGATIONS OF COMPLAINT. — Allegations of the reply which are mere repetitions of the averments of the complaint or petition are improper and may be stricken out.²

c. REFERENCE TO EXTRANEOUS MATTER. — The reply should not refer to documents that are not a part of the record.³

76 Ind. 1; *Davis v. Davis*, 119 Ind. 511; *Cooper v. Smith*, 119 Ind. 313.

Where a Reply Assumes to Be in Avoidance of the entire answer and obviously is not a defense to part of the answer, it is open to a demurrer. *Musselman v. Cravens*, 47 Ind. 1.

Reply to Specific Averments of Answer. — A reply limiting its extent to specific averments of the answer is good. Thus, where the answer set up that the consideration of a note had partially failed by reason of the nondelivery of certain apparatus to secure payment for which the note was given, a reply in avoidance which concluded with a statement that as to certain items "the said defendants ought not to sustain their answer" was held good. *Numbers v. Bowser*, 29 Ind. 491.

Uncertainty of Reply as Applying to Several Paragraphs. — Where the reply was headed by a preliminary or introductory statement designating it as a reply to the second and third paragraphs of the answer, after which followed two separate paragraphs properly numbered, the first a general denial, and the second pleading payment of the items pleaded as a set-off in the third paragraph of the answer, it was held that the reply was intended to apply to the third paragraph of the answer only. *Hill v. Hill*, 121 Ind. 256.

Admissions of Reply Contradicting Allegations of Complaint. — The right of a plaintiff to the relief for which he prays must be measured by the allegations of his complaint, and not by what he may aver in his reply, and if the admissions of the latter so contradict the allegations of the former as to defeat the right of action, the remedy is by motion for judgment on the pleadings, and where the allegations in an answer which constitute a complete defense to the plaintiff's cause of action are not denied by a reply, judgment will be rendered for the defendant upon

motion therefor, notwithstanding a verdict for the plaintiff. *Wyatt v. Henderson*, 31 Oregon 48.

Even When a Reply Is Sworn To, its contents must be sufficient to raise an issue of fact, and the allegations therein and denials of matters that the plaintiff desires to put in issue should be made with distinctness and precision and without evasion; otherwise the requirement of a replication will be of but little utility. *Landers v. Bolton*, 26 Cal. 393.

Ambiguity of Reply. — Judgment for the plaintiff will be upheld where a cause of action is stated in the complaint and the affirmations of the answer are distinctly denied by the reply, notwithstanding some of the latter's allegations are ambiguous. *Boscovitz v. Cooper*, 20 Mont. 197.

1. *Kinsey v. State*, 98 Ind. 351.

2. *West v. West*, 144 Mo. 119; *Hall v. Harris*, 61 Iowa 500.

Reply Must Allege New Facts. — A reply which does not contain any facts that do not appear in the complaint and answer is bad. *Croome v. Craig*, 53 Hun (N. Y.) 350.

Motion to Strike Out. — A reply which is in effect merely a reiteration of the allegations of the petition should be stricken from the files; but where no new issue is raised by it, the defendant will not be prejudiced by the refusal of the court to strike it out. *Bayliss v. Murray*, 69 Iowa 290.

Effect on Proof. — The elimination from the reply of matter which is only a repetition of the averments of the petition will in no way restrict the plaintiff from proving the facts stated in the petition. *West v. West*, 144 Mo. 119.

3. *Platt v. Brickley*, 119 Ind. 333.

Reference to Interrogatories. — Where the reply commenced: "For the sake of brevity in the reply the plaintiff has herein referred to his answer to the interrogatories administered to him in this action by the defendants," and in

d. ALLEGING AND DENYING LEGAL CONCLUSIONS. — There need be no denial of a legal conclusion alleged in the answer, and a failure to make such a denial will not have the effect of admitting that the conclusion drawn is correct.¹ Where the reply alleges merely the conclusions of the pleader it raises no issue and may be stricken out on motion.²

e. ALLEGING MATTERS OF EVIDENCE. — Mere evidence and argument are improper in the reply; nor ought the pleader to sum up his case or a particular part of it and say what the result is, and what conclusion ought to be drawn, and what he is entitled to thereupon. Allegations of this character are liable to be struck out on motion.³

subsequent parts frequently referred to and relied on facts stated in the answer, but not averred in the reply, it was considered a fatal defect, because the reply should in itself contain all that can be called pleading. *Williamson v. London, etc., R. Co., 12 Ch. D. 787.*

Answer Cannot Be Looked on as Part of Reply. — Where the reply averred that the plaintiffs "made the exchange as stated in the third paragraph of the appellants' answer," it was held that in order to ascertain its meaning that paragraph of the answer must be regarded as a part of the reply, which could not be done. *Atchinson v. Lee, 75 Ind. 132.*

Reference to Bill of Particulars. — The fact that a portion of a paragraph of a reply merely relates to a bill of particulars, and not to an answer, is good ground for a demurrer to that portion of the reply. *Crosby v. Kropf, 33 N. Y. App. Div. 446.*

1. *Denver Circle R. Co. v. Nestor, 10 Colo. 403; State v. Williams, 77 Mo. 463; Dix v. German Ins. Co., 65 Mo. App. 34; Jordan v. National Shoe, etc., Bank, 74 N. Y. 467; People v. Highway Com'rs, 54 N. Y. 276; Scofield v. Whitelegge, 49 N. Y. 259; Larsen v. Oregon R., etc., Co., 19 Oregon 240.* And see generally article LEGAL CONCLUSIONS, vol. 12, p. 1020.

Denial of Contract of Settlement. — Where the answer alleged that the payment of a surgeon's fee and seventy-five dollars was accepted by the plaintiffs as a full settlement of the damages suffered by them, and the plaintiffs denied that they ever made any such contract, it was held to be a denial of a fact, and not the pleading of a conclusion of law. The court said: "It is not a denial of the defend-

ant's conclusion of law, but it is the denial of the fact that there was any agreement such as the defendant has alleged. To say that a certain sum was accepted is stating a fact, and to deny it is to deny a fact." *O'Riley v. Wilson, 4 Oregon 96.*

2. *Tennis v. Barnes, 11 Colo. App. 196.*

Illustrations. — In a suit to enforce a judgment against a *feme covert* the reply averred that in the action in which the judgment sought to be enforced was rendered, the defendant and her husband "availed themselves of all defenses, both legal and equitable." This was held to be a sort of legal conclusion of the pleader, for it was not averred that the defendant, in that action, set up her coverture, and that the court then decided whether such was her status. *Spencer v. Parsons, 89 Ky. 577.*

A denial "that the checks filed by defendant evidence payments made by him on the note sued on" is but a conclusion of law, and not good as a denial that the checks were paid. *Read v. Dickerson, 9 Ky. L. Rep. 534.*

3. *Hall v. Harris, 61 Iowa 500; Williamson v. London, etc., R. Co., 12 Ch. D. 787.*

Motion to Strike Out. — Where evidential facts are pleaded which, if submitted to a jury on the trial, would merely tend to establish the truth of a material averment of the petition, it is no ground of error (though such motion may technically be good) to deny a motion to strike out the evidence pleaded in the reply. *Hudelson v. Tobias First Nat. Bank, 56 Neb. 247.*

Demurrer to Reply. — There is no prejudicial error in overruling a demurrer to a reply that contains simply a statement of the evidence and not

f. SHAM AND FRIVOLOUS REPLIES. — In some jurisdictions replies which not only seem to be put in without adequate reason, but also are so clearly and plainly without foundation that the defect appears upon mere inspection and without any argument respecting them, may be struck out on motion.¹

g. DEPARTURE — (1) *In General* — Reply Must Be Consistent with Complaint. — All matter set up in the reply must be consistent with that stated in the complaint or petition,² and, while support-

defensive matter. *Runkle v. Hartford Ins. Co.*, 99 Iowa 414.

1. *Lloyd v. Ballantine*, (Supm. Ct. Spec. T.) 20 Misc. (N. Y.) 141. And see generally article SHAM AND FRIVOLOUS PLEADINGS.

Illustration. — Where the plaintiff denied that he had any knowledge or information sufficient to form a belief as to the first allegation of an answer, and as to a further allegation in respect to the commencement of the action denied the same upon information and belief, it was held that the latter part of the reply seemed deliberate perjury, as it was disproved by the facts disclosed upon the record itself. *Cavanagh v. Oceanic Steam Nav. Co.*, (Supm. Ct. Gen. T.) 33 N. Y. St. Rep. 903.

A Simple Denial of an Allegation contained in the answer in the language authorized by the code, where there is nothing in the record itself which shows it to be false, cannot be stricken out as sham. *Cavanagh v. Oceanic Steam Nav. Co.*, (Supm. Ct. Gen. T.) 33 N. Y. St. Rep. 903.

2. *Eikenberry v. Edwards*, 71 Iowa 82; *Crawford v. Spencer*, 36 Mo. App. 78; *Mortland v. Holton*, 44 Mo. 58; *Mahoney v. Butte Hardware Co.*, 19 Mont. 377; *Mollyneaux v. Wittenberg*, 39 Neb. 547; *Cobbey v. Knapp*, 23 Neb. 579; *Houston v. Sledge*, 98 N. Car. 414; *Commercial Electric Light, etc., Co. v. Tacoma*, 17 Wash. 661; *Clark v. Sherman*, 5 Wash. 681; *Ankeny v. Clark*, 1 Wash. 549; *Davis v. Ford*, 15 Wash. 107.

Inconsistency Identical with Departure at Common Law. — It has been said that inconsistency of the reply and complaint or petition is the same defect known in the common law as a departure in pleading. *Zehnor v. Beard*, 8 Ind. 96; *Van Dorn v. Bodley*, 38 Ind. 402.

Test of Inconsistency. — The question whether evidence of the facts alleged in the reply would be, if received, contradictory of the allegations of the petition is a good test of inconsistency.

Estes v. Farnham, 11 Minn. 423; *Johnson v. State Bank*, 59 Kan. 250.

Illustration. — Where the petition alleged a positive and unqualified ownership in the plaintiff, and the reply admitted the ownership to be that of a mortgagee, which is a qualified ownership, these allegations were held to require for their support an entirely different character of evidence, and not to support and verify the petition. *Johnson v. State Bank*, 59 Kan. 250. But see *Merchant's Nat. Bank v. Richards*, 74 Mo. 77.

Inconsistency Caused by Defendant's Answer. — Where the petition alleged that a hack used by the defendants as common carriers in transporting persons was unsound and unfit for such a purpose, and the answer, after denying such allegations, alleged that the hack was overloaded, making it necessary for the plaintiff to put this fact in issue if untrue, it was held that if this was inconsistent the defendants, by tendering the issue, were responsible and were estopped from an objection on that score. *Lemon v. Chanslor*, 68 Mo. 340.

Allegations in Reply Made Necessary by Answer. — A complaint in ejectment stated a good cause of action by averring the legal title to be in the plaintiff, and the answer denied the legal title and set up the statute of limitations. The replication denied the affirmative allegations of the answer and alleged a parol agreement affirmatively in reply to the claim of the statute of limitations contained in the answer. This was intended to be in avoidance. By setting up this matter the plaintiff did not assume to rely upon this allegation, nor abandon his claim to recover upon the legal title. "Such matter set forth in a replication rendered necessary by the answer" is not inconsistent with the petition. *Lamme v. Dodson*, 4 Mont. 560.

Consistent Replies — *Tort of Agent.* — Where the answer set up that the de-

ing the cause of action stated in the complaint or petition, should, if new matter is alleged in the answer, avoid such new matter.¹

defendant's agent had committed the tort which was the cause of action alleged in the petition, a reply that the defendant had ratified his agent's act was held not inconsistent. *McLachlin v. Barker*, 64 Mo. App. 511.

Fraud Replied to Defense of Release.

— Where a copartnership brought an action in the name of the firm, and one partner, being largely indebted to the firm, was insolvent and nonresident and released the cause of action to the defendant, the release being a fraudulent contrivance between him and the defendant to cast upon the other partner the burden of the firm's indebtedness, it was held that such allegations constituted a good plea to the release and were properly set up in the reply, for they were matter maintaining the petition. *Hoover v. Missouri Pac. R. Co.*, (Mo. 1891) 16 S. W. Rep. 480.

False Representations. — Where the reply was that a contract was just as alleged in the complaint, and that a writing set up in the answer was not the contract in fact made, and that the plaintiff was induced to sign such writing by the false and fraudulent representations of the defendants as to its contents, it was held consistent. *Rosby v. St. Paul, etc., R. Co.*, 37 Minn. 171.

Matter in Estoppel. — In actions on promissory notes, replies setting up matter that should estop the defendant from denying the allegations of the petition are not inconsistent. *Eikenberry v. Edwards*, 71 Iowa 82; *Rainsford v. Massengale*, 5 Wyo. 1.

Quieting Title. — Where the petition stated a cause of action to quiet title and the defendant pleaded a tenancy in common as to a one-third interest, a reply admitting this fact, but stating facts showing that it would be inequitable for the defendant to set up a naked legal title to defeat the plaintiff's whole equitable claim, was held not to be inconsistent. *Neve v. Allen*, 55 Kan. 638.

Ratification. — Where the defense was nonexecution of a note, a reply that the note had been ratified was held not inconsistent. *Cravens v. Gillilan*, 73 Mo. 524.

Inconsistent Replies — Waiver of Performance. — Where the petition alleges due performance of a contract a reply

setting up a waiver by the defendant of performance is inconsistent. *Mohney v. Reed*, 40 Mo. App. 99; *Burlington First Nat. Bank v. Hatch*, 78 Mo. 24; *Pier v. Heinrichhoffen*, 52 Mo. 333; *Nichols v. Larkin*, 79 Mo. 265; *Lanitz v. King*, 93 Mo. 513; *Randolph v. Frick*, 57 Mo. App. 400.

Waiver of Nonperformance. — Where the answer sets up nonperformance of a contract to a petition on a *quantum meruit*, the reply may allege a waiver. *Wolfe v. Howes*, 20 N. Y. 197; *Mohney v. Reed*, 40 Mo. App. 99.

Personal and Representative Capacity. — A reply showing the cause of action to be in favor of a ward is inconsistent with a petition claiming a personal right to sue. *Bearss v. Montgomery*, 46 Ind. 544.

Enforcement of Contract Piecemeal. — Where the plaintiff instituted proceedings for specific performance of a contract to purchase land, and in his reply he attempted to split the contract and enforce only a portion thereof, it was held inconsistent. *Hill v. Rich Hill Coal Min. Co.*, 119 Mo. 9.

Modifications of Contract. — If a contract be changed in its terms it must be declared on as modified; it is not permissible to declare on the original contract and reply the modified one. *Lanitz v. King*, 93 Mo. 513; *Ennis v. Case Mfg. Co.*, 30 Fed. Rep. 487.

1. *Van Dorn v. Bodley*, 38 Ind. 402; *Reilly v. Rucker*, 16 Ind. 303; *McFadden v. Schroeder*, 4 Ind. App. 305; *Brown v. Indianapolis First Nat. Bank*, 115 Ind. 572; *Ætna L. Ins. Co. v. Nexsen*, 84 Ind. 347; *Kimberlin v. Carter*, 49 Ind. 111; *Cox v. Hayes*, 18 Ind. App. 220; *Conn v. Corry*, 10 Ky. L. Rep. 588; *Auchincloss v. Frank*, 17 Mo. App. 41; *P. C. Hanford Oil Co. v. Findlay*, 80 Wis. 91.

Matter in Explanation or Avoidance of the facts stated in the answer may be pleaded in the reply and does not set up a new cause of action. *Anderson v. Imhoff*, 34 Neb. 335; *Louisville, etc., R. Co. v. Herr*, 135 Ind. 591.

Negligence of Common Carriers. — In *Minneapolis, etc., R. Co. v. Home Ins. Co.*, 64 Minn. 61, the complaint stated facts showing the defendant's liability for a breach of a common-law contract of carriage. The answer confessed

Introduction of New Cause of Action. — The plaintiff cannot introduce in his reply a cause of action different from that which he states in his complaint or petition; ¹ in other words, he cannot, after answer is made, abandon the cause of action set up in the complaint and make an entirely new cause of action in the reply. ²

Reply Cannot Remedy Defects in Complaint. — Where the complaint is defective or does not contain facts sufficient to constitute a cause of action, a reply cannot cure it by supplying the necessary allegations, ³ nor can it in any manner enlarge, in ordinary cases, the claim for relief alleged in the complaint. ⁴

and sought to avoid this contract by alleging that, for a consideration moving to the shippers, the common-law liability of the defendant was restricted by exemptions in the bills of lading, and that the defendant was free from negligence in the premises. The reply simply met the new matter alleged in the answer, as to the absence of any negligence on the part of the defendant, by a denial and an affirmative allegation of its negligence. This was held not to be inconsistent.

Either Legal or Equitable Matter of defense not inconsistent with the complaint may be replied; thus, fraud may be replied to a plea of release. *Girard v. St. Louis Car-Wheel Co.*, 46 Mo. App. 79; *Vautrain v. St. Louis, etc., R. Co.*, 8 Mo. App. 538; *Dixon v. Brooklyn City, etc., R. Co.*, 100 N. Y. 170; *Bean v. Western North Carolina R. Co.*, 107 N. Car. 731; *Bussian v. Milwaukee, etc., R. Co.*, 56 Wis. 325.

1. *Crawford v. Spencer*, 36 Mo. App. 78; *Savage v. Aiken*, 21 Neb. 605; *School Dist. v. Caldwell*, 16 Neb. 68; *Durbin v. Fisk*, 16 Ohio St. 534; *Coles v. Kelsey*, 2 Tex. 541; *Clark v. Sherman*, 5 Wash. 681; *Dibble v. De Matos*, 8 Wash. 543.

Reply Governed by Same Rule as Replication. — A plaintiff in an action or suit must recover, if at all, upon his complaint. The facts constituting his cause of action or suit must there be stated; a reply can serve him no purpose except to controvert or avoid new matters set up in the answer. The old rule that every pleading on the part of the plaintiff subsequent to the declaration, and on the part of the defendant subsequent to the plea, could be used only to fortify respectively the declaration and plea, is still in force in principle, and it matters not what may be alleged in a reply, if the complaint fails to state a cause of suit the plaintiff will not be entitled to any relief. *Lillienthal v.*

Hotaling Co., 15 Oregon 371. As to departures in replication, see *supra*, III. 4. c. (5) *Departure*.

A Reply Does Not Limit the Allegations of the petition. The plaintiff's cause of action is still based upon its allegations and is in no manner founded upon the reply. *Gaty v. Clark*, 28 Mo. App. 332.

2. *McAroy v. Wright*, 25 Ind. 22; *McFadden v. Schroeder*, 4 Ind. App. 305; *Baker v. Long*, 17 Kan. 341; *Osten v. Winehill*, 10 Wash. 333; *Distler v. Dabney*, 3 Wash. 200.

3. *Potts v. Hartman*, 101 Ind. 359; *Titlow v. Hubbard*, 63 Ind. 6; *Clarke v. Bancroft*, 13 Iowa 320; *Webb v. Bidwell*, 15 Minn. 479; *Tullis v. Orthwein*, 5 Minn. 377; *Bernheimer v. Marshall*, 2 Minn. 78; *McMahill v. Jenkins*, 69 Mo. App. 279; *Mohney v. Reed*, 40 Mo. App. 99; *Chesbrough v. New York, etc., R. Co.*, 26 Barb. (N. Y.) 9; *Brown v. Colie*, 1 E. D. Smith (N. Y.) 265; *Durbin v. Fisk*, 16 Ohio St. 534.

Inconsistent Matter Treated as Amendment. — Where matter set up in the reply is treated by the parties as an amendment to the petition it will be so considered on appeal, as the rights of the parties have been fairly and fully considered. *Ruffner v. Ridley*, 81 Ky. 165.

Amendment of Complaint Proper. — Where a necessary element of the plaintiff's cause of action is omitted from the petition he should amend. *School Dist. v. Caldwell*, 16 Neb. 68.

4. *Lafever v. Stone*, 55 Iowa 49; *Jones v. Marshall*, 56 Iowa 739; *Marder v. Wright*, 70 Iowa 45; *Hunt v. Johnston*, 105 Iowa 311; *Cox v. Ætna Ins. Co.*, 29 Ind. 586; *Bell v. Waudby*, 4 Wash. 743.

No Judgment Different from That Prayed in Petition. — In *Marder v. Wright*, 70 Iowa 42, the plaintiffs claimed in their petition that they had a lien on prop-

Facts Subsequently Occurring. — In some cases, however, under statute, new facts which have occurred since the institution of the suit may be brought into the issue by a reply, without laying it open to a charge of inconsistency.¹

Inconsistent Averments Treated as Surplusage. — Where, in addition to new matter avoiding the answer and supporting the complaint, the reply contains surplus averments inconsistent with the complaint, the surplusage will be disregarded and is liable to be stricken out on motion.²

(2) **New Assignment.** — Where it is necessary for the plaintiff to indicate that he is suing for some matter other than that to which the answer relates, it seems that he may, under some codes, make a reply that is in the nature of a new assignment.³

erty for the purchase money, and that the interest of the defendant in the property was subordinate to their lien, and prayed for judgment for the enforcement of this claim. In their reply they urged that the defendant be compelled to account to them for the money which they insisted came into his hands as assignee of their debtor. The court said that a plaintiff is not permitted to plead in his reply matters which are material only to the cause of action alleged in his petition. "Much less will he be permitted to recover on a distinct cause of action which is pleaded only in his reply. When an answer is filed, he may be awarded any relief consistent with the case made by the petition, or embraced in the issue made by the answer. * * * But he cannot be awarded an entirely different judgment from that prayed for in the petition."

1. *St. Joseph Union Depot Co. v. Chicago, etc., R. Co.*, 131 Mo. 291, holding that where the petition claimed a certain amount due for rent, a reply setting up that a further instalment of rent had fallen due since the suit was commenced was properly allowed.

Office of Reply Not Changed. — The statute permitting the allegation of facts occurring since the institution of suit was not intended to change the office of a reply, which is that of a denial or a confession and avoidance of matter set up in the answer. *Crawford v. Spencer*, 36 Mo. App. 78.

2. *McAroy v. Wright*, 25 Ind. 22.

Immaterial Matter. — Where the variance from the complaint is in matter not material to the cause of action, it is not considered liable to a charge of inconsistency. *Bishop v. Travis*, 51 Minn. 183.

3. **As to New Assignments in Replications**, see *supra*, III. 1. b. (6) and III. 4. c. (10) *New Assignment*.

Assumpsit. — In *Bishop v. Travis*, 51 Minn. 183, the complaint alleged the execution by the defendant of two promissory notes and the indorsement and delivery of them by the payee to the plaintiff before maturity. The substance of the defendant's answer was that at maturity he paid the notes to the payee, who surrendered and redelivered them to him. In the reply the plaintiff admitted the fact of the redelivery, but sought to avoid the effect which the defendant claimed for it by alleging that, for a valuable consideration, he reissued the notes. The court said: "This is not a departure, but in the nature of what in pleading is called a 'new assignment,' which is but a restatement, with greater particularity and exactness, of the same cause of action already set up in the complaint."

Justification of Trespass by License. — In an action of trespass where the gravamen of the action was the breaking and entering the plaintiff's close, the defendant's lascivious conduct with the wife of the plaintiff being alleged by way of aggravation, the answer fully justified the entry by showing leave from the plaintiff. It was held incumbent on the plaintiff to new-assign, by way of reply, such special matter as to make it appear, if he could, that the defendant was a trespasser *ab initio*, notwithstanding the license. *Bennett v. McIntire*, 121 Ind. 231.

Bill for Injunction — New Assignment Allowed. — In an action by an administratrix to enjoin the defendants from entering on certain timber lands of the

h. INCONSISTENT REPLIES.—It seems that in some cases there is no objection to stating in a reply matter that is inconsistent with a general denial, and that the right to plead inconsistently is as broad in the case of a reply as in that of an answer.¹

intestate's estate and cutting timber therefrom, the answer set up a sale to them of timber standing on certain parts of the land. The reply to this new matter in the answer admitted a sale of the timber on parts of the land described in the complaint and answer, but alleged that the defendants had cut and removed the timber on all the land. This was held to constitute a proper reply, for it controverted the affirmative defense set up in the answer, and was not in contravention of the *Washington* Code of Procedure, providing that new matter, not inconsistent with the complaint, constituting a defense to new matter in the answer, may be set up in the reply. Such a reply was known "at common law as a new assignment and was recognized as proper pleading." *Davis v. Ford*, 15 Wash. 107.

Slander—New Assignment Necessary.

—In an action for slander in charging the plaintiff with arson, the defendant, by his answer, admitted the speaking, but averred that the words were spoken to his wife in the privacy of his family, and were accidentally overheard by another person, not known to be within hearing, and thus, without having been so intended by him, became public. And he further averred that this was done without malice, and was the wrong and injury complained of in the petition. In his reply the plaintiff averred that it was not true that the defendant spoke the words complained of under the circumstances stated in the answer; and he also averred that the defendant had often spoken the words, or the substance of them, in the presence of divers persons. It was held that the plaintiff, having traversed the allegations of the answer, could not recover for any other publication than that which the answer admitted. If that was not the publication for which he sued, he should have filed an amended petition setting forth his cause of action more minutely and circumstantially, for he could not, by anything contained in his reply, draw the defendant away from the particular publication admitted in the answer. This could only be done by a

new assignment, which is "in the nature of a new petition, or rather it is a more precise and particular repetition of the matter contained in the original petition, so as to indicate that the plaintiff is suing for a matter other than that to which the answer relates." *Campbell v. Bannister*, 79 Ky. 206.

Not Allowable in New York.—In *Stewart v. Wallis*, 30 Barb. (N. Y.) 344, it was said: "The necessity for a new assignment * * * was never so much for the purpose of giving information to the defendant and enabling him to meet the charge and prevent his being misled, as to conform to the technical rules and pleadings and practice of the court. It was unknown in equity and in admiralty, and is superseded in the courts of common law of this state by the code."

Practice under Judicature Act—England.—In an action for trespass to the plaintiff's dwelling house and conversion of his goods, the statement of claim contained allegations that the defendant put bailiffs in the house, stayed therein a long time, and on two different days brought in a concourse of people; the defendant justified the acts complained of as done in execution of a fieri facias, and the plaintiff replied that in continuing in the house for a long time, posting auction bills, and introducing a concourse of people as in the statement of claim mentioned, the defendant stayed more than a reasonable time, and brought in more people and made a greater noise and disturbance upon the plaintiff's premises than was reasonable in order to levy under the fi. fa. It was held that the reply might be considered a new assignment, and therefore admissible under order 18, rule 7. *Byrne v. Duckett*, 10 L. R. Ir. 24.

1. *McDermott v. Iowa Falls, etc.*, R. Co., 85 Iowa 180; *Stanbrough v. Daniels*, 77 Iowa 561; *Day v. Mill Owners' Mut. F. Ins. Co.*, 75 Iowa 694. See also generally article ANSWERS IN CODE PLEADING, vol. 1, p. 852.

Pleading in Alternative—Kentucky Statute.—Under Bullitt's Civ. Code Ky. (1895), § 113, a reply in the alter-

Separate Counts Necessary. — When pleading inconsistently, the various matters relied upon by the plaintiff must be set out in separate counts, each of which must be sufficient in itself.¹

5. Denials — *a.* **AMBIGUITY.** — Conjunctive allegations of the answer must not be replied to by a denial in the conjunctive,² for

native is permissible provided it does not depart from the original cause of action. *Clay City Nat. Bank v. Conlee*, (Ky. 1899) 51 S. W. Rep. 615.

Waiver of Breach of Contract. — A general denial is not inconsistent with a plea of waiver of the breaches of a contract, especially where the alleged breaches might have occurred without any special notice to the person in default. *Tobin v. Western Mut. Aid Soc.*, 72 Iowa 261; *Eikenberry v. Edwards*, 71 Iowa 82.

Express Admissions Control Denials. — Where the reply contains an explicit confession of a fact which, in the absence of proof of matter in avoidance, establishes the defense set out in the answer, it is held that the general denial must be disregarded. *Meadows v. Hawkeye Ins. Co.*, 62 Iowa 387; *Gaffney v. St. Paul, etc., R. Co.*, 38 Minn. 111; *Dwelling House Ins. Co. v. Brewster*, 43 Neb. 528; *North Nebraska Fair, etc., Assoc. v. Box*, (Neb. 1899) 77 N. W. Rep. 770.

In *Indiana* the plaintiff may, in addition to the general traverse, set up new matter in avoidance of the answer and may tender as many issues as he pleases, so that they are not inconsistent with the complaint or frivolous. *Snodgrass v. Hunt*, 15 Ind. 274; *Zehnor v. Beard*, 8 Ind. 96.

Election Between Inconsistent Replies — *Iowa.* — For the reasons that the facts involved in new matter set out by way of defense in the answer are peculiarly within the knowledge of the defendant, and that for lack of knowledge of the facts the plaintiff may be unable to determine before trial which of two or more defenses to the new matter can be maintained, the plaintiff is not compelled to stand on one defense at the risk of abandoning without fault on his part the only one which could be maintained. *Day v. Mill Owners' Mut. F. Ins. Co.*, 75 Iowa 604.

Practice under Judicature Acts — *England.* — It seems that the plaintiff may in his reply both traverse the allegations made in the defense and confess and avoid them. It was remarked by *Bramwell, J. A.*, in *Hall v. Eve*, 4 Ch.

D. 341: "I cannot help thinking it would be a mischievous thing to anticipate a defense that may never be made." If the plaintiff were compelled to put new matters into the statement of claim, he might also "anticipate every form of defense, and that would lead to great length of pleading. It appears to me that an allegation that the defendants had waived their right is much more cheaply, conveniently, and compendiously made in the reply than by amendment in the statement of claim." But see *Earp v. Henderson*, 3 Ch. D. 254.

1. *Runkle v. Hartford Ins. Co.*, 99 Iowa 414.

In *Indiana* where any paragraph of the answer contains new matter, the plaintiff may, in separate paragraphs, reply any new matter which supports the complaint and avoids the new matter in such paragraph of the answer. *Brown v. Indianapolis First Nat. Bank*, 115 Ind. 572.

In *Montana* a reply may contain two or more distinct avoidances of the same defense or counterclaim, but they must be separately stated and numbered. *Babcock v. Maxwell*, 21 Mont. 507.

Withdrawal of Paragraph of Reply After Swearing Jury. — After the jury had been impaneled, the court permitted the plaintiff to withdraw a paragraph of the reply, and proceeded with the trial without reswearing the jury. There was held to be no error in this, because the jury had been sworn to try the issue, and though one of the issues was afterwards withdrawn, the oath nevertheless continued applicable to the issues that remained. *Gerard v. Jones*, 78 Ind. 378.

2. *Pullen v. Wright*, 34 Minn. 314, holding that when the plaintiffs said, "They deny that they warranted and represented that said chest of tea was full and wholly occupied by tea, and that said baking powder and molasses was good and merchantable," and also denied that they "warranted and represented that all of the said property was of good quality," the denials severally were insufficient.

such a denial is of an evasive character and involves a negative pregnant, and this form of denial is as faulty in the reply as it is in the answer.¹

b. ARGUMENTATIVENESS. — Where the reply does not directly deny the answer, yet sets up a state of facts inconsistent with it, it is called an argumentative denial, the effect of which varies in the different jurisdictions; in all of these, however, argumentativeness is dealt with in the reply as in the answer.²

1. See article ANSWERS IN CODE PLEADING, vol. 1, p. 796.

As Alleged and Set Forth. — A denial that "the said defendant is entitled to the sum of two thousand four hundred dollars, or to any other sum for damages as alleged and set forth" in the petition, is a bad denial to new matter in the answer, because it seems to admit the facts to be true and yet to deny that the defendant is entitled to damages. *McKenzie v. Farrell*, 4 Bosw. (N. Y.) 192.

Missouri. — In *Merchants' Nat. Bank v. Richards*, 6 Mo. App. 454, Bakewell, J., said: "The doctrine of a negative pregnant seems not to be recognized in Missouri. The denial of a complex statement in the very language in which it is made is not careful pleading; but where the purpose of the pleader is clear, it is sufficient to put in issue all the material facts in the allegation denied, as if each were disjunctively stated and denied, unless a case is presented in which the answer must be fairly regarded as ambiguous." *Citing Wynn v. Cory*, 43 Mo. 304.

Denial Too Broad. — Where the answer alleged the insolvency of the grantor of a bill of sale at the time of its execution, and that all the property conveyed was his property not exempt from execution, thereby inferring that the bill of sale was fraudulent as to creditors, the reply only denied that the conveyance included all the grantor's property not so exempt. It was held that this denial was too broad to avail the plaintiffs, because it would be true if the grantor had only a dollar's worth of property not included in the bill of sale, and yet its legal character would not be affected. *Truitt v. Caldwell*, 3 Minn. 364.

Instance of Negative Pregnant. — In an action against a railroad for killing stock, the answer set up a contract by the plaintiff to erect a fence along the road, and charged that because he did not fence, the stock got upon the road.

The reply denied that the plaintiff had contracted with the company to build a fence on his own land on the line of the said road, as stated by the defendant, and denied that "plaintiff's stock came on said railroad track by reason of plaintiff not building a fence that he was bound to build by reason of any contract that he had made." Thus, while it denied the execution of a contract which bound him to fence the road, it impliedly admitted that some kind of contract had been made. But it was held, under the *Missouri* practice, that where a contract is collaterally set up in pleadings, a denial of this kind is sufficient to require the defendant to produce it on the trial, so that its terms can be construed by the court. *Ells v. Pacific R. Co.*, 55 Mo. 278.

Apparent Admission of Adverse Possession. — Where the defense set up the statute of limitations and also twenty-one years' adverse possession of premises by the defendant and those under whom he held, a reply that "it is not true that the defendant has occupied said premises adversely for the last twenty-one years prior to the commencement of this action" was considered to admit, apparently, that the cause of action did not accrue within twenty-one years and that the defendant and those under whom he claimed had been in adverse possession for twenty-one years. *Kyser v. Cannon*, 29 Ohio St. 359.

2. See article ANSWERS IN CODE PLEADING, vol. 1, p. 799.

In *Indiana* such denials are considered but defects of a formal character which cannot be reached on demurrer. It seems that the proper remedy is a motion to make the reply more specific. *Kepler v. Jessup*, 11 Ind. App. 241; *Vance v. Schroyer*, 82 Ind. 114; *Doherty v. Bell*, 55 Ind. 205; *Meredith v. Lackey*, 14 Ind. 529; *Austin v. Swank*, 9 Ind. 109.

Instance of Argumentative Denial. — In

c. **GENERAL DENIALS.**—Under the codes, a general denial will simply put in issue the truth of the matters alleged, and its use in the reply is precisely similar to its use in the answer.¹

Denial of Each and Every Allegation.—A general reply denying each and every allegation in all the paragraphs of an answer is good.²

an action to recover the value of certain state bonds of a university, amounting to twenty-five thousand dollars, which it was alleged the defendant had in his hands as its agent and attorney, and which, on demand, he refused to deliver, but had sold and converted to his own use, the defendant answered that the university was indebted to him for professional services as attorney in a suit against the state, by which the bonds were obtained, under a special contract, evidenced on the part of the university by a resolution of its board of trustees, made and entered on its records February 8, 1853, to the effect that for such services he be allowed one-fourth of the net proceeds of the suit, to be paid to him proportionately out of such proceeds, as the same should be paid into the treasury of the board; that of said bonds he retained \$16,625, being one-fourth, as specified in the foregoing resolution. To this part of the answer the university, by the second paragraph of its reply, said that at the date of the resolution the defendant was secretary of the board of trustees, and falsely entered the resolution on the records of the board of trustees; that the resolution which was actually adopted provided that for all his legal services and outlays (there were numerous other suits conducted by the defendant as attorney for the university, and services and expenditures as agent) he should be allowed one-fourth, etc.; but that the defendant fraudulently, and without the knowledge or assent of the board, entered the resolution in form as stated in the answer. It was held that this reply was simply an argumentative denial of so much of the answer as alleged the adoption of the resolution, or, in other words, the making of the contract by the trustees. *Judah v. Vincennes University*, 23 Ind. 272.

Where the Reply Asserts what the answer denies, the affirmative allegation is not considered admitted by a failure to deny it. *Matthews v. Lloyd*, 89 Ky. 625.

1. *Kimberling v. Hall*, 10 Ind. 407.

Sufficiency of Reply—*Montana*.—Anterior to the Montana Code of Civil Procedure, 1895, it was held that a reply to new matter was in effect, and should be treated as, an answer, and that where a general denial would be sufficient in an answer it would be proper and sufficient in a reply. *Hammer v. Edwards*, 3 Mont. 187.

Practice under Judicature Acts—*England*.—It is unnecessary to traverse one by one the particular statements of facts which are contained in the defense, but for the purpose of putting those facts in issue by way of denial, a general denial is sufficient except where replying to a counterclaim; in such case the reply must be specific. *Williamson v. London, etc.*, R. Co., 12 Ch. D. 787.

General Denial Affected by Further Answer.—Where an additional answer, filed after a reply of general denial, sets up new matter it should be replied to. *Swihart v. Cline*, 19 Ind. 264.

Replies Unnecessary to Second Answers Not Containing New Matter.—Where a general denial is filed, and afterwards a supplemental petition is put in, to which an additional answer is made not setting up new matter, a further reply is not necessary. *Dreilling v. Battle Creek First Nat. Bank*, 43 Kan. 197.

2. *Cleveland v. Worrell*, 13 Ind. 545, holding that there need not be a separate reply to each paragraph.

Construction of Reply.—Where the reply to an answer was that the plaintiffs "deny each and every allegation therein contained so far as the same controverts the allegations stated in their petition," it was held to be in effect a general denial as to all new matter controverting the allegations of the petition. *Colvin v. Hauenstein*, 110 Mo. 575.

Answer Setting Up Affirmative Matter.—A reply denying "each and every allegation set up in the answer as new matter by way of avoidance" was held sufficient where the answer set up as new matter by way of avoidance that the plaintiff had sold and assigned

Denial of All Material Allegations. — A reply denying all the material allegations of the petition is bad pleading, but not a nullity.¹

Denial in Statutory Form. — If the denial is in precise accord with the forms prescribed by statute it will be sufficient.²

d. GENERAL DENIALS AND OTHER DENIALS AND ALLEGATIONS. — When a general denial is employed in conjunction with another denial and allegation the reply ought to be so framed as to leave no doubt in the mind of the court and the adverse party as to what is denied and what is admitted. This course not only sharpens the issues, but it aids in the preparation of evidence, and lessens expenses in bringing witnesses to meet matters not designed to be controverted at the trial.³

a claim in dispute prior to the commencement of the action. *Chawviteau v. Fay*, (C. Pl. Spec. T.) 54 How. Pr. (N. Y.) 211.

Contra. — A reply, "Now comes the plaintiff, and, replying to the answer herein, denies each and every allegation of new matter therein contained," was held insufficient to put in issue the new matter. *Chicago, etc., R. Co. v. Lundstrom*, 16 Neb. 254.

1. *Collins v. Trotter*, 81 Mo. 275, holding that advantage of its insufficiency should be taken before trial.

Immaterial Allegations May Be Disregarded. — Where the denial in the reply was of "each and every material allegation of new matter" in the answer, it was contended that the use of the word "material" vitiated the denial, and that to be good it should extend to every allegation. It was said by the court: "A little examination will expose the error. The affirmation and denial of an immaterial matter make no issue in an action. We consider pleadings with reference to the issues they present, and take note of affirmations and denials only as they affect these issues. The evidence is confined to those allegations only which are material. They only are subjects of consideration. If immaterial allegations prejudice a party they may be stricken out on his motion. If they do not prejudice they may be disregarded." *Miller v. Brumbaugh*, 7 Kan. 343.

2. *Winchester v. Browne*, (Supm. Ct. Spec. T.) 26 Abb. N. Cas. (N. Y.) 387.

A Denial in Any One of the Forms Prescribed cannot be successfully demurred to upon the ground that it is insufficient in law upon the face thereof. *Winchester v. Browne*, (Supm.

Ct. Spec. T.) 26 Abb. N. Cas. (N. Y.) 387.

Reference to Folios of Answers. — Where the answer is in folios, a denial of all those allegations in it which are contained within certain specified folios is sufficient. *Gassett v. Crocker*, (C. Pl. Spec. T.) 9 Abb. Pr. (N. Y.) 39.

Insufficient Denial of Specific Allegation. — A reply that "it is not true that on the 10th day of January, 1886, 1887, or 1888, this plaintiff had in the city of Frankfort, and subject to taxation, the property in the answer mentioned," is not a denial of the specific allegation of an answer that on the 10th day of January, 1886, 1887, and 1888, the plaintiff owned the property mentioned. *Frankfort v. Mason, etc., Co.*, 100 Ky. 48.

3. *Long v. Long*, 79 Mo. 644, holding a reply bad which was: "Plaintiff denies each and every allegation not herein admitted or otherwise pleaded to." The court, *per Phillips*, Commissioner, remarked: "What is admitted or otherwise pleaded to? To determine this the opposing counsel and the court must go through the pleading analytically, step by step, to discover what perchance may be admitted or denied. * * * When the answer, as in this case, tenders many issues of fact in different counts, affecting the integrity of plaintiff's title relied on as the basis of his recovery, he ought to answer all the allegations, either by denying or admitting them. The reply in this case is of a character which a party would employ who cannot conscientiously deny certain averments, and yet lacks the open candor to admit, knowing its injurious effect on his cause if admitted. Hence, being in doubt as to the course of safety, he adopts a duplex kind of plea, half

e. SPECIFIC DENIAL. — A specific denial of one clause of an answer will not extend to a denial of another and distinct clause.¹

f. DENIAL OF KNOWLEDGE. — Some of the codes require, where a reply is permitted, that it shall contain a general or specific denial of each material allegation which it attempts to controvert, or of any knowledge or information sufficient to form a belief; and, as similar language is usually employed respecting the contents of an answer, replies are governed by the rules applicable to answers.²

Presumption of Knowledge. — A denial "upon information and

denying, half confessing, so that he may insist on a denial or an admission as the one or the other may serve him in an emergency on the trial. Such pleading is vicious, and should be rectified by motion."

Effect of Specific and General Denials. — Where a general denial assumes to deny each allegation not previously denied, it does not include allegations that the reply has specifically attempted to deny. Pullen v. Wright, 34 Minn. 314.

1. Landigan v. Mayer, 32 Oregon 245, holding that where there was an allegation of the absence of knowledge of certain facts at the time of execution of a mortgage, and another allegation denying knowledge of the same facts at the time of a sale under a decree foreclosing such mortgage, a specific denial of the latter allegation was not sufficient and the former allegations stood admitted.

Denial of New Matter in Answer. — Where the reply denies particularly all knowledge of each allegation of new matter sufficient to form a belief, it is a sufficient denial of the new matter in the answer to create an issue of fact upon it. Doremus v. Lewis, 8 Barb. (N. Y.) 124.

2. See article ANSWERS IN CODE PLEADING, vol. I, p. 808.

Insufficient Denials — *Kentucky* — In Gorman v. Young, (Ky. 1892) 18 S. W. Rep. 369, a reply was that the plaintiff "does not know, and has no knowledge of ascertaining, how much money M. C. Allen advanced. * * * It may be true that M. C. Allen may have advanced his children enough in dollars and cents to make up in value this piece of land." This was held to be insufficient, the court saying: "Matters not presumptively within the knowledge of the party must either be denied flatly by him, or else he must deny that he has sufficient knowl-

edge or information to form a belief as to them."

Missouri. — In Watson v. Hawkins, 60 Mo. 550, a reply that the plaintiff "did not know" was held insufficient under a code provision that the plaintiff should deny "specifically each allegation controverted by him."

Where the answer to a petition to cancel a deed as a cloud on title set up matter requiring a reply, it was held insufficient to deny "each and every allegation and statement therein which is or are in any way inconsistent with the allegations in the petition," and "especially * * * all new matter," because it was impossible to tell what allegation in the answer was inconsistent with the allegations in the petition contained; and "it is equally difficult to tell what plaintiff means when he says he 'especially denies all new matter in said answer of defendant.' Under such denials as these, both court and adversary are left in the dark as to what plaintiff intends to deny by those portions of his reply." Young v. Schofield, 132 Mo. 650.

New York. — Where the answer alleged not only an offer containing sundry terms and material allegations, but further averred that mutual releases were made a part of it, it was held that a denial generally of knowledge or information sufficient to form a belief as to whether the offer was correctly set forth was not a denial of each material allegation to which the plaintiff replied. Steinway v. Steinway, 74 Hun (N. Y.) 423.

Immaterial Deviations from Proper Form. — Where the reply denies that the plaintiff had "any knowledge or information sufficient to form a belief as to the truth of the allegations contained in said answer," the defendant claimed that the reply was defective, in that it did not "deny any knowledge or information sufficient to form a be-

belief" should never be used when the facts denied are manifestly within the knowledge of the plaintiff.¹

g. IMPLIED DENIALS. — When a reply is not necessary, all new matter contained in the answer is deemed denied, and an issue is raised by operation of law, enabling the plaintiff to introduce such evidence as would be admitted on legal or equitable principles to traverse and avoid its effect.²

belief as to the truth of any or all of the allegations of the answer;" and thence the allegations of the answer were admitted. The court said: "It may be conceded that, if we are to divide 'a hair 'twixt south and southwest side,' as some courts have done, the denial is technically bad; but if the attention of the trial judge had been called to the matter he would have permitted an amendment as a matter of course, for no lawyer with any respect for himself would claim that he was misled, or that he understood, from the reply, that the allegations of the answer were admitted." *Macalester College v. Nesbitt*, 65 Minn. 17.

1. *Fallon v. Durant*, (Supm. Ct. Spec. T.) 60 How. Pr. (N. Y.) 178, holding that the plaintiff's reply denying "upon information and belief each and every allegation" contained in the answer was clearly insufficient, when the defense in the answer, to which the reply was interposed, set up facts clearly within the plaintiff's knowledge, as was manifest from the allegations contained in the complaint.

Inability to Read the English Language is a sufficient excuse for denying the execution of a release upon information and belief. *Kosztelnik v. Bethlehem Iron Co.*, 91 Fed. Rep. 606.

2. *Arkansas*. — *St. Louis, etc., R. Co. v. Higgins*, 44 Ark. 293; *George v. St. Louis, etc., R. Co.*, 34 Ark. 613; *Abbott v. Rowan*, 33 Ark. 593; *Cannon v. Davies*, 33 Ark. 56; *Lusk v. Perkins*, 48 Ark. 238; *Watson v. Johnson*, 33 Ark. 737.

California. — *Bryan v. Maume*, 28 Cal. 238; *Moore v. Copp*, 119 Cal. 429; *Grangers' Business Assoc. v. Clark*, 84 Cal. 201; *Rankin v. Sisters of Mercy*, 82 Cal. 88; *Curtiss v. Sprague*, 49 Cal. 301; *Colton Land, etc., Co. v. Raynor*, 57 Cal. 588; *Doyle v. Franklin*, 40 Cal. 106; *Herold v. Smith*, 34 Cal. 122; *Sterling v. Smith*, 97 Cal. 343; *Clark v. Child*, 66 Cal. 87.

Indiana. — *Turner v. Simpson*, 12 Ind. 413; *Lamson v. Falls*, 6 Ind. 309; *Walker v. Woollen*, 54 Ind. 164.

Iowa. — *Noble v. The Steamboat Northern Illinois*, 23 Iowa 109; *Barger v. Farris*, 34 Iowa 228; *Corbin v. Beebee*, 36 Iowa 336; *Des Moines University v. Livingston*, 57 Iowa 307; *Carleton v. Byington*, 24 Iowa 172; *Bayliss v. Murray*, 69 Iowa 290; *Kervick v. Mitchell*, 68 Iowa 273; *Walker v. Sioux City, etc., Town Lot Co.*, 65 Iowa 563; *Hunt v. Johnston*, 105 Iowa 311; *McQuade v. Collins*, 93 Iowa 22; *Hartley v. Keokuk, etc., R. Co.*, 85 Iowa 455; *Chase v. Kaynor*, 78 Iowa 449; *Scott v. Luther*, 44 Iowa 570; *Mills County Nat. Bank v. Perry*, 72 Iowa 15; *Williams v. Wilcox*, 66 Iowa 65; *Allison v. King*, 25 Iowa 56; *Stuart v. Hines*, 33 Iowa 60; *Gwyer v. Figins*, 37 Iowa 517; *Meadows v. Hawkeye Ins. Co.*, 62 Iowa 387; *Higley v. Burlington, etc., R. Co.*, 99 Iowa 503; *Davis v. Payne*, 45 Iowa 194; *Cassidy v. Caton*, 47 Iowa 22.

Kansas. — *Wilson v. Fuller*, 9 Kan. 176.

Kentucky. — *Barbaroux v. Barker*, 4 Met. (Ky.) 49; *Mason v. Mason*, 5 Bush (Ky.) 194; *Robinson v. Williamson*, 7 Bush (Ky.) 605; *Stern v. Freeman*, 4 Met. (Ky.) 313; *Fahnestock v. Bailey*, 3 Met. (Ky.) 51; *Mitcheson v. Foster*, 3 Met. (Ky.) 325; *Ashby v. Woolfolk*, 3 Met. (Ky.) 542; *Graves v. Ward*, 2 Duv. (Ky.) 304; *Harris v. Moberly*, 5 Bush (Ky.) 557; *Kentucky Female Orphan School v. Fleming*, 10 Bush (Ky.) 234; *Brown v. Ready*, (Ky. 1893) 20 S. W. Rep. 1036; *Carter v. Goodman*, 11 Bush (Ky.) 233; *Blalock v. Keys*, 13 Ky. L. Rep. 205; *Crow v. Crow*, 4 Ky. L. Rep. 909; *McCrocklin v. Hiatt*, 6 Ky. L. Rep. 745.

Minnesota. — *Davis v. Crookston Waterworks, etc., Co.*, 57 Minn. 408.

Missouri. — *Watson v. Hawkins*, 60 Mo. 550; *State v. Rau*, 93 Mo. 126.

Montana. — *Caruthers v. Pemberton*, 1 Mont. 111.

Nebraska. — *Peaks v. Lord*, 42 Neb. 15; *McCann v. McLennan*, 2 Neb. 286.

Nevada. — *State v. Yellow Jacket Silver Min. Co.*, 14 Nev. 220.

New York. — *Van Gieson v. Van*

A Denial Implied by Law Is Not Waived by pleading a defense inconsistent therewith, so as to relieve the defendant from the burden of proving the new matter in the answer.¹

Gieson, 12 Barb. (N. Y.) 520; Favilla v. Moretti, (Supm. Ct. Spec. T.) 18 Civ. Pro. (N. Y.) 388; Van Nest v. Talmage, (Supm. Ct. Gen. T.) 17 Abb. Pr. (N. Y.) 99; De Leyer v. Michaels, (C. Pl. Gen. T.) 5 Abb. Pr. (N. Y.) 203; Vassear v. Livingston, 13 N. Y. 248; Devlin v. Bevins, (Supm. Ct. Spec. T.) 22 How. Pr. (N. Y.) 290; Williams v. Upton, (County Ct.) 8 How. Pr. (N. Y.) 205; Richtmyer v. Haskins, (Supm. Ct. Gen. T.) 9 How. Pr. (N. Y.) 481; Myatt v. Saratoga County Mut. Ins. Co., (Supm. Ct. Spec. T.) 9 How. Pr. (N. Y.) 488; Quin v. Chambers, 1 Duer (N. Y.) 673; Springer v. Bien, 16 Daly (N. Y.) 275; Maricle v. Brooks, (Supm. Ct. Gen. T.) 5 N. Y. Supp. 210; Farrell v. Amberg, (C. Pl. Gen. T.) 23 Civ. Pro. (N. Y.) 434, 8 Misc. (N. Y.) 220; Burke v. Thorne, 44 Barb. (N. Y.) 363; Scott v. Stockwell, (Supm. Ct. Spec. T.) 65 How. Pr. (N. Y.) 249; American Dock, etc., Co. v. Staley, 40 N. Y. Super. Ct. 539; Prentiss v. Graves, 33 Barb. (N. Y.) 621; Romano v. Irsch, (C. Pl. Gen. T.) 7 Misc. (N. Y.) 147; Avery v. New York Cent., etc., R. Co., (Buffalo Super. Ct. Gen. T.) 6 N. Y. Supp. 547; Cockerill v. Loonam, 36 Hun (N. Y.) 353; Equitable L. Assur. Soc. v. Cuyler, 75 N. Y. 511; Arthur v. Homestead F. Ins. Co., 78 N. Y. 462; New York L. Ins. Co. v. Aitkin, 125 N. Y. 660; Thompson v. Sickles, 46 Barb. (N. Y.) 49; Dambman v. Schulting, 4 Hun (N. Y.) 50, 6 Thomp. & C. (N. Y.) 251; Ward v. Comegys, (Supm. Ct. Spec. T.) 2 How. Pr. N. S. (N. Y.) 428; Dillon v. Sixth Ave. R. Co., 46 N. Y. Super. Ct. 21; Kuhn v. American Automatic Knife, etc., Co., (C. Pl. Gen. T.) 9 Misc. (N. Y.) 54; Conklin v. Field, (County Ct.) 37 How. Pr. (N. Y.) 455; Hodges v. Hunt, 22 Barb. (N. Y.) 150; Wilcox v. Palmeter, 2 Hun (N. Y.) 517.

North Carolina. — Askew v. Koonce, 118 N. Car. 526; Price v. Eccles, 73 N. Car. 162; Stubbs v. Motz, 113 N. Car. 458; Buffkin v. Eason, 110 N. Car. 264; Fitzgerald v. Shelton, 95 N. Car. 519; Stanton v. Hughes, 97 N. Car. 318; Moore v. Garner, 101 N. Car. 374.

Ohio. — Corry v. Campbell, 25 Ohio St. 134; Long v. Hoban, 7 Ohio Dec. (Reprint) 688.

South Carolina. — Egan v. Bissell,

54 S. Car. 80; Davis v. Schmidt, 22 S. Car. 128; Price v. Richmond, etc., R. Co., 38 S. Car. 199.

South Dakota. — Cornwall v. McKinney, 9 S. Dak. 213.

Texas. — Martin v. Teal, (Tex. Civ. App. 1895) 29 S. W. Rep. 691; McKinney v. Nunn, 82 Tex. 44; Bauman v. Chambers, 91 Tex. 108; Meyer v. Opperman, 76 Tex. 105; Gouhenant v. Brisbane, 18 Tex. 20.

Washington. — Bellingham Bay, etc., R. Co. v. Strand, 1 Wash. 133; Johnson v. Maxwell, 2 Wash. 482; Ewing v. Van Wagenen, 6 Wash. 39; Fife v. Olson, 5 Wash. 789; Frank v. Jenkins, 11 Wash. 611.

Wisconsin. — Roys v. Lull, 9 Wis. 324; Wood v. Lake, 13 Wis. 84; Smith v. Coolbaugh, 21 Wis. 427; Waddle v. Morrill, 26 Wis. 611.

In Actions to Enforce Mechanics' Liens, it is held in *Minnesota* that the allegations of the answer are deemed to be denied without a reply. *Bruce v. Lennon*, 52 Minn. 547; *Davis v. Crookston Waterworks, etc., Co.*, 57 Minn. 402; *Johnson v. Lau*, 58 Minn. 508.

Unnecessary Reply. — Where a reply is unnecessary the issues are complete without one, and a demurrer thereto should be sustained. *Porter v. Mitchell*, 82 Ind. 214.

1. *Day v. Mill Owners' Mut. F. Ins. Co.*, 75 Iowa 694; *Parsons v. Grand Lodge, etc.*, (Iowa 1899) 78 N. W. Rep. 676; *Stanbrough v. Daniels*, 77 Iowa 561.

Colorable Admissions necessary to sustain a confession and avoidance do not affect a general denial interposed by operation of law to the allegations of the answer. *Nichols v. Chicago Great Western R. Co.*, 94 Iowa 202; *Schulte v. Coulthurst*, 94 Iowa 418; *Runkle v. Hartford Ins. Co.*, 99 Iowa 414. And such admissions cannot be treated as evidence to disprove the denial. *Day v. Mill Owners' Mut. F. Ins. Co.*, 75 Iowa 694.

Admission by Implication. — It is not necessary that the confession be in express terms. If by reasonable implication the reply admits the facts sought to be avoided, it is sufficient. *Runkle v. Hartford Ins. Co.*, 99 Iowa 414; *Day v. Mill Owners' Mut. F. Ins. Co.*, 75 Iowa 694.

h. PROOF UNDER GENERAL DENIAL. — Under a general denial, the plaintiff may introduce any evidence inconsistent with the facts alleged in the answer which tends to meet and break down the defense, and is not confined to negative proof in denial thereof;¹ but a general denial will not authorize the plaintiff to introduce evidence to establish an affirmative defense.²

Where the reply does not expressly admit the allegations of the answer, they are denied by operation of law. *Parsons v. Grand Lodge, etc.*, (Iowa 1899) 78 N. W. Rep. 676; *Nichols v. Chicago Great Western R. Co.*, 94 Iowa 202; *Schulte v. Coulthurst*, 94 Iowa 418.

Effect of Absence of Order Requiring Reply. — In the absence of an order requiring the plaintiff to reply to a defense of avoidance, the allegations of an answer not setting up a counterclaim must be taken to be controverted. *Reilly v. Sabater*, (Supm. Ct. Tr. T.) 26 Civ. Pro. (N. Y.) 34.

1. *Balue v. Sear*, 131 Ind. 303, holding that where the defendant, in his answer, alleged not only that the plaintiff did not procure a loan on a note and mortgage for the defendant, but that the plaintiff "did not pay this defendant or any other person for him anything whatever," and by his evidence went into that subject, a door was opened for the admission of evidence in support of the plaintiff's version of the matter.

Alteration of Contract. — Under a general denial the plaintiff may show that a contract has been altered fraudulently by the defendant since execution and performance. *Wirges v. Baeuerle*, 12 Hun (N. Y.) 134.

Fraud. — A reply, while tacitly admitting the execution of a written instrument set forth in the answer, thereby raising no issue so far as its execution was concerned, did allege that the signatures of the plaintiff and the other parties who signed the instrument were procured by certain false and fraudulent statements made by the agent of the defendant, and specified what such statements were and the manner in which it was claimed that the signatures were procured. It was held that the reply raised an issue, and that therefore the plaintiff had the right to introduce evidence to show that the verbal contract which he claimed was originally made had not been varied by a subsequent written agreement. *Missouri Pac. R. Co. v. McGrath*, 3 Kan. App. 220.

Justification of Plaintiff's Acts. — In replying the answer alleged generally, without stating in what particular, that the plaintiff "violated the terms and broke the conditions" of a mortgage authorizing the defendant to seize the property covered by it on certain contingencies. The reply was a general denial. It was held that on proof by the defendant of certain acts of the plaintiff, the latter might show by any evidence that such acts were not a violation of the terms of the mortgage. *Ellingsen v. Cooke*, 37 Minn. 400.

In *Nebraska* justification must be specially pleaded, or the facts relied on as testimony to excuse the plaintiff's acts will not be admissible in evidence. *Phenix Ins. Co. v. Bachelder*, 39 Neb. 95.

In an Action for Malicious Prosecution an answer setting up the fact that the defendant acted under the advice of counsel, though a good defense if true, is not new matter requiring a reply. *Olson v. Tvete*, 46 Minn. 225. And see generally article MALICIOUS PROSECUTION, vol. 13, p. 419.

Recovery of Real Estate. — In a suit for possession of and to quiet title to real estate the plaintiff may rely on any legal or equitable defense to the answer he may have under a general denial. *Jackson v. Neal*, 136 Ind. 173. See also articles EJECTMENT, vol. 7, p. 260; QUIETING TITLE — REMOVAL OF CLOUD, vol. 17, p. 274.

Reply to Plea of Non Est Factum. — Where the petition contains sufficient averments as to execution of an instrument, a sworn plea of *non est factum* will not necessitate a replication setting up facts relied on in evidence to establish a ratification. *Houston, etc., R. Co. v. Chandler*, 51 Tex. 476.

2. *Judy v. Duncan*, 21 Mo. App. 548; *McClendon v. Wells*, 20 S. Car. 514; *Balue v. Sear*, 131 Ind. 301.

Affirmative Matter Must Be Plead. — The rule is that whenever a plaintiff intends to rely upon any fact not included in the allegations necessary to the support of the defendant's case, "he must set it out according to the statute

and new matter in avoidance of the answer must be specially pleaded, otherwise it cannot be proved on the trial.¹

6. Verification of Reply — a. IN GENERAL — Provisions of Codes. — The various codes differ as to the necessity of a reply being made under oath. Prominent among their respective provisions

in ordinary and concise language, else he will be precluded from giving evidence of it upon the trial. An affirmative defense should be clearly and distinctly set forth." *Flint-Walling Mfg. Co. v. Ball*, 43 Mo. App. 504.

1. *Kimberling v. Hall*, 10 Ind. 407; *Swihart v. Cline*, 19 Ind. 264; *Dillon v. Russell*, 5 Neb. 488; *Payne v. Briggs*, 8 Neb. 78; *Phenix Ins. Co. v. Bachelder*, 39 Neb. 95; *Harrell v. Kemper*, 44 Tex. 421.

Contributory Negligence. — In *Ford v. Chicago*, etc., R. Co., 106 Iowa 85, it was held that where the answer sets up contributory negligence in avoidance, if the plaintiff expects to introduce evidence of matter to avoid the facts pleaded in the answer he should plead the facts by way of reply. *Citing Hay v. Frazier*, 49 Iowa 454.

Statute of Limitations. — Matter in avoidance of the statute of limitations must be pleaded. *Willits v. Chicago*, etc., R. Co., 80 Iowa 531.

Forgery. — Where the defendant set up in his answer an assignment of a judgment to him, it was held that the plaintiff, if he desired and expected to introduce evidence tending to prove such assignment to be a forgery, should have alleged such fact in a reply, otherwise he could not, on objection made, introduce evidence tending to prove forgery. *Hay v. Frazier*, 49 Iowa 454.

Want of Jurisdiction must be pleaded in order to avoid the effect of a judgment. *Platner v. Platner*, 66 Iowa 378.

Fraud. — The plaintiff may, without amending his petition, prove fraud without pleading it, where the answer has set up payment to which no reply is allowed. *Noble v. The Steamboat Northern Illinois*, 23 Iowa 109.

Waiver of Breach of Contract. — A general denial is insufficient to make an issue of a waiver by the defendant of a breach of contract alleged in the answer; the reply should set up the waiver. *Ehrlich v. Aetna L. Ins. Co.*, 103 Mo. 231.

Notice by Plaintiff of Matter in Avoidance of Answer. — In Iowa the statute

provides that a party may admit in writing any allegation of facts pleaded by his adversary which otherwise would be deemed controverted by mere force of law, but he is not precluded from proving other independent facts in avoidance of the facts admitted. Where the defendant's answer sets up matter by way of confession and avoidance, and the plaintiff proposes to overcome the matters alleged in avoidance, the plaintiff should in some way advise the court that matter in avoidance of the facts admitted will be relied upon to defeat their effect, and this may be done by a separate paper, by an entry of record, or by embodying the notice in the admission itself. It has been declared that such a statement or notice is not expressly required by statute, but is necessary from the nature of the case. *Viele v. Germania Ins. Co.*, 26 Iowa 9.

Matter Constituting a Defense — Federal Practice. — It was said in *Burlington Ins. Co. v. Miller*, 60 Fed. Rep. 254, by Thayer, J., that in most of the states it would be the duty of the plaintiff to file a reply to the new matter alleged in the answer, if it is intended to show a state of facts constituting an estoppel *in pais* or a waiver of the condition. "It appears to be held by the Arkansas courts that a plaintiff may prove any facts, without pleading them, which will suffice to overthrow or rebut a special plea or defense stated in the answer by way of confession or avoidance, such as was interposed in the present case. * * * It follows, therefore, that the same rule of pleading should be observed by the federal courts sitting in Arkansas in the trial of common-law cases." *Citing Lusk v. Perkins*, 48 Ark. 243.

Reason for Rule. — By denying generally or specifically, or upon a denial of knowledge or information sufficient to form a belief, the plaintiff is held to rely upon such denials; and at the trial he will not be permitted to show new matter constituting a defense to the defendant's new matter in avoidance, for the reason that he has not pleaded it. The issue will be upon the denial

are requirements that a reply shall be verified when it denies the execution of a written instrument, when the answer is verified, and when the reply is dilatory.¹

b. FORM OF VERIFICATION. — In some cases the affidavit of verification must be to the effect that the reply is true to the knowledge of the party making it, except as to the portion stated on information and belief, as to which he believes it to be true; in others it is deemed to be made on knowledge unless stated to be on information and belief; in others it may be made on belief only.²

c. BY WHOM MADE. — It is preferable that the Plaintiff, or one of several plaintiffs acquainted with the facts, should verify the reply; but as a general rule a representative who has personal knowledge of all the material allegations, or who has possession of a promissory note or similar security which may be the cause of action, is permitted to do so.³

If the Affidavit Is Made by a Stranger the reason thereof should be set out in the affidavit, because, though there are cases where attor-

of the defendant's averments. *Winchester v. Browne*, (Supm. Ct. Spec. T.) 26 Abb. N. Cas. (N. Y.) 387.

1. See the codes of the various states. As to remedies for absence of verification, see *infra*, V. 7. *d. Absence of Verification.*

Verified Answer Demands Verified Reply — *New York*. — Where it is provided by statute that "when any pleading in a case shall be verified by affidavit, all subsequent pleadings (except demurrers) shall be verified also," it is held that if the answer be verified the plaintiff should also swear to the truth of his reply. *Levi v. Jakeways*, (Supm. Ct. Spec. T.) 4 How. Pr. (N. Y.) 126.

Denial of Execution of Bond — *Kansas*. — An answer in substance and effect denying that a bond sued on is executed by the defendant, and not seeking affirmative relief, does not require a verified reply. *Madden v. State*, 35 Kan. 146.

Burden of Proof. — A verified reply will compel the defendant to prove the allegations of the answer. *Molino v. Blake*, (Ariz. 1898) 52 Pac. Rep. 366.

Testimony Required. — A reply under oath does not require the testimony of more than one witness to overcome it. *Arms v. Stockton*, 12 Iowa 327.

2. See the codes of the various states; and see article VERIFICATION.

3. See the codes of the various states.

Reply of One of Several Parties under Oath. — To a reply denying all the alle-

gations of the answer the affidavit of verification was made by one of two defendants, partners. It stated that the affiant was not personally acquainted with the matters set up in the reply, but from the information of his codefendant he believed that the facts stated were true in substance and in fact. An agent of the plaintiffs also filed an affidavit stating that he was acquainted with all the facts and that the matter in the reply was true, and that the reply of the codefendant could not be obtained, as he was absent and his place of residence could not be ascertained. It was held on appeal that the reply fully complied with the requirements of the code, because it was made under oath by one of several parties, and in addition was supported by the affidavit of one showing himself possessed of information equal to that of the absent defendant. *Kerr v. Hedge*, 12 Iowa 426.

Instrument in Possession of Representative. — Where the action is on a promissory note in the possession of an agent or attorney, either of them may verify the reply. *Kirkland v. Aiken*, 66 Barb. (N. Y.) 211.

By Attorney of Nonresident Plaintiff. — When the plaintiff is a nonresident, the reply may be verified by his attorney upon information. *Roscoe v. Maison*, (Supm. Ct. Spec. T.) 7 How. Pr. (N. Y.) 121; *Drevert v. Appsert*, (Supm. Ct. Spec. T.) 2 Abb. Pr. (N. Y.) 165.

neys or agents may make affidavits for another in the less important steps of a cause, without a very rigid inquiry into their means of knowledge, when this is undertaken upon the substance of the suit — upon a point on which the very rights of the parties depend — the affiant should satisfy the mind of the court that his means of information are full and adequate.¹

d. **EFFECT OF UNVERIFIED REPLY.** — Failure to verify a reply which should be verified will relieve the defendant from the necessity of proving the allegations of his answer.²

1. *Leach v. Keach*, 7 Iowa 232.

Sufficiency of Unnecessary Verification.

— Where a verification is unnecessary, the question whether a verification by a representative, not stating therein that the affiant had knowledge of the facts sworn to by him, nor stating that he is agent or attorney of the plaintiff, nor any other fact concerning authority upon him to verify the reply, is sufficient, need not be determined. *Mad-den v. State*, 35 Kan. 146.

Approved Precedent of Verification by Representative. — “B. makes oath that the plaintiffs are all nonresidents; that he is both agent and attorney for them in this county and state; that the claims sued on are all in writing and in his possession for collection; that most of the facts involved are in his personal knowledge, or derived from correspondence with the plaintiffs, and from frequent interviews for them with defendant, M.; and that the same are true except those stated on information and belief, and as to those he believes them true.” *Johnson v. Maxwell*, 87 N. Car. 18.

Insufficient Verification by Representative. — Where the matter in question was, in its nature and by the statement of it, supposed to have taken place between the parties personally, while the wife of the complainant, who made the sworn denial, did not pretend to possess any special information upon it, nor any knowledge save such as might be supposed to arise from a general familiarity with her husband's affairs, it was held that her knowledge did not answer the requirement of the statute, and was not sufficient to enable her to verify the pleading in the place of the complainant himself. *Leach v. Keach*, 7 Iowa 232.

2. *Moore v. Emmert*, 21 Kan. 1, holding that after trial there is no error in refusing permission to verify a reply, and the allegations of the answer will stand admitted.

Unverified Reply Will Prevent Judgment of Non Pros.

— Where there is no motion to set aside a reply on the ground that it is not verified, it is sufficient to prevent judgment for want of a reply. *Wells v. Dickey*, 15 Ind. 361.

Admissions by Failure to Verify. — In *Missouri Pac. R. Co. v. Finley*, 38 Kan. 550, the petition alleged that a railway company, by its agents, drove certain cattle from a wrecked train along and upon the highway to a neighboring village. The answer alleged that after the cars were derailed and the cattle taken therefrom, the owner, by his agents, drove the cattle to the next station. The question upon this part of the pleading was, Which of the two sets of men drove the cattle — the agents of the railway company, or the agents of the owner? It was held that a failure to verify the reply did not admit that the owner took charge of the cattle and drove them along the public highway.

Where the answer alleges a written contract of settlement of the matter in controversy, and there is no verified denial thereof, the execution of the contracts being admitted under the code, it carries with it a recognition of all legal inferences which may necessarily be drawn from it. *Chicago, etc., R. Co. v. Imhoff*, 3 Kan. App. 765.

Verified Answer Not Admitted True when Reply Is Not Requisite.

— Where no reply is necessary, it is not requisite that a reply filed denying the sworn allegations of the answer should be on oath, and the verified answer will not be taken as true. *Harper County v. Rose*, 140 U. S. 71.

Proof of Execution Is Not Requisite in Indiana where a reply denying the execution of a written instrument is not verified. *Wells v. Dickey*, 15 Ind. 361; *McNeer v. Dipboy*, 13 Ind. 542; *Russell v. Drummond*, 6 Ind. 216.

Unverified Reply Traverses Other Averments. — Absence of verification will

7. Remedies for Insufficiency and Irregularity — *a*. IN GENERAL.

— A demurrer to a reply should as a rule be carried back to the answer, and if the answer is insufficient judgment on the demurrer should be rendered for the plaintiff even though the reply is demurrable.¹ All objections to a reply on the ground of its insufficiency to put in issue the allegations of the answer should be raised in the trial court, otherwise they cannot be considered on appeal.²

Various Motions — Demurrer. — The objection may be in the form of a motion to have the pleading made certain and definite, or there may be a demurrer,³ a motion for judgment on the pleadings and taking an exception on a refusal of the motion,⁴ or, if the ground of insufficiency is that the reply contains repugnant allegations, a motion to compel the plaintiff to elect on which he will rely.⁵

b. INCONSISTENCY. — The practice under the various codes respecting replies that appear to be inconsistent is not harmonious. In some states it seems that the defendant should demur;⁶

not render the reply ineffectual as a traverse of all other averments of the answer other than the execution of a written instrument. *Hill v. Jones*, 14 Ind. 389.

In Iowa a party replying under oath can claim that his reply be considered as evidence, but the defendant cannot claim anything from the fact that the reply is unverified. *Lee v. Keister*, 11 Iowa 480; *Kerr v. Hedge*, 12 Iowa 426.

1. See article DEMURRERS AT COMMON LAW AND UNDER THE CODES, vol. 6, p. 326.

2. *Interstate Land, etc., Co. v. Patton*, 21 Colo. 503; *Holden v. Clark*, 16 Kan. 346; *Louisville, etc., R. Co. v. Payton*, (Ky. 1898) 45 S. W. Rep. 83; *Dean v. Goddard*, 55 Minn. 290; *Edmonson v. Phillips*, 73 Mo. 63; *Long v. Long*, 79 Mo. 644; *Collins v. Trotter*, 81 Mo. 275; *Chicago, etc., R. Co. v. Lundstrom*, 16 Neb. 254; *Walker v. Scott*, 106 N. Car. 56; *Wood v. Lake*, 13 Wis. 94. And see generally article EXCEPTIONS AND OBJECTIONS, vol. 8, p. 153.

Objections Waived. — Where it is provided by the code that the defendant may, within ten days after the service of a notice in writing upon himself or attorney that a reply has been filed, demur or move to strike out such reply, it is held that if he goes to trial without objection during the ten days he waives any right to object that the statutory period within which to attack the reply

was not allowed to him. *Interstate Land, etc., Co. v. Patton*, 21 Colo. 503.

3. *Highlands v. Raine*, 23 Colo. 295; *Interstate Land, etc., Co. v. Patton*, 21 Colo. 503; *Dean v. Goddard*, 55 Minn. 290. And see articles DEFINITENESS AND CERTAINTY IN PLEADING, vol. 6, p. 246; DEMURRERS AT COMMON LAW AND UNDER THE CODES, vol. 6, p. 292; DEMURRERS IN CHANCERY, vol. 6, p. 391.

Bill of Particulars. — Though a bill of particulars may be an appropriate remedy, it will not be directed, as to the same matters, in conjunction with the granting of a motion to make the reply more definite and certain. *Lahey v. Kortright*, 55 N. Y. Super. Ct. 156.

4. *Walker v. Scott*, 106 N. Car. 56.

In Colorado it seems that the defect cannot be reached by a motion of this kind. *Highlands v. Raine*, 23 Colo. 295.

5. *Dean v. Goddard*, 55 Minn. 290.

6. *Haas v. Shaw*, 91 Ind. 384; *Dinckelocker v. Marsh*, 75 Ind. 548; *Will v. Whitney*, 15 Ind. 194; *McAroy v. Wright*, 25 Ind. 22; *Hopkins v. Greensburg, etc.*, Turnpike Co., 46 Ind. 187; *Bishop v. Travis*, 51 Minn. 183; *Bausman v. Woodman*, 33 Minn. 512; *Bennett v. Connecticut F. Ins. Co.*, 27 Cinc. L. Bul. 15, 11 Ohio Dec. (Reprint) 429; *Newcomb v. Weber*, 1 Cinc. Super. Ct. 12; *Ennis v. Case Mfg. Co.*, 30 Fed. Rep. 487.

In Missouri the defendant may either demur specially or move to strike out.

in others the object may be attained by moving to strike out¹ or by moving for judgment on the pleadings;² or according to some authorities the reply may be disregarded.³

Time for Excepting for Inconsistency. — Any objection to the reply on the ground of inconsistency with the complaint must be taken before verdict, or its sufficiency will be regarded as admitted.⁴

Hurf, etc., *Chemical Co. v. Lackawanna Line*, 70 Mo. App. 274.

Demurrer Not Permitted — New York. — It was held under the New York Code of 1849 that a motion to set aside or strike out the reply upon the ground of inconsistency was proper where it alleged new matter inconsistent with the complaint. *White v. Joy*, 13 N. Y. 83, the court saying: "Since the code, parties must find their authority for pleading in the code; and if the authority is not found there for any pleading put in, and it is not a case where a demurrer is authorized, the remedy is by motion to strike out. It is an irregularity to put in pleadings not authorized by the code. All the cases in which a demurrer may be interposed are clearly specified."

1. *Hunt v. Johnston*, 105 Iowa 311; *Philibert v. Burch*, 4 Mo. App. 470; *Magruder v. Admire*, 4 Mo. App. 133; *Bowman v. Springfield, etc., R. Co.*, 14 Cinc. L. Bul. 55, 1 Ohio Cir. Ct. 64, 1 Ohio Cir. Dec. 39; *London, etc., Docks Co. v. Metropolitan R. Co.*, 35 L. T. N. S. 733; *Davis v. Ford*, 15 Wash. 107.

Simultaneous Demurrer and Motion to Strike. — Where the defendant moves to strike out the reply because it is inconsistent with the petition, he cannot at the same time demur for the same reason, because the demurrer recognizes the existence of the pleading, but raises the question of its sufficiency. *Laws v. Carrier*, 2 Cinc. Super. Ct. 80, where the court said: "If the motion to strike out the reply be granted, there is nothing to demur to; and, on the other hand, if the demurrer be sustained there is no subject for the motion. The motion must be stricken from the files, though the party may renew it at the proper time if he desires so to do."

Refusal of Trial Court to Strike Out Inconsistent Reply. — Where the ruling of the trial court was held technically erroneous in refusing to strike out a reply which was inconsistent, it was said by the appellate court: "The office of a pleading is to give notice to the opposite party of the ground on

which the pleader intends to reply, and where this notice has been given, and an issue has been made upon the pleading in which it has been given, and the issue has been fully and fairly contested at the trial, it does not appear that the party against whom the contest is finally determined is entitled to a reversal of the judgment merely because his antagonist notified him of the ground of his contention in a reply, instead of notifying him of such ground in his petition." *Crawford v. Spencer*, 36 Mo. App. 78. See also *Hiltz v. Scully*, 1 Cinc. Super. Ct. 555, a similar case.

2. *Osten v. Winchill*, 10 Wash. 333.

3. *Sankey v. Noyes*, 1 Nev. 68; *Hargis v. Burgin*, 4 Ky. L. Rep. 627; *Pennington v. Balee*, 8 Ky. L. Rep. 962; *Davis v. Ford*, 15 Wash. 107.

4. *Lebanon Min. Co. v. Consolidated Republican Min. Co.*, 6 Colo. 371; *Prenatt v. Runyon*, 12 Ind. 174; *Briggs v. Klosse*, 5 Ind. App. 129; *New v. Wambach*, 42 Ind. 456; *McAroy v. Wright*, 25 Ind. 22; *Adams County v. Hunter*, 78 Iowa 328; *Pennington v. Balee*, 8 Ky. L. Rep. 962; *Whitney v. National Masonic Acc. Assoc.*, 57 Minn. 472; *Mortland v. Holton*, 44 Mo. 58; *Philibert v. Burck*, 4 Mo. App. 470; *State v. Jones*, 53 Mo. App. 207; *Randolph v. Frick*, 57 Mo. App. 400; *Hurf, etc., Chemical Co. v. Lackawanna Line*, 70 Mo. App. 274; *Stepp v. Livingston*, 72 Mo. App. 175.

Referee's Report. — The report of a referee is considered equivalent to a verdict. *Beard v. Hand*, 88 Ind. 183.

Objections Waived. — In *Ankeny v. Clark*, 148 U. S. 355, *Shiras, J.*, said: "Even if, as a matter of technics, the replication was a departure from the complaint, it is not easy to see how the defendant could have availed himself of such a defect in a court of error. His proper course, if he wished to invoke the rigor of the law, was to raise the question either by a demurrer or by a motion; but his conduct in agreeing to a change of venue after the pleadings had been perfected, in entering into a stipulation as to the

c. **FAULTY DENIALS.** — Should the denial fall short of that rendered necessary by the code, it may be objected to by a motion to make it definite, and certain or there may be a demurrer thereto,¹ but any objection on this score should be made at or before the trial.²

d. **ABSENCE OF VERIFICATION.** — It seems that an unverified reply may in some cases be returned to the plaintiff and treated as a nullity,³ or there may be a motion to set it aside,⁴ but it has been held that the defect cannot be reached by demurrer.⁵

e. **UNNECESSARY REPLIES.** — Where the reply is unnecessary and not authorized, it should be struck from the files or treated as surplusage, or it may be demurred to.⁶

principal facts of the case, and in going to trial upon the issue as made up, ought to preclude him from opening the pleadings at the trial."

Demurrer to Evidence and Motion for Nonsuit. — Where the defendant objects to testimony under the pleadings on the ground of inconsistency, and moves for a nonsuit instead of moving for judgment on the pleadings, he preserves his rights in an appellate court. *Osten v. Winehill*, 10 Wash. 333.

1. *Fallon v. Durant*, (Supm. Ct. Spec. T.) 60 How. Pr. (N. Y.) 178; *Herdman v. Marshall*, 17 Neb. 252; *Macalester College v. Nesbitt*, 65 Minn. 17. And see generally articles **DEFINITENESS AND CERTAINTY IN PLEADING**, vol. 6, p. 246; **DEMURRERS AT COMMON LAW AND UNDER THE CODES**, vol. 6, p. 292; **DEMURRERS IN CHANCERY**, vol. 6, p. 391.

2. *Peterson v. Ruhnke*, 46 Minn. 115, holding that where no objection was made to the reply until the case came on for trial, it was too late, the court saying: "Where no attempt is made to correct pleadings by motion or otherwise before the trial, every reasonable intendment will be made in their support. The purpose of the pleader to put in issue the new matter set up in the answer is evident, and it is clear that the defendant could not be misled. Assuming that the pleading was objectionable, the remedy was by special motion to correct it, and not by disregarding it, or by the exclusion of evidence at the trial."

Objection at Trial. — In *Herdman v. Marshall*, 17 Neb. 252, it was held that if an objection is to be made at all it should be made on the trial, so that the party filing the pleading is not taken by surprise.

In *Kimberlin v. Short*, 24 Mo. App.

643, where the allegation of the answer was that the plaintiff, "without just cause, discharged the defendant," and the reply was that "plaintiff denies that he discharged defendant without just cause," it was held that a denial in the terms of the averment of the answer would be deemed sufficient after verdict to put in issue all the facts thus blended in one sentence. The court said: "The pleader who sees fit to thus blend two separate facts, that he was discharged, without just cause, ought not to be allowed, after going to trial without objection, to claim that the answer denying the averment as made in its very terms admits the fact of discharge. Had the denial been that he denied he discharged defendant as alleged, it would have put in issue only the justice of the discharge."

3. *Levi v. Jakeways*, (Supm. Ct. Spec. T.) 4 How. Pr. (N. Y.) 126. And see article **VERIFICATION**.

4. *Silliman v. Eddy*, (Supm. Ct. Spec. T.) 8 How. Pr. (N. Y.) 122, holding that where the reply is entirely uncalled for and cannot have any legal bearing on the rights of the parties, the absence of a proper verification can be no ground for a motion to set it aside.

5. *Wells v. Dickey*, 15 Ind. 361; *McNeer v. Dipboy*, 13 Ind. 542; *Russell v. Drummond*, 6 Ind. 216.

Defense to Objection to Unverified Replies. — Where the reply is objected to on the ground of absence of a verification, the plaintiff may assert that he was not bound to reply. *Silliman v. Eddy*, (Supm. Ct. Spec. T.) 8 How. Pr. (N. Y.) 122.

Contra. — *Roscoe v. Maison*, (Supm. Ct. Spec. T.) 7 How. Pr. (N. Y.) 121.

6. *Lusk v. Perkins*, 48 Ark. 238; *Abbott v. Rowan*, 33 Ark. 593; *George*

8. Aider by Reply.—Where the reply expressly alleges or admits a material fact omitted by the answer, it has the effect of making good any deficiencies therein, and judgment should not in such case be rendered for the plaintiff on the pleadings.¹

v. St. Louis, etc., R. Co., 34 Ark. 613; *St. Louis, etc., R. Co. v. Higgins*, 44 Ark. 293; *Ferris v. Johnson*, 27 Ind. 247; *Hunt v. Johnston*, 105 Iowa 311; *Bayliss v. Murray*, 69 Iowa 290; *Ward v. Comegys*, (Supm. Ct. Spec. T.) 2 How. Pr. N. S. (N. Y.) 428; *Dillon v. Sixth Ave. R. Co.*, 46 N. Y. Super. Ct. 21; *Sterling v. Metropolitan L. Ins. Co.*, (Supm. Ct. Gen. T.) 6 N. Y. St. Rep. 96; *Davis v. Schmidt*, 22 S. Car. 128.

Not Demurrable.—It has been held that the objection cannot be taken by demurrer. *Cannon v. Davies*, 33 Ark. 56; *Avery v. New York Cent., etc., R. Co.*, (Buffalo Super. Ct. Gen. T.) 6 N. Y. Supp. 547.

Irregular Replies Causing No Embarrassment to the defendant will not be struck out. *Stegman v. Hollingsworth*, (Supm. Ct. Gen. T.) 16 N. Y. Supp. 820.

Motion Must Be Timely.—Where rules are prescribed limiting the time

within which an objection may be made, it is unnecessary for the moving party to show that the motion is in time; but if it is not made in time, that fact should be set up by the adverse party. *Barber v. Bennett*, 4 Sandf. (N. Y.) 705.

1. *James v. McPhee*, 9 Colo. 486; *Colorado Fuel, etc., Co. v. Chappell*, (Colo. App. 1898) 55 Pac. Rep. 606.

Effect of Omission to Demur.—Where the sufficiency as a defense of matter arising after action begun, that has been set out in the answer, has not been raised by demurrer, but a reply has been put in expressly denying it, it is too late to object that it cannot be relied on as a defense. *Puffer v. Lucas*, 101 N. Car. 281.

Abandonment of Demurrer.—Where the plaintiff, instead of relying upon the sufficiency of a demurrer, files a replication, he abandons the demurrer and it ceases to be a part of the record. *Young v. Martin*, 8 Wall. (U. S.) 354.

REPORT AND CASE MADE.

BY CHARLES H. STREET.

- I. IN GENERAL, 725.
- II. WHAT QUESTIONS MAY BE REPORTED, 728.
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- IV. HEARING AND DETERMINATION OF REPORT, 733.
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CROSS-REFERENCES.

See in general articles *AGREED CASE*, vol. 1, p. 384; *CASE MADE ON APPEAL*, vol. 3, p. 879; *CERTIFIED CASES*, vol. 3, p. 918.

I. IN GENERAL. — In Connecticut and Vermont certain of the inferior courts are authorized by statute to reserve for the higher courts, before judgment, questions of law arising in cases tried before them.¹

In Massachusetts, while the power of justices of the Supreme Judicial Court to report to the full court, at any stage of a case, questions of law arising on a trial or other proceeding, whether civil or criminal, has long been recognized,² the judges of the

1. In Connecticut, "questions of law may be reserved by the Superior Court, Court of Common Pleas, or District Court, in cases tried before either of them, for the advice of the Supreme Court of Errors; provided, that no such questions shall be reserved without the consent of all parties to the record in such cases; and the court making such reservation shall, in the judgment, decree, or decision made or rendered in such cases, conform to the advice of the Supreme Court of Errors." Gen. Stat. Conn., § 1114.

In Vermont, "when exceptions are taken and filed in a cause in County Court, such court may in its discretion pass the same and said cause to the Supreme Court before final judgment, for hearing and determination

on the exceptions; and the Supreme Court shall hear and determine the question upon such exceptions, and either render final judgment thereon or remand the same to the County Court, as seems just." Stat. Vt., § 1629.

2. Terry v. Brightman, 129 Mass. 535.

Present Statutes. — Such reservation of questions of law by a single justice for the full court is at present authorized by Pub. Stat. Mass., c. 150, § 8; c. 151, §§ 18, 20. And see Forbes v. Tuckerman, 115 Mass. 119.

Questions of Law Arising on a Probate Appeal tried before one of the justices of the Supreme Judicial Court may be brought before the full court on a report of the judge, in case he thinks fit in the exercise of his discretion to re-

inferior courts had no authority, in civil cases, to report such questions to the Supreme Judicial Court, until the establishment of the Superior Court having jurisdiction throughout the commonwealth.¹ By the act establishing this court the judges thereof were authorized to make such report, but this authority was limited to cases tried before a jury,² and the report could

serve them for the consideration of the full court. *Higbee v. Bacon*, 11 Pick. (Mass.) 423.

Report of Evidence on Motion for New Trial. — "If an aggrieved party could have required the presiding justice at the trial term to rule upon the sufficiency of the evidence to warrant the jury in finding affirmatively a particular issue, and neglected to do so, he cannot as of right require the presiding justice on a motion for a new trial, to make a ruling on the subject, or to report the evidence. New trials often are granted on the ground that the verdict is against the evidence, even when there was some evidence to support the verdict proper to be submitted to the jury. Unless, on the hearing of such a motion, the facts in some proper way are separated from the law, there is no question of law arising from the decision on the motion which can be carried to the full court. But the presiding justice may, if he chooses, in deciding such a motion, report the evidence to the full court; and if he does so there may be a question of law which the full court can consider." *Per* Field, C. J., in *Capper v. Capper*, 172 Mass. 262.

Questions of Fact. — The power of a single judge to report cases under Pub. Stat. Mass., c. 150, § 8, is limited to questions of law arising on a trial or other proceeding, or upon a motion for a new trial on account of nondirection or misdirection as to matters of law, and under this section of the statute questions of fact cannot be reported. *Jamaica Pond Aqueduct Corp. v. Chandler*, 9 Allen (Mass.) 159. But a report upon the equity side of the court submits for revision the inferences of fact as well as the conclusions of law involved in the case. *Wright v. Wright*, 13 Allen (Mass.) 207; *Parks v. Bishop*, 120 Mass. 340; *Stockbridge Iron Co. v. Hudson Iron Co.*, 102 Mass. 45. And it also submits for revision those questions, even if of judicial discretion, which are the subjects of appeal, such, for instance, as questions arising on exceptions to an order in

equity refusing a motion for issues. *Harris v. Mackintosh*, 133 Mass. 228.

Joint Reservation of Two Cases. — In *Tansey v. McDonnell*, 142 Mass. 220, A sued B in equity to have an executor's sale adjudged void, and B sued A in another county to have the sale confirmed. Both bills were answered, and the answer to the second pleaded the pendency of the first, but the second bill did not refer to the first, and the facts in the two cases did not appear from the bills and answers to be identical. Under these circumstances it was held that the justice of the Supreme Judicial Court before whom the cases were tried had no authority to reserve them together for the consideration of the full court on the bills and answers, even though the second bill was to be deemed a cross-bill.

Discretion of Court. — In *Phillips v. Soule*, 6 Allen (Mass.) 150, it was held that this power to reserve questions of law was a power resting in the exercise of a sound discretion which the full court would in no degree revise or control; that it ought not to be exercised unless the questions were of so grave and doubtful a nature as in the opinion of the presiding judge to require further consideration, or the case was of such a nature as to render this mode of determining the questions of law involved expedient or necessary; and that in all other cases the right to allege and file exceptions afforded ample opportunity to all parties to obtain the adjudication of the court of last resort on every question material to the determination of their rights. And to the same effect see *Com. v. Child*, 10 Pick. (Mass.) 252.

1. *Goddard v. Perkins*, 9 Gray (Mass.) 411; *Terry v. Brightman*, 129 Mass. 535.

2. *Bearce v. Bowker*, 115 Mass. 129, *Hogan v. Ward*, 115 Mass. 130, note; *Com. v. Dowdican*, 115 Mass. 133.

Illustrations of Rule. — In *Morse v. Dayton*, 125 Mass. 47, it was held that under Gen. Stat. Mass., c. 115, § 6 (Pub. Stat. Mass., c. 153, § 6), questions of law arising on the trial in the

not be made until after verdict.¹ This latter requirement of the act was afterwards changed by a statute authorizing the report to be made before verdict in certain cases,² but this practice was found to be inconvenient, and the statute was subsequently repealed.³ By the present statutes on the subject it is provided that in civil cases the judges of the Superior Court may, after verdict or decision, report questions of law to the Supreme Judicial Court;⁴ that they may report equity cases upon the pleading and the facts found by them to the full court;⁵ and that in

Superior Court of charges of fraud against a person applying to take the oath for the relief of poor debtors might be reported to the Supreme Judicial Court, since such proceeding was in its nature a civil action.

But in *Taylor v. Taunton*, 113 Mass. 290, it was held that a report could not be made under the statute in a case where the trial was had before a sheriff's jury and the verdict was returned into the Superior Court; and it was also held that the report could not be treated as a bill of exceptions in order to retain jurisdiction of the questions stated therein.

Issue Improperly Submitted to Jury. — The fact that an issue which ought to be decided by the judge has been submitted to the jury does not enable the Superior Court to report a question of law arising thereon to the Supreme Judicial Court. *Tryon v. Merrill*, 116 Mass. 299.

1. *Minot v. Sawyer*, 1 Allen (Mass.) 18; *Lincoln v. Parsons*, 1 Allen (Mass.) 388; *Jaha v. Belleg*, 105 Mass. 208.

2. By the statutes of 1869, c. 438, the Superior Court was empowered to report questions of law before verdict with the consent of the parties to the suit. *Terry v. Brightman*, 129 Mass. 535; *Jaha v. Belleg*, 105 Mass. 208. But in a case under this statute where the report was not confined to the specific rulings of the lower court, or to the question whether the whole evidence would in law warrant a verdict, but sought to obtain the opinion of the Supreme Court in advance upon the whole course of the trial and upon the admissibility of the evidence offered, without any ruling of the lower court as to its competency, and without stating such evidence with sufficient precision to enable its competency to be determined, it was held that the report must be dismissed. *Russell v. Lathrop*, 119 Mass. 531.

3. *Terry v. Brightman*, 129 Mass. 535.

4. Pub. Stat. Mass., c. 153, § 6; Stat. 1891, c. 227, § 2.

Construction of Statute. — Where the trial is had by the court without a jury, the judge, after a finding upon the facts equivalent to the verdict of a jury, may report questions of law for the determination of the Supreme Judicial Court in like manner as if a verdict had been rendered by a jury; but the Superior Court has no power to report before verdict cases tried by a jury; nor has it power to report cases tried without a jury without making any decision in matters of law or entering of record a finding upon the facts equivalent to the verdict of a jury. *Terry v. Brightman*, 129 Mass. 535. And to the same effect see *Johnston v. Faxon*, 167 Mass. 473.

Report Confined to Questions of Law. — The authority thus given to report cases for determination by the Supreme Judicial Court extends only to questions of law. *Churchill v. Palmer*, 115 Mass. 310.

Time of Filing Report. — A report may be filed at any time during the term at which the case is tried, and if the case is continued *nisi* from the term at which the verdict was rendered, a report filed on the first day of the following term is in time. *Reed v. Home Sav. Bank*, 130 Mass. 443.

5. A justice of the Superior Court has the same right to report to the full court equity cases upon the pleadings and facts found by him, without deciding the case, as a justice of the Supreme Judicial Court has, and it is a well-known practice to report such cases to the full court upon the pleadings and facts found by a master where no exception is taken to his report and there is no evidence, or upon the agreed facts where all the facts are agreed without any decision of the

criminal cases the presiding judge may report important and doubtful questions of law arising on the trial.¹

In Maine, where an important and doubtful question of law arises upon the hearing of a cause in equity, the justice hearing it may, with the consent of the parties, report the cause to the next law court held within the district.²

In New Hampshire, the presiding justice at a trial term of the Supreme Court, or any justice of the court hearing a cause in vacation, may in certain cases reserve and assign questions of law for the determination of the court at the next law term.³

II. WHAT QUESTIONS MAY BE REPORTED — Questions Actually Arising on Trial. — The power to reserve and report questions of law extends only to questions which actually arose on the trial or hearing, and not to those which might have arisen merely.⁴

case. *Nashua, etc., R. Corp. v. Boston, etc., R. Corp.*, 169 Mass. 157 [*citing* *Murphy v. Barnard*, 162 Mass. 72; *Sawyer v. Seaver*, 166 Mass. 447; *Methodist Episcopal Soc. v. Akers*, 167 Mass. 560; *Stevens v. Mulligan*, 167 Mass. 84; *Mulcahy v. Fenwick*, 161 Mass. 164; *Taft v. Stoddard*, 141 Mass. 150; Stat. 1883, c. 223, § 2].

Although it is provided by statute that auditors' reports presented to the Superior Court and confirmed by that court shall be final, this provision is not to be construed as taking away the general authority of a single justice to report to the full court questions of law arising in equity. *Providence, etc., R. Co., Petitioner*, 172 Mass. 117.

1. Pub. Stat. Mass., c. 214, § 29.

Although the Court of Common Pleas and the Superior Court have been authorized to report after conviction and at the desire and with the consent of the defendant important or doubtful questions of law, neither of these courts has ever been authorized to report such questions before conviction. *Terry v. Brightman*, 129 Mass. 535, *citing* *Com. v. Byrnes*, 126 Mass. 248; *Com. v. Certain Intoxicating Liquors*, 105 Mass. 468, in which latter case it was held that the statute of 1869, c. 438, authorizing the Superior Court to report questions for the determination of the Supreme Judicial Court before verdict, did not apply to criminal cases.

2. Rev. Stat. Me., c. 77, § 23.

In *Banchor v. Mansel*, 47 Me. 58, where the judge at *nisi prius* certified the evidence in a case with his rulings as a matter of law upon the facts which he found proved, and no exceptions

were taken to his rulings, the full court considered the case as one presented on report.

Former Statute. — Before the reorganization of the courts of the state, it was provided by the Act of 1845, c. 172, that whenever in the trial of any cause in the District Court any one or more questions of law should arise, it should be lawful for the judge, with the consent of the parties, to draw up a report of the case, presenting the legal points for decision, and containing such stipulations as the parties might make relative to the disposition of the cause by nonsuit, default, or otherwise, and that the cause should be transferred to the Supreme Judicial Court for decision. *Loring v. Proctor*, 26 Me. 18.

3. Pub. Stat. N. H., c. 204, §§ 11, 13, 14, 15.

Discretion of Court. — The matter of reserving questions of law for the determination of the law term is one which rests entirely in the discretion of the judge before whom the case is tried. *Kent v. Hutchins*, 50 N. H. 92.

Before the Abolishment of the Court of Common Pleas, it was provided by Rev. Stat. N. H., §§ 7-9, that the presiding justice of that court might reserve and assign certain questions of law to the determination of the Superior Court, the provisions of the statute in this regard being in general similar to the present provisions of the Public Statutes above cited. *Claggett v. Simes*, 31 N. H. 56.

4. Unnecessary Ruling by Trial Judge. — In *Aldrich v. Springfield, etc., R. Co.*, 125 Mass. 404, a verdict having been rendered in the Superior Court in

Questions Not Determined Below — Incidental Questions. — Where the court or justice making the report has not rendered any decision whatever on the questions involved the report will be dismissed; ¹ and the same result follows where the questions involved are such that their determination would not lead to any final result. ²

favor of the plaintiff, the defendant alleged exceptions to the rulings of the court on a certain part of the evidence, and subsequently moved to set aside the verdict as against the evidence and the weight of the evidence. This motion was overruled, and in reserving the case for the determination of the Supreme Judicial Court the judge of the Superior Court stated in his report that he had overruled the motion for the purpose of reporting the case to the Supreme Judicial Court and, after reciting the whole evidence as well as the particular exception, concluded his report as follows: "If upon the evidence the action cannot be maintained, or if the exception taken by the defendant is sustained, then the verdict is to be set aside; otherwise the verdict is to stand." On consideration of this report the Supreme Judicial Court held that the judge of the Superior Court had no authority to reserve the question as to whether upon the whole evidence the action could be maintained, since he had not been requested on the trial to rule upon the whole evidence, and therefore it was ordered that the order overruling the motion be set aside and that the motion stand for further hearing in the Superior Court.

Question Not Properly Before Superior Court. — Formal objections to a complaint taken for the first time in the Superior Court on appeal from a conviction by a trial justice are invalid under the statute, and therefore they cannot be reported for the determination of the Supreme Judicial Court, even after verdict and with the consent of the defendant. *Com. v. Vincent*, 108 Mass. 441.

1. *Charter Oak Ins. Co. v. Star Ins. Co.*, 33 Conn. 445; *Stuart v. Stuart*, 123 Mass. 370.

Illustrations of Rule. — *Where the Plaintiff Asks for Leave to Amend His Declaration*, and the court neither grants nor refuses leave, but allows the case to go to the jury as if amendment had been made, with a view of referring the matter to the Supreme Court, the latter court may refuse to consider the question involved in the

report. In such a case the trial court must pass upon the question whether or not the amendment is to be allowed *Loring v. Proctor*, 26 Me. 18.

Motion for Leave to Amend Levy. — On the trial in the Superior Court of a writ of entry, where the trial judge ruled that the levy was invalid and directed a verdict for the defendant, and reported the ruling to the Supreme Judicial Court, together with a motion of the demandant, made after verdict, for amendment of the levy, it was held that the question whether the verdict should be set aside and the levy amended ought to have been heard and determined in the Superior Court before the report was made. *McCormick v. Carroll*, 103 Mass. 151.

Where There Is a Joinder on Demurrer the trial justice cannot report the case to the full court without first ruling on the demurrer; and after ruling on the demurrer his rulings are properly considered on exceptions, in accordance with the statute, and they cannot legally come before the full court on report. *Stevens v. Webster*, 45 Me. 615.

2. *Murphy v. Boston*, etc., R. Co., 110 Mass. 465; *Noble v. Boston*, 111 Mass. 485; *Taft v. Stoddard*, 141 Mass. 150.

In Maine. — In *Merrill v. Washburn*, 83 Me. 189, it was held that a justice hearing an equity case ought not to report it to the law court until the pleadings were sufficiently perfected to enable the latter court to render a final decision on the merits; and that, in a case so reserved, if it appeared that the bill was defective in its averments the report must be dismissed. In its opinion the court said: "We take this occasion to repeat, what we have said in former opinions, that under our present system of equity procedure the law court is an appellate court, a court of last resort. Parties desiring a speedy adjudication of a cause in equity should not present it to the law court until it is in such shape that the opinion of the law court will be a final decision. The court held by a single

Questions Arising on Pleadings. — Questions as to the sufficiency of the pleadings and the correctness of the rulings made by the trial

justice is now the equity court of original jurisdiction, where the sufficiency of the pleadings can be promptly considered, amendments readily made, and the cause then speedily heard on its merits. In this case the plaintiffs were advised by the answer that their bill would be assailed as defective in statement. Instead of making proper amendments, they have submitted their cause to this court of last resort upon their original allegations. These allegations, for the reasons before given, are clearly insufficient to justify the exercise of the court's equity powers."

In Connecticut — Petition for New Trial. — In *Husted v. Mead*, 58 Conn. 55, the court said: "The point was made by the counsel for the appellee that a petition for a new trial is not a suit, but only an interlocutory proceeding in a suit, and that the judgment is not a final one, and that for this reason error will not lie; and some rulings and dicta of this court are cited in support of the claim. But it is a well-settled rule that this court will not consider on a reservation any proceedings that are not final ones, nor advise as to any judgments that are not to be final (*Robinson v. Mason*, 27 Conn. 270; *Tweedy v. Nichols*, 27 Conn. 518; *New York, etc., R. Co. v. Boston, etc., R. Co.*, 36 Conn. 196), and yet it is admitted that this court has for a long time entertained petitions for new trials where brought before it by reservation."

Questions Arising on Disclosure by Garnishee. — Where an action of assumpsit is brought by writ of foreign attachment, and a garnishee is cited in the writ to appear before the court in which it is returnable and disclose whether he has in his hands goods or effects of the defendants, or is indebted to them, and he appears and makes such disclosure, the Superior Court cannot find the facts which are proved or admitted and reserve them for the advice of the Supreme Court of Errors as to what judgment should be rendered thereon. The proceedings upon such disclosure are not of such a character that the rights of the parties can be definitely determined upon them, since the findings thereon do not constitute a judgment and are only *prima facie* evidence of the *scire facias*

to be subsequently brought. *Robinson v. Mason*, 27 Conn. 270.

In Massachusetts — Action on Bond. — In *Shattuck v. Adams*, 136 Mass. 34, it was held that a judge of the Superior Court who had ordered judgment for the penal sum of a bond might report the case for the determination of the Supreme Judicial Court without awarding the damages for which execution was to be issued; and that on such a report the only question open was whether there had been a breach of the bond.

Action on Recognizance in Criminal Case. — In *Com. v. Teevens*, 141 Mass. 577, it was held that in an action on a recognizance given in a criminal case the Superior Court had no authority to make a formal finding "that the penalty is adjudged to be forfeited," and then to report the case to the Supreme Judicial Court. In its opinion the court said: "We are of opinion that the case could not properly be reported until after the court had heard and determined the question of the amount for which judgment should be entered. Until that is done, the finding is interlocutory, the case is not ripe for judgment, and this court cannot order any judgment to be entered, but can merely express an opinion upon the question whether there has been any breach of the recognizance. The statutes provide that, in suits upon recognizances, after the penalty is adjudged forfeited, the court may render judgment for the whole of the penalty, or for any part thereof, according to the circumstances of the case and the situation of the parties, and upon such terms and conditions as it deems reasonable. Pub. Stat., c. 212, § 62. The Superior Court may render judgment for a merely nominal sum, in which case there would be no occasion for the defendant to bring any question of law to this court by exceptions or report. The case of a suit upon a bond is different, because in such a suit the court may enter a final judgment for the penalty of the bond, upon which judgment an execution, or, in some cases, successive executions, may be issued by subsequent independent proceedings. Pub. Stat., c. 171, §§ 9-12. This case is distinguished from the case of *Shattuck v. Adams*, 136 Mass. 34."

court in relation thereto may be reported.¹

Allowance of Costs — Granting of Nonsuits. — As a general rule, the trial court cannot be advised on report as to the allowance or taxation of costs,² or concerning the granting of a nonsuit.³

1. Sufficiency of Demurrer. — In *Massachusetts* the judgment of a justice of the Supreme Judicial Court upon a demurrer in an action at law cannot be revised by appeal, but only on exceptions or report. *Cowley v. Train*, 124 Mass. 226. But in *Maine* the rule would seem to be otherwise. See *Stevens v. Webster*, 45 Me. 615.

Plea of Release and Discharge. — In an action against the indorser of a promissory note the sufficiency of a plea of release and discharge, interposed by the defendant and demurred to by the plaintiff, may be determined on a report to the Supreme Court. *Austin v. Belknap*, 54 Vt. 495.

Pleas or Answers in Abatement. — In *Jaha v. Belleg*, 105 Mass. 208, decided under the statute of 1869, c. 438, the Superior Court reported to the Supreme Judicial Court a question as to whether an answer in abatement had been seasonably filed. In deciding the question the court said: "Before that statute, no question could be reported to this court by the Superior Court before verdict; Gen. Stat., c. 115, § 6; *Minot v. Sawyer*, 1 Allen (Mass.) 18; and questions arising in that court upon pleas or answers in abatement could not be brought to this court at all, by report, exceptions, or otherwise. Gen. Stat., c. 114, § 10; c. 115, § 7; *Stackpole v. Hunt*, 9 Allen (Mass.) 539; *Hamlin v. Jacobs*, 99 Mass. 500, and cases cited. But, even then, the question whether an answer in abatement was seasonably filed in that court might after final judgment be brought to this court by exceptions. *Hastings v. Bolton*, 1 Allen (Mass.) 529. And we have no doubt that any question arising in a civil action before verdict in the Superior Court, which might under the former statutes have been brought to this court by exceptions, may now, under the statute of 1869, c. 438, be brought up by report. The question whether the answer in abatement was seasonably filed is therefore properly before us for adjudication."

Criminal Cases — Sufficiency of Indictment or Complaint. — In *Massachusetts* the presiding justice of the Superior Court may report to the Supreme Judi-

cial Court questions of law arising upon a motion to quash a complaint on the ground that it is insufficient. *Com. v. Byrnes*, 126 Mass. 248.

And in *Maine* also it has been held that the question of quashing an indictment on motion may be reserved by the presiding judge for the determination of the full court. *State v. Maher*, 49 Me. 569.

2. Connecticut. — The Supreme Court will not advise the Superior Court as to the question of costs in an equity case, since this matter, in equity, rests in the discretion of the court. *Hoyt v. Smith*, 28 Conn. 472.

Massachusetts. — In *Hubner v. Hoffman*, 106 Mass. 346, it was held that a judge of the Superior Court had no authority to reserve for the determination of the Supreme Judicial Court a question as to whether he ought to grant the certificate as to costs mentioned in the statute of 1862, c. 36, which statute provided that when the right to an easement on the title to real estate should be in fact concerned in an action, and the judge before whom the action was tried certified such to be the fact, the party finally prevailing therein should recover his full costs, without regard to the amount of damages recovered.

But in the later case of *Rathke v. Gardner*, 134 Mass. 14, it was held that where such certificate was based upon a ruling on a question of law, to which exception was taken, such ruling might be revised by the Supreme Judicial Court.

3. Question Not Decided Below. — The Supreme Court of Errors will not entertain a case reserved for advice on the question whether a nonsuit should have been granted, where the motion has not been decided either way by the court below. *Charter Oak Ins. Co. v. Star Ins. Co.*, 33 Conn. 445.

Exceptional Case. — In *Shea v. Boston, etc., R. Co.*, 154 Mass. 31, although it was held that it was not strictly regular for the Superior Court to report a case to the Supreme Judicial Court upon a nonsuit, the latter court consented to entertain and determine the case on its merits.

III. FORM OF REPORT. — The report should state the nature of the case in which it is made, should indicate clearly the questions intended to be reserved, and should set forth so much of the evidence and facts as may be necessary to present such questions for determination.¹

1. *Howes v. Tolman*, 63 Me. 258; *Thurston v. Lowder*, 40 Me. 197; *Odiorne v. Bacon*, 6 Cush. (Mass.) 185; *Wright v. Quirk*, 105 Mass. 44; *Churchill v. Palmer*, 115 Mass. 310.

Reports Held to Be Insufficient. — Where the presiding justice at a trial term reports a case to the law term it must appear by the report that certain questions of law were expressly reserved to be decided by the full court, and a mere statement that certain instructions were given or refused, without any averment that exceptions were taken to the rulings of the court, does not constitute a reservation for future decision; nor does a bare statement that a motion was made to set aside the verdict because it was against "the law applicable to the facts in the case" present any question of law which the law term can properly entertain and decide. *Sanford v. Lebanon*, 31 Me. 124.

Where the question reported by the Superior Court to the Supreme Judicial Court is whether there was any evidence to be submitted to the jury upon the principal issues in the case, a report which states none of the rulings upon the admission or rejection of evidence, but merely refers for them to the annexed stenographer's report, through which they are scattered, is insufficient and will be dismissed; especially in a case where the stenographer's report is voluminous and consists mainly of unimportant details of the evidence. *Churchill v. Palmer*, 115 Mass. 310.

Reports Held to Be Sufficient. — Where a case is tried before a justice of the Supreme Judicial Court, without a jury, a report which states the facts found by him and reserves the case for the consideration of the full court is sufficient. *Eaton v. Pacific Nat. Bank*, 144 Mass. 260.

And where a report states the nature of the action and that "the case" is reported for the consideration of the Supreme Judicial Court, the declaration will be considered to be incorporated into the report, and an objection that it is not expressly embodied

therein will not be entertained. *Murray v. Fitchburg R. Co.*, 130 Mass. 99.

Qualification of Rule in New Hampshire. — In *Claggett v. Simes*, 31 N. H. 56, which was a case reserved by the presiding justice of the Court of Common Pleas for determination by the Superior Court, it was objected that the report did not state expressly that the Court of Common Pleas had expressed any opinion, given any direction, or rendered any judgment, or that any exceptions had been taken by any person aggrieved, and, therefore, that it did not appear to have been made in any of the cases specified in the statute. In overruling these objections the court said: "But we are of opinion that it is not necessary that these facts should be expressly stated. They may sufficiently appear by implication. And where the case shows that a motion or application was made to the court for some order or disposition of a case, and the question is transferred, it is necessarily implied that the court declined to make the order, and the mover excepted. Upon any other view it is impossible to account for the transfer; for if the court decided to grant the motion, why was it not done? and if it was refused, and the mover did not object, but acquiesced, why was the transfer made? The case shows no fact upon which the other side could have any right to except. It does not seem to us that it could be either important or useful to state in terms what was the opinion of the court below. And it therefore seems to us that the cases were properly transferred, and that the Superior Court had authority to consider and decide the questions, and to direct the judgment to be entered."

Facts or Evidence of Facts. — In *Connecticut* it has been held that the report should state the facts found by the trial justice, and not the evidence on which such facts were found. *Corbin v. American Mills*, 27 Conn. 274.

And in *Maine* the same rule prevails. *Dwinel v. Perley*, 38 Me. 509.

But in *Massachusetts* it has been held that a finding of a single justice of

Where Exceptions Have Been Allowed on the trial they should not be stated in a separate bill, but should be incorporated in the report.¹

Stipulation that Decision Shall Be Final. — In some jurisdictions the report must embody a stipulation that the decision thereof shall finally dispose of the case.²

IV. HEARING AND DETERMINATION OF REPORT — 1. What Questions Are Open. — In considering a case reserved for its advice the court will not pass upon any question which is not presented by the report,³ nor will the court revise findings of fact which are

the Supreme Judicial Court, sitting in equity, will not be revised by the full court on report unless all the evidence at the hearing is set out in the report. *McConnell v. Kelley*, 138 Mass. 372.

Signature of Trial Justice. — In *Maine* the law court will not entertain a case reserved for its consideration by a Superior Court unless the report is signed by the justice of the latter court. *Blodgett v. Dow*, (Me. 1888) 13 Atl. Rep. 580.

1. *Aldrich v. Boston, etc., R. Co.*, 100 Mass. 31.

2. **Connecticut.** — Where on a motion to dissolve a temporary injunction the Superior Court finds the facts and reserves the case for the advice of the Supreme Court of Errors, the latter court may decline to entertain the case unless the parties enter into a written stipulation to accept its decision as final and not to require a further hearing on the petition for a permanent injunction. *New York, etc., R. Co. v. Boston, etc., R. Co.*, 36 Conn. 196.

Maine. — Under a statute providing that questions of law may be reported by a judge of the District Court to the Supreme Judicial Court upon stipulations relating to the disposition of the action by nonsuit, default, or otherwise, a report which provides that if the decision of the question of law be in favor of one party the other shall still have the right to a jury trial will be dismissed for irregularity. Such a stipulation does not provide for a final disposition of the action as contemplated by the statute. *Randall v. Haines*, 31 Me. 418.

Massachusetts. — A demurrer to the evidence must be taken in writing, and there must be a joinder by the adverse party so that the record may raise an issue of law upon which the court may give judgment, and if such a demurrer is overruled the plaintiff is entitled to judgment. A report from the Superior

Court, therefore, which states that the defendant demurred to the evidence, and provides that if the demurrer is sustained there shall be an entry of verdict for the defendant, but if it is overruled a new trial shall be granted, must be dismissed, since the stipulation as to the allowance of a new trial in case the demurrer is overruled is improper. *Golden v. Knowles*, 120 Mass. 336.

3. *Hood v. New York, etc., R. Co.*, 23 Conn. 609; *Occum Co. v. A. & W. Sprague Mfg. Co.*, 35 Conn. 510.

Reason for Rule. — In *Occum Co. v. A. & W. Sprague Mfg. Co.*, 35 Conn. 496, the court said: "It is to be remembered that the statute under which questions of law are reserved for the advice of the Supreme Court of Errors makes our advice, when properly asked for, binding upon the Superior Court. But when we assume to advise that court in respect to questions not regularly reserved, our advice may be regarded or not, as to that court shall seem best, and if we are to pass upon the decisions of that court we prefer to do it on some regular motion or writ of error, which will render our decision binding, rather than to volunteer our advice upon the suggestion of counsel only. We have not therefore looked into the cases cited or examined very carefully the learned arguments of the respondent's counsel on this subject."

Where Parties Have Assented to Facts Stated. — Where a case is presented to the Supreme Court on report, and it appears that the parties have assented to the facts as stated in the report, no other facts can be presented to the court, nor can the writ and pleadings, unless made a part of the case by the report, be examined for the purpose of influencing the court. *Lyon v. Williamson*, 27 Me. 149; *Gardiner v. Piscataquis Mut. F. Ins. Co.*, 38 Me. 439.

embodied therein.¹

Objections Waived in the Trial Court, either expressly or by implication, cannot be raised on consideration of the report.²

Sufficiency of Evidence to Support Verdict. — In *Massachusetts*, where the question presented for the determination of the full court is whether the jury was warranted in finding the verdict rendered, the court will not consider the weight of the evidence, but only

1. In *Equity Cases*. — By Act Me., April 9, 1852, it was provided that all causes in equity were to be heard and determined at a term held for the trial of causes by a jury, and that the judge, when requested, should "report the facts proved, and the questions of law therein arising, and his decision of the same; and his decree upon the premises." In *Dwinel v. Perley*, 38 Me. 509, it was said: "The party dissatisfied may remove the same by exceptions or report. When so removed, if the testimony be all reported, the court of law is not authorized to revise the decision of the presiding judge upon the effect of that testimony, and to find the facts to be different. * * * The decree may be reversed or varied, or any other order or decree may be made which may be required by the facts so found." To the same effect see *Morris v. Day*, 37 Me. 386.

Massachusetts. — Where the parties to an action in the Superior Court submit the case by agreement for the judge to find the facts and report the whole case to the Supreme Judicial Court to decide which party is entitled to judgment, the latter court cannot revise the findings of a material fact upon conflicting evidence by the Superior Court although all the evidence is reported. *Sheffield v. Otis*, 107 Mass. 282. And the same rule applies where a justice of the Supreme Judicial Court reports a case for the determination of the full court. *Morrison v. Morrison*, 136 Mass. 310.

2. *Maine.* — *State v. Woodbury*, 76 Me. 457; *Pillsbury v. Brown*, 82 Me. 450; *Elm City Club v. Howes*, 92 Me. 211.

Massachusetts. — *Henshaw v. Bellows Falls Bank*, 10 Gray (Mass.) 568; *Denny v. Conway Stock, etc., Co.*, 13 Gray (Mass.) 492; *Holbrook v. Young*, 108 Mass. 83; *Learned v. Foster*, 117 Mass. 365; *Somerby v. Buntin*, 118 Mass. 279; *Gardner v. Hazelton*, 121 Mass. 494; *Doherty v. Munson*, 127 Mass. 495; *Nash v. New England Mut. L. Ins. Co.*,

127 Mass. 91; *Nowell v. Boston Academy*, 130 Mass. 209; *Kennedy v. Owen*, 131 Mass. 431; *Butterworth v. Western Assur. Co.*, 132 Mass. 489; *Morrison v. Morrison*, 136 Mass. 310; *Hodgkins v. Price*, 137 Mass. 13; *Providence, etc., R. Co., Petitioner*, 172 Mass. 117.

Illustrations of Rule. — Thus it has been held that the following objections cannot be raised for the first time on the consideration of a report, when they have not been raised in the trial court:

That certain evidence offered on the trial was incompetent. *State v. Woodbury*, 76 Me. 457.

That a certain defense is not open under the pleadings. *Kennedy v. Owen*, 131 Mass. 431.

That there has been a breach of a warranty on the face of a policy of insurance. *Denny v. Conway Stock, etc., Co.*, 13 Gray (Mass.) 492.

That there was a variance between the allegations of a declaration and the proof. *Butterworth v. Western Assur. Co.*, 132 Mass. 489.

That a defense sought to be raised on the hearing of the report was not set up in the defendant's answer. *Learned v. Foster*, 117 Mass. 365.

That no answer was filed. *Morrison v. Morrison*, 136 Mass. 310.

Fact Admitted on Trial. — Where the report states that it was admitted on the trial that a written agreement had been executed by a lessee and by one of two trustees under the will of the lessor, the question whether such agreement was effectual to terminate a written lease is not open to the trustees on consideration of the report. *Stewart v. Putnam*, 127 Mass. 403.

Exception to Rule. — The objection that a verdict is not sufficient in law to support any judgment is open on the argument of a report, although it was not taken at the trial, and although the report provides that judgment shall be entered on the verdict if the rulings at the trial were correct. *Leonard v. Robbins*, 13 Allen (Mass.) 217.

whether there was any evidence legally warranting such verdict.¹

2. Determination of Report. — On the hearing of a report the presumptions are in favor of the rulings made by the trial court, and such rulings will be affirmed unless the party at whose instance the cause is reported clearly shows that they are erroneous.²

Advice as to Amendment of Pleadings. — In *Connecticut*, where it appears on reservation that a party is entitled to recover on the merits, but that his pleadings are defective, the Supreme Court may advise judgment in his favor contingently upon a proper amendment thereof.³

Dismissal or Amendment. — A report which fails to raise any question of law⁴ or which is defective in any essential particular,⁵

1. Forsyth *v.* Hooper, 11 Allen (Mass.) 419; Heywood *v.* Stiles, 124 Mass. 275.

2. Howes *v.* Tolman, 63 Me. 258.

But for a qualification of this rule as applied to reports in criminal cases see *Com. v. Shepard*, 1 Allen (Mass.) 575.

3. Sheldon *v.* Bradley, 37 Conn. 339; Lemon *v.* Phoenix Mut. L. Ins. Co., 38 Conn. 303; Erichson *v.* Beach, 40 Conn. 287; Camp *v.* Scott, 47 Conn. 366; Haussman *v.* Burnham, 59 Conn. 117; Logiodice *v.* Gannon, 60 Conn. 81; Grant *v.* Grant, 63 Conn. 530.

Illustrations of Rule. — In *Logiodice v. Gannon*, 60 Conn. 84, the plaintiff claimed as damages a sum which took the case out of the jurisdiction of the Court of Common Pleas, and upon a plea to the jurisdiction filed by the defendant his reply denied some of the facts alleged in his complaint and constituted a clear departure in pleading; but on reservation of the case the Court of Common Pleas was advised to permit the plaintiff to amend his complaint so as to bring the case within its jurisdiction, provided it appeared that such amendment was allowable under the provisions of the law relating to amendments.

In *Grant v. Grant*, 63 Conn. 530, which was a suit against the estate of a decedent, the plaintiff's petition failed to allege that the claim on which the suit was based had been presented to the administrator prior to the institution of the suit, but on reservation the Superior Court was advised to render judgment in her favor, provided the complaint was properly amended; otherwise to render judgment in favor of the defendant.

4. Cox *v.* Johnson, 61 N. H. 642.

5. Connecticut. — In a case reserved for the advice of the Supreme Court of Errors, where the findings of fact set out in the report leave indefinite the matters on which the briefs and oral arguments of the parties depend, the Supreme Court will remand the case for a further hearing below and a more explicit finding of the facts. *Dowd v. Ensign*, 68 Conn. 318.

Maine. — A report which does not contain a full statement of the case reserved and of the rulings of the trial judge will be dismissed. *Porter v. Buckfield Branch R. Co.*, 32 Me. 539.

Discharge or Report — New Hampshire Practice. — "An application to discharge a case and send a cause to a new trial is addressed to the discretion of the court, and requires an extraordinary exercise of their powers, which can be allowable and proper only when it is made clear that it is necessary, to prevent injustice. It has been occasionally done where a statement has been agreed upon by the parties, and submitted for the opinion of the court, where it has been apparent that the parties have fallen into error in relation to the facts or their bearing. *Heywood v. Wingate*, 14 N. H. 73. But it is very unusual, if indeed the instance has ever occurred, that a case drawn by the court, for the purpose of presenting the exceptions taken and the questions raised on the trial, should be set aside for the purpose of enabling a party to remedy, upon a new trial, any mistake he discovers he has made in relation to the law applicable to his case, especially where it is not suggested that the case fails to state truly the occurrences upon the trial, so far [as] they are material to the points de-

may be dismissed; but it seems that immaterial defects may be remedied by amendment.¹

In Criminal Cases. — In a criminal case reported under the *Massachusetts* statute, where the court is of the opinion that no verdict of conviction ought to be rendered upon the indictment, the proper judgment is that all further proceedings upon the verdict be stayed, and that the defendant be discharged and go without day.²

V. PRACTICE AFTER REPORT IS DETERMINED. — After a decision has been rendered upon a report the subsequent procedure will depend largely upon the provisions of the statute under which the case was reserved.³ In *Connecticut*, when a question has been reserved for the advice of the Supreme Court and a judgment has been entered in the lower court in accordance with the advice given, the Supreme Court will not, in ordinary cases, consider the same question upon subsequent proceedings in error.⁴ And in *Massachusetts* it has been held that a final decree

signed to be raised. It is not designed to be stated that cases may not arise where such application may not be proper to be made, and to be granted by the court; but we think it must be incumbent upon the party who presents such application to satisfy the court that by adopting this course they will do substantial justice to the parties, or that by refusing to adopt it they will permit such injustice to be done to him as he will be unable to relieve himself from by the ordinary course of judicial proceedings." *Per* Bell, J., in *Richardson v. Huggins*, 23 N. H. 106. To the same effect see *Goodrich v. Eastern R. Co.*, 38 N. H. 390.

For Further Instances of reports dismissed for various reasons, see *supra*, II. *What Questions May Be Reported*; III. *Form of Report*.

1. Where questions arising on the trial of a case are transferred from the Court of Common Pleas to the Superior Court for determination, the judge who tried the cause may amend his report in vacation or after he has retired from the bench. *Tappan v. Tappan*, 31 N. H. 41.

2. *Com. v. Ordway*, 12 Cush. (Mass.) 270.

New Trial Ordered. — Where the report shows that certain evidence admissible for some purposes, but not for all, has been admitted on the trial, but does not show that proper instructions were given to the jury as to its effect, a new trial should be granted; it cannot be presumed that correct in-

structions were given if the contrary is not shown, as it might be presumed on a bill of exceptions. *Com. v. Shepard*, 1 Allen (Mass.) 575.

3. In *New Hampshire* the practice after a reserved case has been determined is regulated by Pub. Stat., c. 204, § 15. For decisions illustrating the practice in such cases under the former statute (Rev. Stat., c. 172, §§ 7, 8), see *Stevenson v. Cofferin*, 20 N. H. 288; *Claggett v. Simes*, 31 N. H. 56; *Perkins v. Langmaid*, 36 N. H. 501.

In *Vermont*, after the questions reported to the Supreme Court have been decided, the case may be remanded to the County Court for further proceedings. *Austin v. Belknap*, 54 Vt. 495.

4. *Smith v. Lewis*, 26 Conn. 110; *Nichols v. Bridgeport*, 27 Conn. 462; *Derby v. Alling*, 43 Conn. 255.

Illustration of Rule. — Upon the petition of an executor to the Superior Court for advice as to the construction of a will, where all the parties interested have been brought in as respondents, and the Supreme Court of Errors has given an opinion upon questions reserved for its advice, it will not, except at its discretion, consider the same questions again when they arise upon a probate appeal between the parties who were respondents in the former case. *Maltby's Appeal*, 47 Conn. 350.

Exceptions to Rule. — A question arising upon proceedings in error will be considered by the Supreme Court even though it has been previously deter-

in equity entered in the Superior Court in accordance with the advice given by the Supreme Judicial Court on report cannot be attacked by a bill of review in the former court, but only by a petition for a rehearing in the Supreme Judicial Court.¹

mined upon a reservation for advice, where it is of such a nature that its determination involves the jurisdiction of the court. *Fowler v. Bishop*, 32 Conn. 205.

And likewise where a statute upon which the right of action depends is drawn in question as being repugnant to the Constitution of the United

States, the Supreme Court will sustain a writ of error notwithstanding a previous reservation, for the purpose of affirming the judgment so that the case may be carried to the Supreme Court of the United States. *New Haven, etc., Co. v. State*, 44 Conn. 376.

1. *Nashua, etc., R. Corp. v. Boston, etc., R. Corp.*, 169 Mass. 157.

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- V. IN INDICTMENTS AND INFORMATIONS, 742.
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I. DEFINITION. — Repugnancy is some contrariety or inconsistency between different allegations of the same party,¹ and constitutes a fault in any pleading wherein it is found.² But

1. Gould's Pl. (5th ed.), c. 3, §§ 172, 173.

Repugnancy Created by Superfluous Averment. — "But there is this exception, that if the second allegation, which creates the repugnancy, is merely superfluous and redundant, so that it may be rejected from the pleading without materially altering the general sense and effect, it shall in that case be rejected, at least if laid under a videlicet, and shall not vitiate the pleading." Stephen on Pleading, § 5, rule 1. See also *Springfield Second Nat. Bank v. Hart*, 8 Ind. App. 21.

In *Wyat v. Aland*, 1 Salk. 324, Lord Holt said that "where a matter is nonsense by being contradictory and repugnant to somewhat precedent, there the precedent matter which is sense shall not be defeated by the repugnancy which follows, but that which is contradictory shall be rejected."

Cognate Defects. — Repugnancy violates the rule requiring definiteness and certainty in pleadings, and is therefore somewhat related to other defects bearing specific names, such as ambiguity, argumentativeness, alternative averments, negatives pregnant, etc.; and for these see the article DEFINITENESS AND CERTAINTY IN PLEADING, vol. 6, p. 246.

Repugnancy by Legal Construction. — "Where a general fact or result is pleaded, and also the special facts by which such result is reached, and they do not support the result, the special facts control and the pleading is

bad." *Carlson v. Presbyterian Board of Relief*, 67 Minn. 438.

"General statements of facts, as a rule, are controlled by specific facts disclosed in the pleading." *Frain v. Burgett*, 152 Ind. 56. See generally article CONSTRUCTION OF PLEADINGS, vol. 4, p. 741.

In actions for negligence a general allegation of absence of knowledge of the danger by the plaintiff will be overcome by allegations which show that he must have had knowledge. *Louisville, etc., R. Co. v. Kemper*, 147 Ind. 561; *Stuart v. New Albany Mfg. Co.*, 15 Ind. App. 184.

In *Moyer v. Ft. Wayne, etc., R. Co.*, 132 Ind. 88, an action on a contract against a corporation, the complaint alleged that the defendant was the same corporation that entered into the contract with the plaintiff, but specific averments in the complaint showed that the defendant was a new corporation organized subsequently to the making of the contract. It was held that there could be no recovery upon the theory that the defendant was the same corporation as the one with which the plaintiff contracted.

But in order to control the general allegations the specific allegations must be clearly repugnant thereto, and must show that the general allegations are untrue. *Warbritton v. Demorett*, 129 Ind. 346.

2. An Affidavit of Defense admitting at the outset an indebtedness of a certain amount, but at the conclusion assert-

repugnancy will not ordinarily vitiate a pleading unless the inconsistency is so gross as to destroy the entire meaning.¹ And a repugnancy in common parlance is not necessarily a legal repugnancy.²

II. IN PLEADINGS AT COMMON LAW. — A Declaration³ or a Plea⁴ is

ing that "in truth and in fact the defendant does not owe the plaintiff one cent," was held to be insufficient for repugnancy. *Kelly v. Singer Mfg. Co.*, 4 Pa. Dist. 440.

1. *Lemmon v. Reed*, 14 Ind. App. 655; *Springfield Second Nat. Bank v. Hart*, 8 Ind. App. 20, where the pleading was held bad because of the "utter absence of the averment of a necessary fact left standing when the entire statement is considered." See also *Wright v. Card*, 16 R. I. 719.

Date of Alleged Act. — There is no substantial conflict between an averment that an act was done "on or about the 20th" of the month and an averment that it was "between the first and 20th" day of that month. *Kaler v. Tufts*, 81 Me. 63.

Liability as Partners. — In *Carico v. Moore*, 4 Ind. App. 20, an action against partners to recover for goods sold, the complaint contained a direct averment that the defendants were partners doing business under a firm name and style mentioned. It was held that another averment that the defendants held themselves out and permitted themselves to be held out as partners was not inconsistent with the prior direct averment, and did not render the complaint demurrable.

2. *White v. Snell*, 9 Pick. (Mass.) 17.

3. *Denison v. Richardson*, 14 East 291.

Instances of Repugnancy. — In trespass, where the plaintiff declared for taking and carrying away timber lying in a certain place for the completion of a house then lately built the declaration was held bad, since the timber could not be for a house already built. *Nevil v. Soper*, 1 Salk. 213.

In covenant against an apprentice the plaintiff assigned for breach that the apprentice, before the time of his apprenticeship expired, *durante tempore quo survivit* departed from his master's service. The defendant demurred and had judgment because the declaration was repugnant, for it should have been *durante tempore quo servire debuit*. *Nevil v. Soper*, 1 Salk. 213.

A count in assumpsit, declaring on a

promise to pay a sum certain if the plaintiff would provide another with necessities, and also on a promise to pay as much as the plaintiff reasonably deserved to have on the same account, was held both double and repugnant. *State v. Haven*, 59 Vt. 407, *citing* 1 Chitty on Pleading 231.

In *Greaves v. Neal*, 57 Fed. Rep. 816, the plaintiff sued to recover the value of property alleged to have been acquired by the defendants by an unlawful preference. The declaration referred to an assignment, annexing it in such a way as to make it a part of the pleadings, and alleged that the insolvent person assigned "for the equal benefit of all his creditors who should file releases," but the annexed assignment was expressed to be "for the benefit of all his creditors without any preference." It was held that the declaration was demurrable for repugnancy.

Instance of No Repugnancy. — In an action on a promise to pay a sum of money to the plaintiff if and when the defendant should collect certain demands against a third person, it was held that there was no repugnancy between a count alleging that the defendant did not use due diligence to collect such demands and a count alleging that there were no such demands. *White v. Snell*, 9 Pick. (Mass.) 16.

4. *Wright v. Card*, 16 R. I. 719; *Barber v. Summers*, 5 Blackf. (Ind.) 339; *Gulliver v. Fowler*, 64 Conn. 556.

Instances of Repugnancy. — Where the defendant pleaded a grant of a rent out of a *term of years*, and alleged that by virtue thereof he was seized in his demesne, *as of freehold*, for the term of his life, the plea was held bad for repugnancy. *Butt's Case*, 7 Coke 25.

In an action of debt against the surety on a replevin bond the defendant, in the beginning of his plea, pleaded by way of confession and avoidance matters which were claimed to operate as a release from liability for the breaches alleged, thus in effect admitting the breaches, and in the latter part of the plea he pleaded general performance, thus in effect traversing

bad where it contains repugnant allegations respecting matter of substance.¹ But this rule is confined to single counts or pleas, and repugnancy between the different counts of a declaration,² or between two or more pleas,³ does not make the pleading objectionable.

Replication. — Repugnancy between a protestation and an averment in a replication is immaterial.⁴

III. IN PLEADINGS IN CHANCERY. — A bill in equity containing inconsistent allegations which neutralize each other is defective for repugnancy,⁵ and the same rule applies to an answer.⁶ But bills framed with a double aspect, so called, are not objectionable for repugnancy, and constitute a common and approved device in equity pleading.⁷

or denying the breaches. The plea was held bad for repugnancy. *Wright v. Card*, 16 R. I. 719.

In debt on a bond to perform the conditions in an indenture of lease the defendant pleaded a rescission and cancellation of the lease by mutual consent. A replication admitting those facts, but alleging a parol agreement that the lease was to remain in force, and that the bond should remain in force to secure the performance of the conditions, was held bad for repugnancy. *Sibley v. Brown*, 4 Pick. (Mass.) 137.

1. Surplusage. — A repugnant allegation which may be rejected as surplusage does not vitiate the pleading. *Buckley v. Kenyon*, 10 East 142. See also *supra*, p. 738, note 1.

2. *Barton v. Gray*, 48 Mich. 164. And see *White v. Snell*, 9 Pick. (Mass.) 17.

3. The fact that two or more pleas are repugnant to each other is no objection to either of them when they are filed together. *True v. Huntoon*, 54 N. H. 121; *Murrell v. Jones*, 40 Miss. 573. See also *St. Louis, etc., R. Co. v. Whitley*, 77 Tex. 126; *Peoria, etc., R. Co. v. Barton*, 38 Ill. App. 475; and article PLEAS AT LAW, vol. 16, p. 570.

After Verdict. — Where a declaration contains several counts and a verdict for the plaintiff has been applied to a good count, it is no ground for arrest of judgment that another count is repugnant to the count to which the verdict was applied. *White v. Snell*, 9 Pick. (Mass.) 16.

4. *Hapgood v. Houghton*, 8 Pick. (Mass.) 451; *Commercial Bank v. Sparrow*, 2 Den. (N. Y.) 97.

5. *Friedman v. Fennell*, 94 Ala. 570; *Bynum v. Ewart*, 90 Tenn. 655.

"At law, a party may, without animadversion, state his case in many different and seemingly repugnant forms, by resorting to different counts; but such a mode of pleading does not accord with the plain and simple rules that obtain in courts of equity." *Murrell v. Jones*, 40 Miss. 573.

A plaintiff in a bill in equity cannot claim land under the title of one party and at the same time repudiate that title and claim a right to subject it as the title of another. *Bynum v. Ewart*, 90 Tenn. 658.

Original and Amended Bill. — If an original and an amended bill in equity allege repugnant grounds for relief, the bill as amended is demurrable. *Winter v. Quarles*, 43 Ala. 692. See also *Magnetic Ore Co. v. Marbury Lumber Co.* 113 Ala. 306; and article AMENDMENTS, vol. 1, p. 476.

6. The equity rule, as stated in *Hopper v. Hopper*, 11 Paige (N. Y.) 46, is that a defendant cannot set up two defenses "which are so inconsistent with each other that if the matters constituting one defense are truly stated the matters upon which the other defense is attempted to be based must necessarily be untrue in point of fact. But the defendant may deny the allegations upon which the complainant's title to relief is founded, and may at the same time set up in his answer any other matters not wholly inconsistent with such denial." See also article ANSWERS IN EQUITY PLEADING, vol. 1, p. 878.

7. See article BILLS IN EQUITY, vol. 3, p. 364.

"The orator may state his case in different aspects, and if either is good he may succeed, notwithstanding it may be inconsistent with some other

IV. IN PLEADINGS UNDER THE CODES. — A Code Complaint or Petition should not in one and the same count make contradictory and wholly irreconcilable statements of facts.¹ But a plaintiff seeking equitable relief may draw his pleading with a double aspect, as in chancery pleading.² Precisely how far inconsistency between separate counts will be tolerated is not entirely clear.³

Answer. — Repugnancy in a single count or paragraph of an answer undoubtedly violates the rule of good pleading.⁴

stated ground of recovery." *Nichols v. Nichols*, 61 Vt. 429, citing *McConnell v. McConnell*, 11 Vt. 290.

1. In *Chapman v. Allen*, 11 Wash. 627, a complaint for partition alleging that the defendant held the legal title to the whole of the land, and also that the plaintiff and the defendant were joint owners in fee of equal portions of the premises, was held bad for repugnancy.

Averments Held Not Inconsistent. — In an action for personal services there is nothing inconsistent between an allegation that the defendant agreed to pay a certain price and an averment that the services were worth the same price. *American Encaustic Tiling Co. v. Reich*, (N. Y. City Ct. Gen. T.) 11 N. Y. Supp. 776.

An allegation in a complaint on a promissory note that the indorsers waived notice is not inconsistent with allegations tending to show that the holder was excused from giving notice by the subsequent action of the indorsers. *Loveday v. Anderson*, 18 Wash. 322.

Conflict with Exhibit or Bill of Particulars. — In actions upon written contracts where the contract, or a copy thereof, is filed with and made a part of the pleading as an exhibit, the contents of the contract control rather than any averments of the complaint which may conflict therewith. *Furry v. O'Connor*, 1 Ind. App. 575. But the rule has no application to a bill of particulars. *Chapin v. Elgin*, etc., R. Co., 11 Ind. App. 632, holding that a complaint is not demurrable for inconsistency with a bill of particulars.

2. *Higgins v. Hayden*, 53 Neb. 64. See also *Harris v. Warlick*, (Tex. Civ. App. 1897) 42 S. W. Rep. 356.

3. In *Stockton Combined Harvester, etc., Works v. Glens Falls Ins. Co.*, 121 Cal. 167, it was held that a cause of action arising out of one transaction may be stated in separate counts in different ways, even though they are

inconsistent with each other. In *Harris v. Warlick*, (Tex. Civ. App. 1897) 42 S. W. Rep. 356, it was said to be "immaterial that one count in a petition be inconsistent with another or contradicted by it." In *Losch v. Pickett*, 36 Kan. 216, it was held that if a plaintiff makes contradictory and inconsistent allegations, though in separate counts, the court may consider as true such of the allegations as are against the pleader. In *Roberts v. Quincy*, etc., R. Co., 43 Mo. App. 289, the court said: "Where several counts in the same petition are inconsistent, so that the proof of one necessarily disproves the other, the court should, if requested by the defendants so to do, and may, of its own motion, compel the plaintiff at any time to elect on which one of the inconsistent counts he will proceed to trial." See further *Sweet v. Ingerson*, (Supm. Ct. Gen. T.) 12 How. Pr. (N. Y.) 331; *Jack v. Des Moines*, etc., R. Co., 49 Iowa 627; *Keens v. Gaslin*, 24 Neb. 310.

4. *Buhne v. Corbett*, 43 Cal. 264; *People v. Lothrop*, 3 Colo. 428.

In an action on an accident insurance policy a paragraph of the defendant's answer admitted the allegation of the plaintiff that the insured "accidentally cut and lacerated one of his fingers," but also averred that there were no visible marks of the injury. It was held on demurrer that because of repugnancy in the answer the defense that there were no visible marks of the injury, as required by a condition in the policy, was not well pleaded. *Bernays v. U. S. Mutual Acc. Assoc.*, 45 Fed. Rep. 455.

"Under the code much liberality is indulged in the construction of pleadings. A demurrer will not be sustained for mere inconsistency, indefiniteness, or repugnancy, if some fact or facts are averred positively and the indefiniteness, inconsistency, or repugnancy is not such as to render the averment meaningless." *Springfield*

Whether the defendant may properly set up inconsistent defenses in separate counts or paragraphs of his answer is a subject of much conflict or confusion of authorities.¹

V. IN INDICTMENTS AND INFORMATIONS. — At common law, repugnancy between the material averments of an indictment or information will vitiate a count in which it occurs.² But a count which would be bad for repugnancy at common law may be rendered valid by force of a statute.³ And it is no objection

Second Nat. Bank *v.* Hart, 8 Ind. App. 20.

1. See generally article ANSWERS IN CODE PLEADING, vol. 1, p. 855 *et seq.*

California. — "If a plea or defense separately pleaded in an answer contain several matters, these should not be repugnant or inconsistent in themselves. But the plea or defense regarded as an entirety, if it be otherwise sufficient in point of form and substance, is not to be defeated or disregarded merely because it is inconsistent with some other plea or defense pleaded." *Buhne v. Corbett*, 43 Cal. 264, quoted with approval in *Banta v. Siller*, 121 Cal. 418.

In separate defenses a denial in one is not waived by an admission of the same matter in another. *Billings v. Drew*, 52 Cal. 565; *Miles v. Woodward*, 115 Cal. 308. And a denial in an answer is not waived or overcome by an averment in a cross-complaint of substantially the same facts as those which the answer denies. *Meyers v. Merillion*, 118 Cal. 352.

Connecticut. — In *Gulliver v. Fowler*, 64 Conn. 556, an action on a guaranty against several defendants, their joint answer began thus: "The defendants admit the truth of the matters contained in the plaintiff's complaint, but in avoidance of the same set up the following facts." Four separate defenses were then pleaded, the third of which was that the guaranty was signed without consideration. The complaint, however, had alleged that it was signed for value received. The court said that the third defense "was therefore void for repugnancy and no evidence was admissible in its support."

Wisconsin. — "It is well settled that the defendant may plead as many defenses and counterclaims as he has, although they may be based on inconsistent legal theories. * * * This rule does not invade the general principle that the truth should be established nor the principle that an admission in

an answer will not be affected by a repugnant denial in another part of the same answer. * * * While authorities may be found stating, in general terms, that inconsistent defenses cannot be set up in the same answer, examination will show that these are generally cases where repugnant allegations of fact are contained in the different defenses, and where, consequently, the proof of one defense would necessarily disprove the other." *South Milwaukee Boulevard Heights Co. v. Harte*, 95 Wis. 592.

2. See article INDICTMENTS, INFORMATIONS, AND COMPLAINTS, vol. 10, p. 532.

"Every indictment or information ought to contain a complete description of such facts and circumstances as constitute the crime, without inconsistency or repugnancy." *Rex v. Stevens*, 5 East 244.

An indictment for a statutory offense of carnally knowing "a female child under the age of puberty" was held to be fatally repugnant in charging the defendant with carnal knowledge of "a female child of the age of twelve years and under the age of puberty," since the common law fixed the age of puberty at twelve years in females. *State v. Pierson*, 44 Ark. 265.

An indictment stating the Christian name of the accused together with an alias followed by the averment that his "true Christian name is to this grand jury unknown," was held to be fatally repugnant to itself. *Jones v. State*, 63 Ala. 27.

Repugnancy Avoided by Construction. — An indictment charging the defendant with the acceptance of a bribe to vote for "a question which was and might be by law brought before" him as state senator was held to contain no repugnancy. *State v. Smalls*, 11 S. Car. 262, where the court said: "It was merely equivalent to saying that it was brought before him to act upon as a senator in conformity with law."

3. *State v. Chamberlain*, 89 Mo. 129, where, although the allegations in the

to an indictment or information that the several counts thereof are repugnant to each other where each contains a criminal charge sufficiently alleged.¹

VI. OBJECTIONS FOR REPUGNANCY — HOW TAKEN. — At Common Law a pleading which contains repugnant allegations respecting matter of substance is bad on general demurrer.² But if the repugnancy relates to form only, no advantage of it can be taken except by special demurrer.³

In Chancery Pleading repugnancy in the bill is a demurrable defect,⁴ and failure to demur is a waiver thereof.⁵ An answer setting up inconsistent defenses is subject to exception.⁶

In Code Pleading repugnancy in a complaint, petition, or answer is a ground for demurrer,⁷ or, perhaps, a motion to make more definite and certain.⁸ Objections for joinder of inconsistent defenses have been considered in a preceding article.⁹

In Indictments or Informations. — Repugnancy in an indictment or information is a ground for demurrer¹⁰ or motion in arrest of judgment.¹¹

purport clause of an indictment for forgery were clearly repugnant, the validity of the indictment was sustained because there was "sufficient matter alleged to indicate the crime and person charged" within the meaning of the statute declaring that in such a case an indictment should not be held invalid. To the same point see *State v. Pullens*, 81 Mo. 387. And under identical statutory provisions it was held that a repugnancy between the title and the body of the indictment as to the name of the defendant did not render the indictment bad. *State v. Boss*, 74 Ind. 80.

1. *State v. Mallon*, 75 Mo. 355. See also article INDICTMENTS, INFORMATIONS, AND COMPLAINTS, vol. 10, p. 532, note 3.

2. *Barber v. Summers*, 5 Blackf. (Ind.) 339; *Wright v. Card*, 16 R. I. 721. See also *Nevil v. Soper*, 1 Salk. 213; *Greaves v. Neal*, 57 Fed. Rep. 816.

Striking Out Plea. — In *Wright v. Card*, 16 R. I. 719, it was held that a plea bad for repugnancy was properly struck out.

3. Gould's Pl., c. 3, § 173. See also *Denison v. Richardson*, 14 East 291; *Sibley v. Brown*, 4 Pick. (Mass.) 137.

Objection for repugnancy between different counts in a declaration should be taken by special demurrer. *White v. Snell*, 9 Pick. (Mass.) 17.

4. *Friedman v. Fennell*, 94 Ala. 570;

Bynum v. Ewart, 90 Tenn. 655. See also *Murrell v. Jones*, 40 Miss. 573.

5. *American Freehold Land Mortg. Co. v. Sewell*, 92 Ala. 173.

6. *Scanlan v. Scanlan*, 134 Ill. 630, where, however, the court said: "We take it that where inconsistent defenses are set up in an answer, and such answer is not excepted to, and on the hearing one of the defenses pleaded is found to be untrue and the other is established by the proofs, the decree will not be reversed on account of the interposition of such untrue and inconsistent defense." As to exceptions to answers, see generally article ANSWERS IN EQUITY PLEADING, vol. 1, p. 895 *et seq.*

7. *Chapman v. Allen*, 11 Wash. 627; *Springfield Second Nat. Bank v. Hart*, 8 Ind. App. 20; *Bernays v. U. S. Mutual Acc. Assoc.*, 45 Fed. Rep. 455.

8. In an action for services rendered the complaint contained averments which would admit proof of an implied contract to pay what the services were reasonably worth, as well as an express promise to pay a particular sum mentioned. It was held that objection should have been taken by motion to have the pleading corrected, and that the objection came too late on appeal. *Hewitt v. Brown*, 21 Minn. 163.

9. See article ANSWERS IN CODE PLEADING, vol. 1, p. 860.

10. *State v. Pierson*, 44 Ark. 265.

11. *Jones v. State*, 63 Ala. 27.

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RESCISSION, CANCELLATION, AND REFORMATION OF CONTRACTS.

By B. A. MILBURN.

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CROSS-REFERENCES.

As to *Fraud and Mistake in general*, see articles *FRAUD*, vol. 9, p. 675; *MISTAKE*, vol. 14, p. 32.

Matters of Substantive Law and Evidence, see AM. AND ENG. ENCYC. OF LAW, titles *FRAUD AND DECEIT*, vol. 14, p. 12; *MISTAKE*; *REFORMATION AND CANCELLATION OF CONTRACTS*.

I. SCOPE OF ARTICLE. — This article is confined to a treatment of suits in equity or actions of an equitable nature under the Code for the rescission of contracts or the cancellation of written instruments, and for the reformation of contracts in writing. The article does not treat of the procedure in actions at law where the parties to contracts elect to rescind them and pursue their legal remedies.¹

II. DEFINITIONS — **1. Rescission or Cancellation.** — A suit in equity for the rescission or cancellation of a contract is one in which a party who has been imposed upon by fraud or otherwise, asks the decree of a court of equity declaring that the contract is void, and if the contract is in writing, ordering it to be delivered up for cancellation.² A bill for the cancellation of an

1. Jurisdictional Questions and questions as to the grounds upon and circumstances under which equity will decree the rescission, cancellation, or reformation of contracts, are not within the province of this work; and although in appropriate places throughout this article will be found statements of the salient rules as to the exercise of jurisdiction and leading cases in which such rules have been enunciated, reference is made for an exhaustive treatment of these subjects to titles in the American and English Encyclopædia of Law as indicated in the cross-references given at the commencement of this article.

2. "Rescind" Defined. — In *Constant v. Lehman*, 52 Kan. 227, the court said: "To rescind is to revoke, to annul what has already been done, and implies that the parties shall be again placed in the same condition that they were in before the transaction. It never implies the making of a new contract for the parties by the court."

Redhibition under Louisiana Code. — Code La., art. 2496, defines redhibition to be "the avoidance of a sale on account of some vice or defect in the thing sold, which renders it either absolutely useless, or its use so inconvenient and imperfect that it must be supposed that the buyer would not have purchased it had he known of the vice." *Andrews v. Hensler*, 6 Wall. (U. S.) 254.

Resemblance to Rescissory Action of Civil Law. — In *Davis v. Tarwater*, 15 Ark. 286, the court said: "The application of a vendee to a court of equity to rescind a contract of sale closely resembles the rescissory action of the civil law on the part of the buyer."

Distinguished from Bill to Redeem. — In *New England Mortg. Security Co. v. Powell*, 97 Ala. 483, in which the bill sought the cancellation of a mortgage and a perpetual injunction against its foreclosure on the ground that the mortgage was made in violation of a statute and was therefore void, the court said: "This is not a bill to redeem. Its equity rests upon the alleged invalidity of the note and mortgage from which arises complainant's right to have them canceled as a cloud upon his title. A bill to redeem has essentially different qualities and objects. It conclusively assumes the validity of the mortgage, and prays, not for its cancellation, as void casting a cloud on the title, but that payment of the mortgage debt be established or that complainant be permitted to pay what may be found due thereon upon an accounting; that the forfeiture be set aside, and that complainant obtain a reconveyance of the legal title, or a decree to that effect. No such relief can be had under the present bill."

Distinction Between Actions for Breach of Covenant and to Rescind. — In *Yeates v. Pryor*, 11 Ark. 58, the court said: "There is a sensible distinction to be observed between suits at law for a breach of covenant for title and quiet possession, and to rescind contracts. In the suit at law the party relies upon his contract, and seeks to recover damages for a breach of it; whereas, in suits to rescind contracts the ground of complaint is not that the conditions of the contract have been broken merely, but that the contract was in its inception fraudulent and should not be enforced."

Not an Action for Damages. — In

instrument is founded upon the principle *quia timet*, that is, the complainant is entitled to the preventive process of the court, for fear the agreement may be vexatiously or injuriously used against him.¹

Converse of Specific Performance. — The rescission, cancellation, or delivering up of agreements, deeds, etc., is the converse of specific performance. The right to relief originates in the fraud which, but for the interposition of the court, would be perpetrated upon the complaining party.²

2. Reformation. — A suit for the reformation of a written contract³ is one in which a court of equity is asked to make a decree that the contract shall be rectified or construed so as to make it express the original intention of the parties when an error in drafting the contract has been committed.⁴

Wainscott v. Occidental Bldg., etc., Assoc., 98 Cal. 253, which was an action to rescind a written contract on the ground of fraud, the court said: "This action is not one to recover damages, a money compensation. Doubtless, if plaintiff has a cause of action, he could have affirmed the contract and sued for damages. He has, however, elected to seek a cancellation for the injury, the damage, sustained."

Compared to Action to Quiet Title or Remove Cloud. — An action to cancel a deed procured by the defendant from the plaintiff by fraud is not, technically speaking, an action to quiet title or remove a cloud. *Jackson v. Tatebo*, 3 Wash. 456.

See also generally article **QUIETING TITLE**.

Cancellation of Deed Fraudulently Abstracted. — An action to set aside and cancel a deed which it is alleged the defendant, without the plaintiff's consent, fraudulently abstracted from a safe pending the completion of a proposed sale to the defendant, and recorded, is in its nature an action to quiet the title of the plaintiff to his property. *Rising v. Gibbs*, (Cal. 1892) 30 Pac. Rep. 589.

1. *Per Nisbet, J.*, in *Butler v. Durham*, 2 Ga. 413.

2. *Brainard v. Holsaple*, 4 Greene (Iowa) 485; *Willard v. Ford*, 16 Neb. 543; *Reid v. Burns*, 13 Ohio St. 49, in which case it was declared that "the ground for the equitable relief in either case is the same;" *Bogie v. Bogie*, 41 Wis. 209. See also *Willard's Eq.*, which authority was cited in *Willard v. Ford*, 16 Neb. 543.

Equitable Action. — An action for the

cancellation of a deed is equitable in its nature. *Maclellan v. Seim*, 57 Kan. 471.

3. Written Contract. — Reformation implies the existence of a written contract. *Conaway v. Gore*, 24 Kan. 389.

4. *Lumbert v. Hill*, 41 Me. 475; *Adams v. Stevens*, 49 Me. 362; *Cameron v. White*, 74 Wis. 425.

Rectification. — It has been declared that, strictly speaking, an action is for the rectification of a contract rather than its reformation. *Brundige v. Blair*, 43 Kan. 369.

Establishment and Declaration of Trust.

— An application to have a deed performed upon the ground of an alleged mistake in its preparation is substantially the same as one for the establishment and declaration of a trust in respect to the property conveyed by the deed in conformity to the alleged intention of the parties. *McDonnell v. Milholland*, 48 Md. 540.

Rules of Evidence. — An action for the reformation of a written contract is an action in equity triable by the court, and the same strict rules of evidence are not applied as in actions tried by a jury, and an error in admitting evidence will not necessarily be fatal if there is other evidence sufficient to sustain the findings of the court. *Cameron v. White*, 74 Wis. 425.

Reformation Compared to Specific Performance. — In *Adams v. Wheeler*, 122 Ind. 251, *Mitchell, C. J.*, said: "An action to reform a written instrument is in the nature of an action for the specific performance of a contract."

An action for the specific performance of a contract to convey land in which it is charged that the defendant

3. Distinction Between Cancellation and Reformation. — There is a plain distinction between canceling a written contract and reforming it.¹

III. EQUITABLE JURISDICTION — 1. To Rescind or Cancel Contracts — a. IN GENERAL. — The jurisdiction of courts of equity to decree the rescission or cancellation of contracts upon certain grounds is an ancient and inherent one. The cases in which a court of equity exercises its jurisdiction to decree the surrender and cancellation of written instruments are, in general, where the instrument has been obtained by fraud, where a defense exists which would be cognizable only in a court of equity, where the instrument is negotiable, and by a transfer the transferee may acquire rights which the present holder does not possess, and where the instrument is a cloud upon the title of the plaintiff to real estate.²

Exercise of Jurisdiction to Avoid Multiplicity of Suits. — The mere fact

induced the plaintiff, by fraudulent representations, to accept a deed for a portion of the premises, under the belief that it conveyed the whole, is in effect an action to reform the deed. *Nicholson v. Tarpey*, 89 Cal. 617.

1. *Werner v. Rawson*, 89 Ga. 619, in which case the court quoted from 15 Am. and Eng. Encyc. of Law (1st ed.), p. 647, as follows: "Equity will not reform a written contract unless the mistake is proved to be the mistake of both parties, but may rescind and cancel a contract upon the ground of a mistake of facts material to the contract of one party only."

2. *Venice v. Woodruff*, 62 N. Y. 462, 20 Am. Rep. 495, in which case *Rapallo, J.*, said: "The jurisdiction of the court of chancery has been asserted to decree the surrender of every instrument which ought not to be enforced, whether void at law or not, and whether void from matter appearing on its face, or from matter which must be established by extrinsic proof." *Citing Hamilton v. Cummings*, 1 Johns. Ch. (N. Y.) 520. See also, in support of the general jurisdiction of equity to rescind and cancel contracts, *Lewis v. Tobias*, 10 Cal. 574; *Field v. Holbrook*, (N. Y. Super. Ct. Gen. T.) 14 How. Pr. (N. Y.) 108; *Pierce v. Webb*, 3 Bro. C. C. 16, note 1; *Pettit v. Shepherd*, 5 Paige (N. Y.) 498; *Van Doren v. New York*, 9 Paige (N. Y.) 388; *Hilton v. Advance Thresher Co.*, 8 S. Dak. 412; *Jackman v. Mitchell*, 13 Ves. Jr. 581; *Hayward v. Dimsdale*, 17 Ves. Jr. 111, and *Atty.-Gen. v. Morgan*, 2 Russ. 306.

Instrument Valid in Its Inception. — Equity has jurisdiction under some circumstances to order an instrument, valid in its inception, to be delivered up after it has ceased to be operative, but the exercise of this power is to be regulated by sound discretion, as the circumstances of the individual case may dictate, and the resort to equity must be expedient, either because the instrument is liable to abuse from its negotiable nature or because the defense, not arising on its face, may be difficult or uncertain at law, or from some other special circumstances peculiar to the case. *Brown v. Boyd*, 158 Mass. 470, in which case the court cited *Hamilton v. Cummings*, 1 Johns. Ch. (N. Y.) 517; *Noah v. Webb*, 1 Edw. (N. Y.) 604; *Foley v. Kirk*, 33 N. J. Eq. 170, and *Hughes v. Saunders*, 3 Bibb (Ky.) 360.

Enumeration of Various Grounds. — In *Field v. Holbrook*, (N. Y. Super. Ct. Gen. T.) 14 How. Pr. (N. Y.) 103, which case has been cited and relied upon as an authority by many of the courts of the various states, *Duer, J.*, after an elaborate and exhaustive examination and digest of the cases, said: "I am convinced, by an attentive examination of the authorities, that the cases in which alone the jurisdiction of which the exercise is now claimed can be said to be established and undoubted, may be reduced to the following classes: First. When the plaintiff alleges that the instrument which he prays may be surrendered or canceled is void upon grounds of which a court of equity alone can take cogni-

that numerous independent parties hold separate instruments upon which they may bring suits is not sufficient to justify a court of equity in entertaining an action by the maker for the rescission of such instruments where not one of the well-understood grounds of equitable relief is alleged;¹ but in a case in which cancellation is sought, which otherwise would not appeal strongly to the chancellor, jurisdiction may be assumed to avoid a multiplicity of suits.²

Bill for Recovery of Damages. — Equity will interpose in a case of fraud for no other purpose than to effectuate a rescission of the contract, and will not entertain a bill for the recovery of damages when there has been no rescission, or nothing entitling the plaintiff to it, but will leave him to his legal remedy.³

Negotiable Instruments. — The jurisdiction of courts of equity to entertain an action to compel the cancellation and delivery of negotiable instruments apparently valid, but in fact invalid, while in the hands of holders with notice before maturity, is well settled.⁴

zance; in fewer words, when he sets up a purely equitable defense. Second. When the instrument is a deed or other document concerning real estate, which, although inoperative if suffered to remain uncanceled, would throw a cloud upon the plaintiff's title to the lands which it embraces, or to which it refers. * * * Third. When the instrument is negotiable in its character, as a bill of exchange, and the putting it into circulation by the holder would be a fraudulent act. * * * Fourth. Where the plaintiff claims to have a defense valid in law, but which rests upon evidence which he is in danger of losing if the adverse party is suffered to delay the prosecution of his claims."

Extraordinary Power. — In *Atlantic Delaine Co. v. James*, 94 U. S. 207, Strong, J., said: "Canceling an executed contract is an exertion of the most extraordinary power of a court of equity."

1. *Venice v. Woodruff*, 62 N. Y. 462, 20 Am. Rep. 495, in which case the action was brought to cancel certain town bonds and restrain the holders thereof from transferring them. *Distinguishing* New York, etc., *R. Co. v. Schuyler*, 17 N. Y. 592.

2. *Louisville, etc., R. Co. v. Ohio Valley Imp., etc., Co.*, 57 Fed. Rep. 42, in which case it was doubtful whether a proper case for cancellation was presented, because the instrument was void, but it was alleged that the complainant's guaranty appeared upon some six or seven hundred bonds, and

that it would become liable to suits upon coupons upon each bond as it matured. The court in assuming jurisdiction to cancel the guaranty, said: "It is obvious that in course of time these bonds might pass into the hands of hundreds of persons, and the complainant company thus be subjected to a ruinous number of actions. A judgment in its favor, as between it and a particular holder, would not conclude any other holder. If the defenses to these bonds be treated as purely legal, and the remedy sought a legal remedy, the jurisdiction would exist. * * * There has been much conflict of authority as to the circumstances which will justify a court of equity in taking jurisdiction to prevent a multiplicity of suits; but an examination of numerous authorities brings me to the conclusion that where a complainant may be subjected to a multitude of separate suits by separate claimants, and the judgment in one case would not be conclusive in others, a case arises for equitable jurisdiction, if the defendants have a community of interest in the questions at issue and in the kind of relief sought, by reason of the common origin of their several claims." *Citing* New-York, etc., *R. Co. v. Schuyler*, 17 N. Y. 592; *Saratoga County v. Deyoe*, 77 N. Y. 219; *Black v. Shreeve*, 7 N. J. Eq. 440, and *Sheffield Waterworks v. Yeomans*, L. R. 2 Ch. 11.

3. *McCulloch v. Scott*, 13 B. Mon. (Ky.) 172, 56 Am. Dec. 561.

4. *Paterson v. Baker*, 51 N. J. Eq. 49; *Scott v. Menasha*, 84 Wis. 73.

Action by Party in Default. — The right to rescind belongs only to the party who is himself without default. Thus, if one having sufficient ground therefor wishes to avoid a contract, but has done some act which hinders performance by the other, or has failed in any way to perform his own part of the stipulations, his right is thereby lost to him.¹

Payment of Debt Evidenced by Instrument. — The jurisdiction of equity to require the cancellation of instruments given to secure the payment of debts after a satisfaction thereof, and thereby to remove clouds from the title to real estate, is well established, but it would seem that where payment or performance is alleged as a ground for rescission it must appear that the plaintiff is without an adequate remedy at law.²

b. EXCLUSIVE JURISDICTION OF EQUITY. — A suit to set aside a contract is in its nature a suit in equity,³ and it has been declared in numerous cases that the cancellation of instruments and the rescission of contracts is not within the jurisdiction of a court of law, but is distinctively and exclusively relief which can be awarded by a court of equity only.⁴

Overdue Promissory Note. — An action cannot be maintained by a party to an overdue promissory note to compel a surrender thereof for cancellation, especially after a suit at law has been brought upon the note, as the remedy at law is adequate and complete. *Resch v. Senn*, 31 Wis. 138, in which case the court cited *Hamilton v. Cummings*, 1 Johns. Ch. (N. Y.) 517, in which latter case Chancellor Kent said: "Perhaps the cases may all be reconciled on the general principle that the exercise of this power is to be regulated by sound discretion, as the circumstances of the individual case may dictate; and that the resort to equity, to be sustained, must be expedient, either because the instrument is liable to abuse from its negotiable nature, or because the defense, not arising on its face, may be difficult or uncertain at law, or from some other special circumstances peculiar to the case, and rendering a resort here highly proper and clear of all suspicion of any design to promote expense and litigation."

1. *Per Dunbar, C. J.*, in *Reddish v. Smith*, 10 Wash. 178, quoting 1 Am. and Eng. Encyc. of Law (1st ed.) 77.

2. *Hartley v. Matthews*, 96 Ala. 224, holding that equity has jurisdiction to cancel a mortgage which has been paid; *Travelers' Ins. Co. v. Jones*, 16 Colo. 515; *Builer v. Durham*, 2 Ga. 413, holding that it must appear that

the plaintiff is without adequate remedy at law.

Minnesota Statute. — In *Miller v. Rouse*, 8 Minn. 124, it was held that under Comp. Stat. Minn., c. 629, § 35, providing that an action may be brought by "one person against another for the purpose of determining an adverse claim which the latter makes against the former for money or property upon an alleged obligation," the maker of a note may, after having paid it, maintain a suit for its cancellation where the defendant is asserting that it is an outstanding obligation.

3. *Kellogg v. Kellogg*, 21 Colo. 181; *Leighton v. Orr*, 44 Iowa 679; *Friday v. Parkhurst*, 13 Wash. 439.

4. *McCorkell v. Karhoff*, 90 Iowa 545; *Clapp v. Greenlee*, 100 Iowa 586; *Relf v. Eberly*, 23 Iowa 467; *Brainard v. Holsapple*, 4 Greene (Iowa) 485; *Baltimore Sugar Refining Co. v. Campbell, etc., Co.*, 83 Md. 36; *Nathan v. Nathan*, 166 Mass. 294; *Perea v. Barela*, 6 N. Mex. 239, in which case relief was sought against a receipt procured by fraud, and it was declared that the case was one of purely equitable cognizance, and that the "court would have been powerless to have given her relief under a common-law proceeding;" *Johnson v. Cooper*, 2 Yerg. (Tenn.) 524, 24 Am. Dec. 502; *Louisville, etc., R. Co. v. Ohio Valley Imp., etc., Co.*, 57 Fed. Rep. 42, in which case *Lurton, J.*, said that "can-

c. **DISCRETION OF CHANCELLOR.** — An application to a court of equity for the rescission, cancellation, or delivering up of agreements and securities is not founded upon an absolute right, but is rather an appeal to the sound discretion of the court, which in granting or refusing the relief prayed acts upon its own notions of what is reasonable and just under all the surrounding circumstances.¹ It has been laid down that a resort to equity, to be sustained, must be expedient either because the instrument is liable to abuse from its negotiable nature; or because the defense not arising on its face may be difficult or uncertain at law; or from some other special circumstances peculiar to the case, and rendering a resort to equity highly proper.²

Where Specific Performance Would Be Refused. — Although it is undoubtedly within the sound discretion of the chancellor to refuse to rescind a contract, the specific execution of which he would not decree, yet in general where a specific execution would be refused a rescission will be decreed.³

Abuse of Discretion. — Although the rescission of a contract rests largely in the discretion of the chancellor, he will not be allowed to abuse the discretion and to refuse a remedy plainly contemplated by established rules of equity.⁴

d. **STATUTORY PROVISIONS.** — In some states statutes have been enacted expressly conferring jurisdiction to rescind con-

cellation is one of those purely equitable remedies exercised exclusively by courts of equity." See also *Gray v. Coan*, 23 Iowa 344; *MacLellan v. Seim*, 57 Kan. 471.

1. *Reid v. Burns*, 13 Ohio St. 49, in which case the court said: "The court will also, in some cases, order an indenture to be canceled or annulled, on the application of one party, when it would refuse similar relief on the application of another, showing very clearly that the court, in such cases, has ample discretion." Quoted with approval in *Bogie v. Bogie*, 41 Wis. 209. See also *Myrick v. Jacks*, 39 Ark. 293; *Lewis v. Tobias*, 10 Cal. 574; *Butler v. Durham*, 2 Ga. 413; *Hamilton v. Cummings*, 1 Johns. Ch. (N. Y.) 517; *Field v. Holbrook*, (N. Y. Super. Ct. Gen. T.) 14 How. Pr. (N. Y.) 108; *Kirby v. Harrison*, 2 Ohio St. 326, 59 Am. Dec. 677.

The True Consideration. — The court before granting the rescission or cancellation of a contract often considers whether the relief prayed would be attended with hardship or not, or whether a superior or inferior equity arises on the part of the applicant.

Reid v. Burns, 13 Ohio St. 49. Cited in *Bogie v. Bogie*, 41 Wis. 209.

2. *Venice v. Woodruff*, 62 N. Y. 462, 20 Am. Rep. 495, in which case the court cited *Hamilton v. Cummings*, 1 Johns. Ch. (N. Y.) 520.

Action by Vendor — Increase in Value of Land. — The court will exercise caution especially where a vendor seeks the cancellation of a deed to land and the land has risen rapidly in value since the execution of the deed. *White v. Johnson*, 4 Wash. 113.

3. *Kirby v. Harrison*, 2 Ohio St. 326, 59 Am. Dec. 677. See also *Beck v. Simmons*, 7 Ala. 71; *Watkins v. Collins*, 11 Ohio 31; *State v. Baum*, 6 Ohio 386; *Jackson v. Ashton*, 11 Pet. (U. S.) 229.

4. *Douglas County v. Walbridge*, 38 Wis. 179, in which case *Cole, J.*, said: "While we are to understand that the interference of a court of equity in these cases is a matter of mere discretion, this is not an arbitrary and capricious, but a sound and reasonable discretion, *secundum arbitrium boni judicis*." See also *Myrick v. Jacks*, 39 Ark. 293; *Shaeffer v. Sleade*, 7 Blackf. (Ind.) 178; *Reid v. Burns*, 13 Ohio St. 49; *Bogie v. Bogie*, 41 Wis. 209.

tracts and prescribing the grounds upon which rescission may be granted.¹

e. FOR FRAUD — (1) *In General.* — The jurisdiction of equity to direct the delivery and cancellation or rescission of agreements, securities, deeds, or other instruments, is an old head of equity jurisdiction and is founded upon the administration of a protective or preventive justice.²

1. Civ. Code Cal., §§ 1689, 3412; *Bradley v. Anglo-American Gas Control Co.*, 102 Cal. 627; *Barry v. St. Joseph's Hospital, etc.*, (Cal. 1897) 48 Pac. Rep. 68; *Schultz v. McLean*, (Cal. 1890) 25 Pac. Rep. 427; *Comp. Stat. Minn.*, c. 72, § 35.

Grounds Other than Those Prescribed. — Civil Code Cal., § 1689, provides the grounds upon which a contract may be rescinded, and it has been held that rescission can be had in those cases only which are mentioned in the statute. *Schultz v. McLean*, (Cal. 1890) 25 Pac. Rep. 427. See also *Barry v. St. Joseph's Hospital, etc.*, (Cal. 1897) 48 Pac. Rep. 68.

2. A discussion of the question what constitutes fraud, and a statement of the various kinds of fraud which will warrant relief in equity, not being within the scope of this work, no more has here been attempted than a mere outline of the bare rules as to the jurisdiction of equity, and reference is made for full treatment of the subject of fraud, and of the grounds upon which a court of equity will rescind or cancel contracts, to the American and English *Encyclopædia of Law*, titles *Fraud and Deceit*, vol. 14, p. 12; *Reformation and Cancellation of Contracts*. Among the best considered and most instructive of the multitudinous cases in which the doctrine stated in the text finds support are the following cases:

Alabama. — *Johnson v. Rogers*, 112 Ala. 576; *Joseph v. Decatur Land, etc.*, Co., 102 Ala. 346; *Baker v. Maxwell*, 99 Ala. 558; *Kyle v. Perdue*, 95 Ala. 579; *Howle v. North Birmingham Land Co.*, 95 Ala. 389; *Meeks v. Garner*, 93 Ala. 17; *Birmingham Warehouse, etc., Co. v. Elyton Land Co.*, 93 Ala. 549; *Joseph v. Seward*, 91 Ala. 597; *Bullock v. Tuttle*, 90 Ala. 435; *New Orleans, etc., Coal, etc., Co. v. Musgrove*, 90 Ala. 429; *Crown v. Cariger*, 66 Ala. 590; *Waddell v. Lanier*, 62 Ala. 347; *Thweatt v. McLeod*, 56 Ala. 375; *Bailey v. Litten*, 52 Ala. 282; *Foster v. Gressett*, 29 Ala. 393; *Lester*

v. Mahan, 25 Ala. 445, 60 Am. Dec. 530; *Calloway v. McElroy*, 3 Ala. 406; *Younge v. Harris*, 2 Ala. 111; *Weatherford v. James*, 2 Ala. 173.

Arkansas. — *Crabtree v. Bradbury*, (Ark. 1890) 13 S. W. Rep. 935; *Taylor v. Mississippi Mills*, 47 Ark. 247; *Gaty v. Holcomb*, 44 Ark. 216; *Myrick v. Jacks*, 39 Ark. 293; *Merritt v. Robinson*, 35 Ark. 483; *Strayhorn v. Giles*, 22 Ark. 517; *Brittin v. Crabtree*, 20 Ark. 309; *Yeates v. Pryor*, 11 Ark. 58. See also *Peay v. Wright*, 22 Ark. 198.

California. — *Newman v. Smith*, 77 Cal. 22; *Wainscott v. Occidental Bldg., etc., Assoc.*, 98 Cal. 253; *Hick v. Thomas*, 90 Cal. 289; *Lawrence v. Gayetty*, 78 Cal. 128; *Newman v. Smith*, 77 Cal. 22; *Hart v. Kinball*, 72 Cal. 283; *Duff v. Duff*, 71 Cal. 513; *Brown v. Burbank*, 64 Cal. 99; *Gorham v. Gilson*, 28 Cal. 479; *Alvarez v. Brannan*, 7 Cal. 503.

Colorado. — *Meldrum v. Meldrum*, 15 Colo. 478; *Sears v. Hicklin*, 13 Colo. 143; *Wilson v. Morris*, 4 Colo. App. 242; *Reddin v. Dunn*, 2 Colo. App. 518.

Connecticut. — *Henshaw v. Atkins*, 2 Root (Conn.) 7, wherein it was held that equity will relieve against notes and executions obtained by fraud, by granting a perpetual injunction; *Buxton v. Broadway*, 45 Conn. 540; *Bisell v. Beckwith*, 33 Conn. 357; *Lavette v. Sage*, 29 Conn. 577; *Ferguson v. Fisk*, 28 Conn. 501; *Story v. Norwich, etc., R. Co.*, 24 Conn. 94; *Sherwood v. Salmon*, 5 Day (Conn.) 439, 5 Am. Dec. 167. See also *Avery v. Chappel*, 6 Conn. 270.

Florida. — *Stackpole v. Hancock*, (Fla. 1898) 24 So. Rep. 914; *Stephens v. Orman*, 10 Fla. 9.

Georgia. — *Bell v. Weyman*, 99 Ga. 273; *Bowden v. Achor*, 95 Ga. 243; *Kent v. Davis*, 89 Ga. 151; *Carbine v. McCoy*, 85 Ga. 185; *New England Mortg. Security Co. v. Robson*, 79 Ga. 757; *Shewmake v. Williams*, 54 Ga. 206; *Dart v. Orme*, 41 Ga. 376; *Walker v. Hunter*, 27 Ga. 336; *Smith v. Mitch-*

Nature of Fraud for Which Relief Will Be Granted. — It has been declared that in order to authorize a court of equity to set aside a con-

ell, 6 Ga. 458; *Butler v. Durham*, 2 Ga. 413.

Illinois. — *Ehrler v. Braun*, 120 Ill. 503, 22 Ill. App. 391; *Stone v. Wood*, 85 Ill. 603; *Allen v. Hart*, 72 Ill. 104; *Moore v. Munn*, 69 Ill. 591; *Henshaw v. Bryant*, 5 Ill. 97.

Indiana. — *Givan v. Masterson*, 152 Ind. 127; *Union Cent. L. Ins. Co. v. Huyck*, 5 Ind. App. 474; *Tucker v. Roach*, 139 Ind. 275; *Robinson v. Reinhart*, 137 Ind. 674; *Catalani v. Catalani*, 124 Ind. 54.

Iowa. — *Berkshire v. Peterson*, 83 Iowa 197; *Norton v. Norton*, 74 Iowa 161; *Clough v. Adams*, 71 Iowa 17; *Wilcox v. Iowa Wesleyan University*, 32 Iowa 369; *Mitchell v. Moore*, 24 Iowa 394; *Relf v. Eberly*, 23 Iowa 467.

Kansas. — *Curtis v. Stilson*, 38 Kan. 302; *Macellan v. Seim*, 57 Kan. 471; *Paddock v. Pulsifer*, 43 Kan. 718; *Douthitt v. Applegate*, 33 Kan. 395; *McKee v. Eaton*, 26 Kan. 227; *Claggett v. Crall*, 12 Kan. 393. See also *Davis v. Hagler*, 40 Kan. 187; *Yeamans v. James*, 27 Kan. 195.

Kentucky. — *Breeding v. Flannery*, (Ky. 1890) 14 S. W. Rep. 907; *Moyers v. Evans*, (Ky. 1890) 12 S. W. Rep. 1063; *Hunter v. Owen*, (Ky. 1888) 9 S. W. Rep. 717; *Titus v. Rochester German Ins. Co.*, 97 Ky. 569; *Ruffner v. Ridley*, 81 Ky. 165; *Tibbs v. Timberlake*, 4 Litt. (Ky.) 12; *Carr v. Callaghan*, 3 Litt. (Ky.) 365; *Ashley v. Denton*, 1 Litt. (Ky.) 86; *Mershon v. Commonwealth Bank*, 6 J. J. Marsh. (Ky.) 438; *Gill v. Corbin*, 4 J. J. Marsh. (Ky.) 392; *Caldwell v. Caldwell*, 1 J. J. Marsh. (Ky.) 53; *Kennedy v. Johnson*, 2 Bibb (Ky.) 12; *Waters v. Mattingly*, 1 Bibb (Ky.) 244; *Taylor v. Porter*, 1 Dana (Ky.) 422.

Maine. — *Pratt v. Philbrook*, 33 Me. 17.

Maryland. — *Taymon v. Mitchell*, 1 Md. Ch. 496, in which case it was said that courts of law and equity have concurrent jurisdiction; *Berger v. Bullock*, 85 Md. 441; *McShane v. Hazlehurst*, 50 Md. 107; *Highberger v. Stiffer*, 21 Md. 338.

Massachusetts. — *Nathan v. Nathan*, 166 Mass. 294; *Chase v. Hubbard*, 153 Mass. 91; *Chatham Furnace Co. v. Mofatt*, 147 Mass. 403; *Thompson v. Heywood*, 129 Mass. 401; *Smith v. Everett*, 126 Mass. 304; *Fuller v. Percival*, 126

Mass. 381; *Litchfield v. Hutchinson*, 117 Mass. 195; *Montgomery v. Pickering*, 116 Mass. 227; *Franklin v. Greene*, 2 Allen (Mass.) 519.

Michigan. — *Knowlton v. Amy*, 47 Mich. 204.

Minnesota. — *Bullitt v. Farrar*, 42 Minn. 8.

Mississippi. — *Brown v. Norman*, 65 Miss. 369, 7 Am. St. Rep. 663; *English v. Benedict*, 25 Miss. 167.

Missouri. — *Freeland v. Eldridge*, 19 Mo. 325; *Damschroeder v. Thias*, 51 Mo. 100.

Montana. — *Muller v. Buyck*, 12 Mont. 354; *Maloy v. Berkin*, 11 Mont. 138.

Nebraska. — *Armstrong v. Helfrich*, 34 Neb. 358; *Stochl v. Caley*, 48 Neb. 786; *Hoock v. Bowman*, 42 Neb. 80; *Galloway v. Merchants Bank*, 42 Neb. 259; *McKnight v. Thompson*, 39 Neb. 752; *Kithcart v. Larimore*, 34 Neb. 273; *Wagner v. Lewis*, 38 Neb. 320; *Cressler v. Rees*, 27 Neb. 515; *Morgan v. Dinges*, 23 Neb. 271; *Hansen v. Berthelsen*, 19 Neb. 433; *Hartman v. Streitz*, 17 Neb. 557; *Kleeman v. Peltzer*, 17 Neb. 381; *Bartlett v. Bartlett*, 15 Neb. 593.

Nevada. — *Gruber v. Baker*, 20 Nev. 453.

New Jersey. — *Monmouth County Mut. F. Ins. Co. v. Hutchinson*, 21 N. J. Eq. 107.

New Mexico. — *Perea v. Barela*, 6 N. Mex. 239.

New York. — *Durell v. Haley*, 1 Paige (N. Y.) 492, in which case equity ordered the restoration of goods to the complainant upon the ground of fraud; *Woodruff v. Bunce*, 9 Paige (N. Y.) 444; *Livingston v. Peru Iron Co.*, 2 Paige (N. Y.) 391; *Thompson v. Graham*, 1 Paige (N. Y.) 384; *Bosley v. National Mach. Co.*, 123 N. Y. 550, 15 Daly (N. Y.) 267; *Bennett v. Judson*, 21 N. Y. 238; *Higgins v. Crouse*, 63 Hun (N. Y.) 134; *Ranney v. Warren*, 13 Hun (N. Y.) 11; *Globe Mut. L. Ins. Co. v. Reals*, (Supm. Ct. Spec. T.) 48 How. Pr. (N. Y.) 502, 50 How. Pr. (N. Y.) 237; *Seymour v. Delancey*, 6 Johns. Ch. (N. Y.) 222; *St. John v. Benedict*, 6 Johns. Ch. (N. Y.) 111; *Arden v. Patterson*, 5 Johns. Ch. (N. Y.) 44; *Chesterman v. Gardner*, 5 Johns. Ch. (N. Y.) 29; *Hamilton v. Cummings*, 1 Johns. Ch. (N. Y.) 517; *Cohen v. Ellis*, (Supm. Ct. Spec. T.) 16

tract for fraud, such a case must be made out as would authorize

Abb. N. Cas. (N. Y.) 320; *Wright v. Deniston*, (C. Pl. Gen. T.) 9 Misc. (N. Y.) 79; *Denison v. Morris*, 2 Edw. (N. Y.) 42. See also *Gillespie v. Moon*, 2 Johns. Ch. (N. Y.) 585.

North Carolina.—*McAlister v. Barry*, 2 Hayw. (N. Car.) 290; *Benzein v. Lenoir*, 1 Dev. Eq. (N. Car.) 225.

Ohio.—*Reid v. Burns*, 13 Ohio St. 49, wherein it was said that "the rescission, cancellation, or delivery up of agreements, securities, or deeds is said to be one of the heads of equity jurisdiction indispensable to reciprocal justice;" *Yeoman v. Lasley*, 40 Ohio St. 190; *Mulvey v. King*, 39 Ohio St. 491; *Parmlee v. Adolph*, 28 Ohio St. 10; *Riddle v. Roll*, 24 Ohio St. 572; *Tracey v. Sacket*, 1 Ohio St. 54.

Oklahoma.—*Day v. Mooney*, 3 Okla. 608, in which case it was declared that fraud vitiates all contracts and that a court of equity has power to relieve from fraudulent contracts although the party might be able to recover damages; *Ellison v. Beannabia*, 4 Okla. 347.

Oregon.—*Shute v. Johnson*, 25 Oregon 59; *Archer v. California Lumber Co.*, 24 Oregon 341; *Finlayson v. Finlayson*, 17 Oregon 347; *Baldock v. Johnson*, 14 Oregon 542.

Pennsylvania.—*Hexter v. Bast*, 125 Pa. St. 52.

South Dakota.—*Taylor v. National Bank*, 6 S. Dak. 511.

Tennessee.—*Barnard v. Roane Iron Co.*, 85 Tenn. 139.

Texas.—*Moore v. Cross*, (Tex. Civ. App. 1894) 26 S. W. Rep. 122; *Garvin v. Hall*, 83 Tex. 301; *Dawson v. Sparks*, 1 Tex. Unrep. Cas. 735.

Utah.—*De Frees v. Carr*, 8 Utah 488, wherein it was said that "where one party to a contract misrepresents a material fact, which operates as a surprise and an inducement to the other party, relief will be granted in equity;" *Adams v. Reed*, 11 Utah 480; *Rasmussen v. McKnight*, 3 Utah 315.

Vermont.—*Glastenbury v. McDonald*, 44 Vt. 450.

Virginia.—*Brown v. Rice*, 26 Gratt. (Va.) 467; *Johnson v. Hendley*, 5 Munf. (Va.) 219.

Washington.—*White v. Johnson*, 4 Wash. 113; *Jackson v. Tatebo*, 3 Wash. 456; *Kennedy v. Currie*, 3 Wash. 442. See also *Drown v. Ingels*, 3 Wash. 424.

Wisconsin.—*Weirich v. Dodge*, 101

Wis. 621; *Swihart v. Harless*, 93 Wis. 211; *Dean v. Brooks*, 88 Wis. 667; *Porter v. Beattie*, 88 Wis. 22; *Paetz v. Stoppelman*, 75 Wis. 510; *Wells v. McGeoch*, 71 Wis. 196; *Salter v. Krueger*, 65 Wis. 217; *Cotzhausen v. Simon*, 47 Wis. 106; *Bogie v. Bogie*, 41 Wis. 209; *Grant v. Law*, 29 Wis. 99; *Burhop v. Milwaukee*, 18 Wis. 431; *Waldo v. Chicago, etc., R. Co.*, 14 Wis. 575. See also *Kyle v. Fehley*, 81 Wis. 67.

United States.—*Schroeder v. Young*, 161 U. S. 334; *Patton v. Glatz*, 56 Fed. Rep. 367; *Herrick v. Throop*, 24 Fed. Rep. 532; *Sharon v. Hill*, 20 Fed. Rep. 1; *Smith v. Richards*, 13 Pet. (U. S.) 26; *Finlay v. King*, 3 Pet. (U. S.) 382; *Boyce v. Grundy*, 3 Pet. (U. S.) 210. See also *Hepburn v. Dunlop*, 1 Wheat. (U. S.) 179.

England.—*Derry v. Peek*, 14 App. Cas. 337; *Arkwright v. Newbold*, 17 Ch. D. 320; *Traill v. Baring*, 4 De G. J. & S. 318; *Ship v. Crosskill*, L. R. 10 Eq. 73; *Dunnage v. White*, 1 Swanst. 137; *Chesterfield v. Janssen*, 2 Ves. 125; *Lysney v. Selby*, 2 Ld. Raym. 1118; *Goring v. Nash*, 3 Atk. 188; *Buckle v. Mitchell*, 18 Ves. Jr. 111; *Revell v. Hussey*, 2 Ball & B. 288; *Mortlock v. Buller*, 10 Ves. Jr. 294; *Gainsborough v. Gifford*, 2 P. Wms. 425; *Bath v. Sherwin*, 10 Mod. 1; 1 Bro. P. C. 266; *London v. Nash*, 1 Ves. 13; *Whittingham v. Thornburgh*, 2 Vern. 206; *Underwood v. Hitchcox*, 1 Ves. 279; *Clowes v. Higginson*, 1 Ves. & B. 527; *Newman v. Milner*, 2 Ves. Jr. 483; *Bromley v. Holland*, 7 Ves. Jr. 3; *Ryan v. Mackmath*, 3 Bro. C. C. 18, note a; *French v. Connelly*, 2 Anstr. 454; *Harford v. Purrier*, 1 Madd. 532; *Law v. Law*, 3 P. Wms. 391; *De Costa v. Scandret*, 2 P. Wms. 170.

Inherent Power.—The jurisdiction of equity to rescind and cancel contracts obtained by fraud is inherent and does not depend upon statute. *Jackson v. Tatebo*, 3 Wash. 456. See also the cases cited in the foregoing paragraphs of this note.

The jurisdiction to cancel written instruments procured by fraud "is exercised for the purpose of affording relief against invalid executory contracts in the possession of another, where the invalidity is not apparent on the instrument itself, and where the defense may be nullified by intentional delay to sue until the evidence in support of it is lost." *Per* Colt, J., in *Fuller v.*

a jury to convict the defendant of obtaining property under false pretenses.¹

Suppression of Truth. — It is well settled that a suppression of truth, or suggestion of what is not true, in some material point, will be ground for setting aside any contract.²

Forged Instruments. — It seems to be well settled that equity will decree the cancellation of a written contract where the plaintiff's signature thereto has been procured by fraud.³

Fraud in Obtaining Possession. — Equity has jurisdiction to cancel a deed, or to decree that it shall be delivered up to the maker where the deed has been executed in escrow, or has not been delivered, and the grantee fraudulently obtains possession of it and records it.⁴

False Representation of Value. — Where there is no relation of trust or confidence existing between the parties, a mere false representation of value by a vendor, where no warranty is intended, is no ground of relief to the purchaser; but where representations of value are intended to be a statement of a fact, to be understood and relied upon as such, and the value of the property is not ascertainable by ordinary inspection, relief will be granted to a purchaser who has been injured thereby.⁵

False Representations as to Solvency. — Where a person who knows himself to be insolvent, by means of fraudulent pretenses or representations obtains possession of goods, under a pretense of purchase, and with the intention not to pay for them, and the design to cheat the vendor out of them, a court of chancery will

Percival, 126 Mass. 381, *citing* Adams Eq. 174; Commercial Mut. Ins. Co. v. McLoon, 14 Allen (Mass.) 351; Martin v. Graves, 5 Allen (Mass.) 601; Hamilton v. Cummings, 1 Johns. Ch. (N. Y.) 517, and Peirsoll v. Elliott, 6 Pet. (U. S.) 95.

1. Henshaw v. Bryant, 5 Ill. 97, in which case the court *cited* Lloyd v. Brewster, 4 Paige (N. Y.) 541.

2. Stephens v. Orman, 10 Fla. 9.

3. Shattuck v. Watson, 53 Ark. 147; Patterson v. Smith, 4 Dana (Ky.) 153; Singery v. Atty.-Gen., 2 Har. & J. (Md.) 487.

In Massachusetts an owner of land cannot maintain a bill in equity to set aside a forged deed as he has an adequate remedy by writ of entry. Boardman v. Jackson, 119 Mass. 161. See also White v. Thayer, 121 Mass. 226.

4. Rising v. Gibbs, (Cal. 1892) 30 Pac. Rep. 589; Klose v. Hillenbrand, 88 Cal. 473; Paxton v. Danforth, 1 Wash. 120.

Action Against Depositary. — In Connecticut it has been held that where a

deed is deposited in escrow and delivered by the depositary in violation of his trust, no relief is obtainable in equity against the depositary. Coe v. Turner, 5 Conn. 86, in which case the court said: "The deed * * * has never been so delivered as to give it any validity; and by legal consequence, the title to the land, for the imagined loss of which the complainants brought their bill, and the court rendered judgment, has never passed from them. They have sustained neither loss nor damage, and may enter on the land in question, or obtain possession by an ejectment, whenever they please."

5. Shute v. Johnson, 25 Oregon 59, in which case the court *cited* 2 Kent's Com. 485; Homer v. Perkins, 124 Mass. 433; Medbury v. Watson, 6 Met. (Mass.) 259; Hubbell v. Meigs, 50 N. Y. 480; Van Epps v. Harrison, 5 Hill (N. Y.) 70, and Rockafellow v. Baker, 41 Pa. St. 321. See also Am. and Eng. Encyc. of Law, titles *Fraud and Deceit*, vol. 14, p. 12; *Reformation and Cancellation of Contracts*.

set aside the sale, and order a return of the goods, if they have not passed into the hands of a *bona fide* purchaser; or the vendor may bring replevin or trover for them.¹

Fraudulent Misuse of Instrument. — There is some conflict in the authorities upon the question, but it would seem that the better opinion is that a court of equity will interfere to prevent the fraudulent use of a paper for a purpose not contemplated at the time it was made, even though there was no mistake or fraud in its execution.²

Confederation to Perpetrate Fraud. — The fact that a wrong complained of is the result of confederacy and combination, will not, in all cases and alone, give jurisdiction to a court of equity. There must be something special in a case of confederacy, to make it a reliable ground of equity jurisdiction. But where several individuals have confederated together to perpetrate a fraud, and a court of chancery, by the exercise of its ordinary functions, can protect a party from the consummation of the fraudulent design, a clear case is presented for equitable relief.³

Cancellation of Deed Given under Judgment of Court. — Relief against

1. *Henshaw v. Bryant*, 5 Ill. 97, in which case the court cited *Rowley v. Bigelow*, 12 Pick. (Mass.) 312; *Van Cleef v. Fleet*, 15 Johns. (N. Y.) 147; *Allison v. Matthieu*, 3 Johns. (N. Y.) 235; *Lloyd v. Brewster*, 4 Paige (N. Y.) 541; *Lupin v. Marie*, 2 Paige (N. Y.) 172; *Durell v. Haley*, 1 Paige (N. Y.) 492, and *Parker v. Patrick*, 5 T. R. 175. See also *Johnson v. O'Donnell*, 75 Ga. 453, in which case the court cited *Carter v. Lipsey*, 70 Ga. 417; *Crine v. Davis*, 68 Ga. 138; *Cohen v. Meyers*, 42 Ga. 46; *Stevens v. Brennan*, 79 N. Y. 255; *Devoe v. Brandt*, 53 N. Y. 462; *Ash v. Putnam*, 1 Hill (N. Y.) 302; *Donaldson v. Farwell*, 93 U. S. 633, and *Load v. Green*, 15 M. & W. 216.

2. *Murray v. Dake*, 46 Cal. 644, in which case the court cited *Coger v. M'Gee*, 2 Bibb (Ky.) 321; *Parke v. Chadwick*, 8 W. & S. (Pa.) 96; *Renshaw v. Gans*, 7 Pa. St. 117, and *Taylor v. Gilman*, 25 Vt. 412.

Fraudulent Representation as to Title. — It is well settled that where there is fraud in respect to the defendant's representations of title to the property conveyed by him, equity will rescind the contract. *Yeates v. Pryor*, 11 Ark. 58, in which case the court cited *Camp v. Camp*, 2 Ala. 634; *Weatherford v. James*, 2 Ala. 173; *Younge v. Harris*, 2 Ala. 111; *Kennedy v. Johnson*, 2 Bibb (Ky.) 12; *Gill v. Corbin*, 4 J. J. Marsh. (Ky.) 392; *Taylor v. Porter*, 1 Dana (Ky.)

422; *Woodruff v. Bunce*, 9 Paige (N. Y.) 444; *Livingston v. Peru Iron Co.*, 2 Paige (N. Y.) 390; *Chesterman v. Gardner*, 5 Johns. Ch. (N. Y.) 29, and *Denston v. Morris*, 2 Edw. (N. Y.) 42.

Plaintiff Not Divested of Possession. — Where there has been a fraudulent representation as to the defendant's title, equity will rescind the contract although the plaintiff has not been divested of possession. *Yeates v. Pryor*, 11 Ark. 58, in which case the court cited *Younge v. Harris*, 2 Ala. 110.

Defect of Title. — In *Peay v. Wright*, 22 Ark. 198, it was said: "If the misrepresentation had been by the vendor, as a general rule, a court of chancery will not rescind a contract after conveyance on account of mere defect of title, but will leave the purchaser to his remedy upon the covenants." Citing *Woodruff v. Bunce*, 9 Paige (N. Y.) 443.

Fraud of Husband upon Wife. — A wife who was fraudulently induced by her husband to join him in a deed to a third person cannot maintain an action against her husband and the grantee for the rescission of the deed. *Hill v. Lewis*, 45 Kan. 162, in which case, however, it was held that the wife may maintain an action for the rescission of a deed procured by the duress of her husband.

3. *Per Storrs, J.*, in *Story v. Norwich*, etc., R. Co., 24 Conn. 94.

fraud or mistake may be afforded as well in the procurement and execution of deeds under the judgment of a court as in a private transaction.¹

Where Plaintiff Has No Title. — It has been held that it is no answer to a suit to rescind a deed procured from the plaintiff by fraud, that the plaintiff had no title and conveyed nothing, because if the plaintiff were ever to obtain title to the land described in the deed, it would inure to the benefit of the defendant or his grantees.²

Void Instruments. — There is a strong line of authority from courts of the highest respectability supporting the view that equity has jurisdiction to decree the cancellation of a deed, bond, note, or other obligation, whether the instrument is or is not void at law, or whether it is void for matter appearing on its face or *aliunde*,³ but it would seem that according to the weight of authority equity has no jurisdiction to rescind or cancel an instrument which is void on its face.⁴

Defective Deed. — A suit in equity will lie to cancel a deed procured from the plaintiff by fraud, although because of the defective description therein it conveys nothing, since the defendant is

1. *Clemons v. Holtheide*, (Ky. 1888) 8 S. W. Rep. 697.

Jurisdiction to Set Aside Compromise Verdict. — In *Titus v. Rochester German Ins. Co.*, 97 Ky. 567, it was held that equity has jurisdiction to set aside a compromise verdict procured by the defendant through false and fraudulent misrepresentations as to the validity of the plaintiff's claim under a policy of insurance.

2. *Jackson v. Tatebo*, 3 Wash. 456, in which case it was declared that another reason why the grantor is entitled to such relief is, that he has a right to relief from his warranty, if nothing more.

3. *Butler v. Durham*, 2 Ga. 413; *Hays v. Hays*, 2 Ind. 28; *Hamilton v. Cummings*, 1 Johns. Ch. (N. Y.) 521; *Jones v. Perry*, 10 Yerg. (Tenn.) 59; *Johnson v. Cooper*, 2 Yerg. (Tenn.) 525.

4. *Shattuck v. Watson*, 53 Ark. 147, in which case the contract was one to compound a felony; *Oakland v. Carpenter*, 21 Cal. 642; *O'Connell v. Noonan*, 1 App. Cas. (D. C.) 332; *Compton v. Bunker Hill Bank*, 96 Ill. 301; *Briggs v. Johnson*, 71 Me. 235; *Atwood v. Fisk*, 101 Mass. 363; *Field v. Holbrook*, (N. Y. Super. Ct. Gen. T.) 14 How. Pr. (N. Y.) 103; *Peirsoll v. Elliott*, 6 Pet. (U. S.) 95; *Elliott v. Peirsoll*, 1 McLean (U. S.) 11; *Grand Chute v. Winegar*, 15 Wall. (U. S.) 373.

Contract Void under Statute. — In *S. L. Sheldon Co. v. Mayers*, 81 Wis. 627, the plaintiff claimed title in replevin under a contract which was void under Rev. Stat. Wis., § 2317, because it was a contract for the sale of personal property, by the terms of which the title was to remain in the seller and the possession in the buyer until the purchase price was paid, and it was signed by the buyer only; the court said: "Inasmuch as the invalidity of the plaintiff's claim of title appears upon the face of the conditional contracts upon which it founds it, the contracts not having been signed by both parties, a court of equity will not, upon original complaint or counterclaim, interfere to set it aside or enjoin the assertion of it. * * * The plaintiff's demurrer to the counterclaim was therefore well taken, and should have been sustained." *Citing Cornish v. Frees*, 74 Wis. 495; *Ferson v. Drew*, 19 Wis. 225; and *Meloy v. Dougherty*, 16 Wis. 269.

In the United States Courts the jurisdiction to cancel an instrument which is void has been sparingly exercised, and some circumstances must appear calling strongly for equitable interposition. *Louisville, etc., R. Co. v. Ohio Valley Imp., etc., Co.*, 57 Fed. Rep. 42, *Citing Grand Chute v. Winegar*, 15 Wall. (U. S.) 373.

entitled to go into equity and have it reformed.¹

(2) *Materiality of Misrepresentations.* — A misrepresentation to be ground for rescission must be in reference to some material thing unknown to the plaintiff, either from his not having examined, or for want of opportunity to be informed, or from his entire confidence reposed in the defendant.²

Knowledge of Falsity of Representations. — The rule is well settled that material representations which are untrue, though innocently made, or concealments of material facts by mistake or inadvertence, when such representations or concealments have been relied on and have become the foundation of the active relations between the parties, operate as a "surprise and imposition," and constitute such fraud as will move a court of equity to decree a rescission of an executory contract.³ A court of equity will not undertake, any more than a court of law, to relieve a party from the consequences of his own inattention and carelessness.⁴

1. *Jackson v. Tatebo*, 3 Wash. 456, in which case it was declared that another reason why the grantor is entitled to such relief is, that he has a right to relief from his warranty, if nothing more.

2. *Larimer County Land Imp. Co. v. Cowan*, 5 Colo. 320; *Stephens v. Orman*, 10 Fla. 9; *Ayres v. Mitchell*, 3 Smed. & M. (Miss.) 683; *Hall v. Thompson*, 1 Smed. & M. (Miss.) 443.

Rescission Must Be Beneficial to Plaintiff. — The rescission of a contract will not be decreed unless it will be beneficial to the plaintiff. *Huff v. Jennings*, 1 Morr. (Iowa) 454.

Inadequacy of Remedy at Law. — Where the plaintiff charges fraud and imposition and prays the cancellation of a title bond given by him, an objection that the action is in reality simply an action in ejectment for the recovery of land and that therefore the action is not cognizable in a court of equity is not tenable. *Turner v. Newman*, (Ky. 1897) 39 S. W. Rep. 504.

3. *Per King, J.*, in *Adams v. Reed*, 11 Utah 480; *Taymon v. Mitchell*, 1 Md. Ch. 496, which was an action to cancel a sale of chattels. The court said: "The principle appears to be, that in a case of misrepresentation of fact, though inadvertently made, by mutual mistake of parties, or by mistake of either one of them, if the other has been prejudiced thereby, a court of equity will set it aside and declare it a nullity." *Citing Evans v. Bicknell*, 6 Ves. Jr. 174; *Burrowes v. Lock*, 10

Ves. Jr. 470; and *Bacon v. Bronson*, 7 Johns. Ch. (N. Y.) 201. See also *Wood v. Stedwell*, 91 Iowa 224; *Smith v. Bricker*, 86 Iowa 285; *Hood v. Smith*, 79 Iowa 621; *Mohler v. Carder*, 73 Iowa 582; *De Frees v. Carr*, 8 Utah 488.

Refusal to Relinquish upon Offer of Plaintiff. — In *Prewitt v. Trimble*, 92 Ky. 176, it was said: "It is a settled rule, that even when one who brings about a contract by misrepresentation commits no fraud, because his representation was, when made, innocent in the ordinary sense, still, if when the fact of its falsity becomes known he refuses to relinquish the advantage, upon offer of reciprocal relinquishment received by the injured party, it would make him guilty of constructive fraud, and the contract subject to rescission by a court of equity."

4. *Hunt v. Hardwick*, 68 Ga. 100, wherein it was declared that a party complaining of mistake or fraud must show that he exercised at least that degree of diligence which may be fairly expected from a reasonable person and that the mistake or fraud did not arise from his own negligence or blind and unsuspecting confidence; *Fuller v. Buice*, 80 Ga. 395; *Short v. Pierce*, 11 Utah 29; *Slaughter v. Gerson*, 13 Wall. (U. S.) 379.

Conveyance in Fraud of Creditors. — A conveyance made, or procured to be made, to defraud creditors, will not be set aside at the instance of the parties to it, or the one procuring it, but equity leaves the parties to their remedy at

Application of Rule Caveat Emptor. — Where, in an action for rescission, it appears that the plaintiff had the present means of knowing that the representations, upon which he claims to have relied, were false, the doctrine *caveat emptor* will be applied, and no relief will be granted.¹

(3) *Restoration or Re-establishment of Contracts.* — Where the plaintiff is by fraud induced to release or destroy a contract a court of equity has jurisdiction to set aside the release or restore the contract, as the exigencies of the particular case may require.²

f. FOR MISTAKE — (1) *In General.* — When the plaintiff alleges a mistake as a ground for relief there is a plain distinction between reforming a writing and canceling it. Under some circumstances equity will cancel a contract because of a mistake of both or one of the parties. Thus, while a court of equity will not reform a written contract upon the ground of mistake unless the mistake is shown to be common to both parties, yet it may exercise its powers to grant relief in a proper case by rescinding and canceling the writing upon the ground of a mistake of facts material to the contract by one party only.³

law, and will not interfere in favor of either. *Holliday v. Holliday*, 10 Iowa 200. See also Am. and Eng. Encyc. of Law, title *Fraudulent Conveyances*.

1. *Mamlock v. Fairbanks*, 46 Wis. 415.

2. *Richards v. Fridley, Wright* (Ohio) 167.

Revival of Mortgage. — Equity has jurisdiction to set aside a release of a mortgage when the release has been obtained by fraud, and reinstate the mortgage not only as against the mortgagor, but as against a purchaser with notice of the mortgage and of the circumstances under which the release was obtained. *Ellis v. Lindley*, 37 Iowa 334. See also *Loomis v. Hudson*, 18 Iowa 416; *Vannice v. Bergen*, 16 Iowa 555; *Welton v. Tizzard*, 15 Iowa 495.

3. *Werner v. Rawson*, 89 Ga. 619. See also *Adams's Eq.* 171, wherein it is said: "A mistake on one side may be a ground for rescinding a contract, or for refusing to enforce its specific performance; but it cannot be a ground for altering its terms." See further the following cases:

Arkansas. — *Griffith v. Sebastian County*, 49 Ark. 24, in which case the mistake was such as to exclude real consent and the minds of the parties never met; *State v. Paup*, 13 Ark. 129, 56 Am. Dec. 306.

California. — *Goodrich v. Lathrop*, 94 Cal. 56, in which case it was alleged

that the plaintiff, knowing that the defendant had a certain lot for sale, went to examine the same with a view to purchasing it, but by mistake looked at a different lot from the one which the defendant had for sale and purchased a lot other than the one which he thought he was buying. *Citing Barfield v. Price*, 40 Cal. 535; *Hearst v. Pujol*, 44 Cal. 230.

Colorado. — *Wilson v. Morris*, 4 Colo. App. 242.

Connecticut. — In *Segur v. Tingley*, 11 Conn. 134, *Williams, C. J.*, said: "An agreement may be set aside, by reason of a mistake of the parties making it, if the point misconceived be the cause of the agreement; or perhaps if it had an important influence upon it."

Georgia. — *Carbine v. McCoy*, 85 Ga. 185; *Geiken v. Graef*, 77 Ga. 340.

Indiana. — *Citizens' Nat. Bank v. Judy*, 146 Ind. 322.

Iowa. — *Clapp v. Greenlee*, 100 Iowa 586, holding that a contract for the sale of land may be rescinded where there has been a mistake as to the subject-matter; *Swezey v. Collins*, 36 Iowa 589, in which case the mistake consisted of a false representation made by one of the parties without knowledge that it was false; *Hood v. Smith*, 79 Iowa 621; *Smith v. Bricker*, 86 Iowa 285; *Montgomery County v. American Emigrant Co.*, 47 Iowa 91; *Gilroy v. Alis*, 22 Iowa 174.

Setting Aside Release of Mortgage. — Where a mortgage is released in ignorance of the existence of an intervening lien, the mistake is deemed in equity such a mistake of fact as to entitle the party to relief, although such lien may have been of record.¹

(2) *Mistake of Law.* — Ordinarily a court of equity will not grant relief against mistakes of law, but where the mistake is

Kentucky. — In *Fitzgerald v. Peck*, 4 Litt. (Ky.) 127, Peck, under a misapprehension as to the amount of his legal liability, executed his notes for more than he was in law bound to pay, and the court granted relief, saying: "If Peck then can be relieved upon any ground, it must be that which the court below has assumed, that is, the ground of a mistake as to what he was really bound to pay."

Maine. — In *Pratt v. Philbrook*, 33 Me. 17, it was said: "A bargain founded in a mutual mistake of the real facts, constituting the very basis or essence of the contract, or founded upon misrepresentations of the seller, material to the bargain, and constituting the essence of it, will avoid it."

New York. — *Crowe v. Lewin*, 95 N. Y. 426; *Knapp v. Fowler*, 30 Hun (N. Y.) 513.

Ohio. — *Irwin v. Wilson*, 45 Ohio St. 426; *Mulvey v. King*, 39 Ohio St. 491.

Rhode Island. — *Lawrence v. Staigg*, 8 R. I. 256.

Virginia. — *Irick v. Fulton*, 3 Gratt. (Va.) 184.

United States. — *Rhode Island v. Massachusetts*, 13 Pet. (U. S.) 23; *Hepburn v. Dunlop*, 1 Wheat. (U. S.) 179; *Daniel v. Mitchell*, 1 Story (U. S.) 172.

England. — In *Hitchcock v. Giddings*, 4 Price 135, the court of exchequer decided that where a vendor, through ignorance and mistake, agreed to sell property in which he had no interest at the time of the sale, the contract should be rescinded. *Cited with approval* in *State v. Paup*, 13 Ark. 129, 56 Am. Dec. 306. See also *Calverley v. Williams*, 1 Ves. Jr. 210; *Price v. Ley*, 32 L. J. Ch. 530; *Fowler v. Scottish Equitable L. Ins. Soc.*, 28 L. J. Ch. 225.

California Statute. — Civil Code Cal., § 3407, provides that rescission cannot be adjudged for mere mistake, unless the party against whom it is adjudged can be restored to substantially the same position as if the contract had not been made. *Goodrich v. Lathrop*, 94

Cal. 56, in which case the court said: "The words 'same position,' found in the section, are used with reference to the subject-matter of the contract, and the fact that the market value of the property may have depreciated while out of the possession of the vendor does not defeat the vendee's right of rescission." See also *Cleghorn v. Zumwalt*, 83 Cal. 155.

Use of Too Extensive Language by Grantor. — Where by mistake the grantor has used too extensive language, the court does not rescind the contract or deed, but merely reforms it. *Goode v. Riley*, 153 Mass. 585.

1. *Pearce v. Buell*, 22 Oregon 29, in which case it was said: "No rule of law is better settled than if a holder of a mortgage take a new mortgage as a substitute for a former one, and cancel and release the latter in ignorance of the existence of an intervening lien upon the mortgaged premises, although such lien be of record, equity will, in the absence of the intervening rights of third parties, restore the lien of the first mortgage and give it its original priority." *Citing* *Bruse v. Nelson*, 35 Iowa 157; *Vannice v. Bergen*, 16 Iowa 555, 85 Am. Dec. 531; *Gobb v. Dyer*, 69 Me. 494; *Robinson v. Sampson*, 23 Me. 388; *Corey v. Alderman*, 46 Mich. 540; *Geib v. Reynolds*, 35 Minn. 331; *Cansler v. Sallis*, 54 Miss. 446; and *Downer v. Miller*, 15 Wis. 612. See also *Bruse v. Nelson*, 35 Iowa 157.

Mistake Made in Assignment of Mortgage. — Where a mortgagor, upon assigning a mortgage by a mistake, entered a satisfaction of the mortgage upon the record, equity, at the suit of the assignee against the mortgagor, will set aside the satisfaction of the mortgage and foreclose the same. *Russell v. Mixer*, 42 Cal. 475.

Mistake at Judicial Sale. — Equity has jurisdiction to grant relief against mistake where it has occurred at a judicial sale. *Miller v. Craig*, 83 Ky. 623, *citing* *Dawson v. Goodwin*, 15 B. Mon. (Ky.) 439, and *Cosby v. Wickliffe*, 12 B. Mon. (Ky.) 202.

gross and palpable, and such as would warrant the belief that undue advantage was taken of the party, owing either to his imbecility of mind, or the exercise of some improper influence exerted over him by the party with whom he dealt, a court of equity will interfere.¹

g. FOR DURESS AND UNDUE INFLUENCE — **Duress.** — It is well settled that a court of equity has jurisdiction to set aside a contract which has been procured by duress.²

Undue Influence. — One of the grounds most frequently urged for setting aside a contract is that it was obtained by undue influence, and it has been uniformly held that a court of equity has jurisdiction to rescind or cancel a contract which has been extorted from the plaintiff by undue influence.³

1. *Dill v. Shahan*, 25 Ala. 694, 60 Am. Dec. 540, in which case the court cited *Bingham v. Bingham*, 1 Ves. 126; *Lansdown v. Lansdown*, Mosely 364; and *Haden v. Ware*, 15 Ala. 149. See also, in support of the proposition that equity ordinarily will not grant relief against mistakes merely of law, *Kyes v. Merrill Furniture Co.*, 92 Wis. 32; and see further Am. and Eng. Encyc. of Law, titles *Mistake*; *Reformation and Cancellation of Contracts*.

Mistake as to Foreign Law. — A mistake as to foreign law is considered a mistake of fact rather than a mistake of law. *Winslow, J.*, in *Daly v. Brennan*, 87 Wis. 36.

2. *Adams v. Schiffer*, 11 Colo. 15, in which case a settlement was made under duress of property; *Muller v. Buyck*, 12 Mont. 354. See also *Moore v. Moore*, 56 Cal. 89; *Kellogg v. Kellogg*, 21 Colo. 181; *Turner v. Turner*, 44 Mo. 535; *Yard v. Yard*, 27 N. J. Eq. 114; *Taylor v. Taylor*, 8 How. (U. S.) 183; *Finlayson v. Finlayson*, 17 Oregon 347; *Anthony v. Hutchins*, 10 R. I. 165.

3. *Yount v. Yount*, 144 Ind. 133, in which case the court cited 27 Am. and Eng. Encyc. of Law (1st ed.), pp. 453-459, and pp. 461-489. Among other well-considered cases in which the doctrine stated in the text has been announced are the following:

California. — *Klose v. Hillenbrand*, 88 Cal. 473, in which case the grantor in a deed, while dangerously sick and suffering from weakness of mind, was unduly influenced to execute the instrument. See also *Pedrorena v. Hotchkiss*, 95 Cal. 636.

Colorado. — *Meldrum v. Meldrum*, 15 Colo. 478, in which case the court cited

Haydock v. Haydock, 34 N. J. Eq. 570. See also *Sears v. Hicklin*, 13 Colo. 143. *Georgia.* — *Walker v. Hunter*, 27 Ga. 336.

Indiana. — *Tucker v. Roach*, 139 Ind. 275, in which case there were undue influence and fraud. See also *Thompson v. Thompson*, 132 Ind. 288; *McCormick v. Malin*, 5 Blackf. (Ind.) 509.

Kansas. — *Jeffers v. Forbes*, 28 Kan. 174, in which case it was declared that a conveyance extorted by undue influence by a party in a dependent position will always be set aside on an application to a court of equity. See also *Paddock v. Pulsifer*, 43 Kan. 718.

Maryland. — *Highberger v. Stiffler*, 21 Md. 338, which was a case of undue influence by a son upon his parent. *Wilson v. Watts*, 9 Md. 356.

Nebraska. — *Fitzgerald v. Fitzgerald*, etc., *Constr. Co.*, 44 Neb. 463.

New Jersey. — *Haydock v. Haydock*, 34 N. J. Eq. 570, in which case gifts made by a husband while sick to his wife were set aside at the suit of the executors of the husband after his death because of the undue influence exercised by the wife over the husband in procuring the gifts. Cited with approval in *Meldrum v. Meldrum*, 15 Colo. 478.

New York. — *Adams v. Irving Nat. Bank*, 116 N. Y. 606.

Ohio. — *Truman v. Lore*, 14 Ohio St. 144, holding that a deed of gift may be avoided on the ground of undue influence. *Tracey v. Sackett*, 1 Ohio St. 54, which was a case of undue influence upon a person of weak understanding.

Washington. — In *Kennedy v. Currie*, 3 Wash. 442, the court said: "If deeds are obtained by the exercise of undue influence over a man whose

Where There Is a Confidential Relation existing between the parties involving trust and good faith, if one party takes advantage of the confidential relations to impose upon another, and by imposition, deception, or undue influence does an injury to the other, a court of equity will lend its aid to remedy the wrong done.¹

What Constitutes Undue Influence.—No general rule can be laid down as to what constitutes undue influence. The question must depend upon the circumstances of each particular case.²

The Principle on Which a Court of Equity Acts in relieving against transactions on the ground of inequality of footing between the parties is not confined to cases where a fiduciary relation is shown to exist, but extends to all the varieties of relations in which dominion may be exercised by one over another, and

mind has ceased to be the safeguard of his actions, it is against conscience for him who has obtained them to derive any advantage from them. It is the peculiar province of a court of conscience to set them aside. That a court of equity will interfere in such a case is among its best settled principles." *Citing* *Harding v. Handy*, 11 Wheat. (U. S.) 103. See also *Drown v. Ingels*, 3 Wash. 424; *White v. Johnson*, 4 Wash. 113, in which latter case the deed was procured by undue influence and without sufficient consideration, and the transaction was tainted with fraud.

United States.—*Harding v. Wheaton*, 2 Mason (U. S.) 378; *Harding v. Handy*, 11 Wheat. (U. S.) 103, in which case there were both undue influence and mental incapacity.

England.—*Anderson v. Elsworth*, 3 Giff. 154; *Curson v. Belworthy*, 3 H. L. Cas. 742, which cases were cited with approval in *Nichols v. McCarthy*, 53 Conn. 299; *Huguenin v. Baseley*, 14 Ves. Jr. 299, which case was cited in *Harkness v. Fraser*, 12 Fla. 336.

1. *Dickerson v. Dickerson*, 24 Neb. 530, in which case the court said: "A party who, by means of the confidential relations between the parties, by deceit and imposition obtains property of the other, will be compelled in a proper case by a court of equity to restore the same to the party injured."

See also, to the same effect, *Boney v. Hollingsworth*, 23 Ala. 698; *Alaniz v. Casenave*, 91 Cal. 41; *Brisson v. Brisson*, 90 Cal. 323, 75 Cal. 525, 7 Am. St. Rep. 189; *Feeney v. Howard*, 79 Cal. 525, 12 Am. St. Rep. 162; *Adams v. Lambard*, 80 Cal. 426; *Broder v. Conklin*, 77 Cal. 330; *Harkness v. Fraser*, 12 Fla. 336; *Muzzy v. Tompkinson*, 2

Wash. 616; *Taylor v. Taylor*, 8 How. (U. S.) 200; *Huguenin v. Baseley*, 14 Ves. Jr. 299; *Goddard v. Carlisle*, 9 Price 169; *Blandy v. Kimber*, 24 Beav. 148.

2. *Sears v. Hicklin*, 13 Colo. 143.

Undue Influence Defined.—In *Ashmead v. Reynolds*, 134 Ind. 139, the following definition of undue influence in 8 Am. and Eng. Encyc. of Law (1st ed.), p. 649, is quoted with approval: "Any improper or wrongful constraint, machination, or urgency of persuasion whereby the will of a person is overpowered, and he is induced to do or forbear an act which he would not do, or would do, if left to act freely." It generally occurs where one of the parties is weak in intellect or so situated or related to the other as to be peculiarly under his influence. "It matters not what the relation is, if confidence is reposed and influence obtained."

Exercise of Controlling Influence over Will.—In *Adams v. Irving Nat. Bank*, 116 N. Y. 606, which is a well-considered case in which the authorities are very fully referred to, the court said: "The principle which appears to underlie all this class of cases is, that whenever a party is so situated as to exercise a controlling influence over the will, conduct, and interest of another, contracts thus made will be set aside."

More Threats to Exercise Legal Rights will not constitute a ground for canceling a contract procured by such threats, even though they were made at a time and under circumstances which were such as to coerce the party into making the contract. *Morton v. Morris*, 72 Fed. Rep. 392, 36 U. S. App. 550.

applies to every case where influence is acquired and abused, and where confidence is reposed and betrayed.¹

h. **CONTRACTS MADE BY INFANTS.**—Where an improvident contract is made by an infant, which is not void but merely voidable, it would seem that equity has jurisdiction to entertain a bill to set it aside, especially where it was procured by misrepresentation, circumvention, and imposition, and other circumstances exist which render it inequitable that the contract should be permitted to stand.²

i. **FOR MENTAL INCAPACITY.**—Whenever there is great weakness of mind in a person executing a contract, especially if it is a conveyance of land, such weakness arising from age, sickness, or any other cause, though not amounting to absolute disqualification, and the consideration is grossly inadequate, a court of equity will, upon proper and seasonable application of the injured party, or his representatives or heirs, interfere and set the conveyance aside.³

1. *Sears v. Hicklin*, 13 Colo. 143, in which case the court cited *Kerron Fraud and Mistake* 183; *Huguenin v. Baseley*, 14 Ves. Jr. 273; *Cooke v. Lamotte*, 15 Beav. 234; and *Williams v. Glenton*, L. R. 1 Ch. 200.

2. **Note and Mortgage Given by Infant.**—In *Salter v. Krueger*, 65 Wis. 217, which was an action to set aside a note and chattel mortgage given by an infant, the court said: "The facts stated seem to be sufficient to constitute a cause of action. The note and mortgage were given without any consideration whatever. They were in no sense for the plaintiff's benefit, but greatly to his disadvantage. They were procured by misrepresentation, circumvention, and imposition. The plaintiff is an infant, and he brings this action by his guardian *ad litem*, for the sole purpose of avoiding his note and mortgage so improvidently given. Upon the facts stated his right to avoid them by reason of his infancy cannot well be doubted. He certainly might have successfully resisted the enforcement of their collection by defendant. Even had the defendant acquired the possession of the mortgaged property under the mortgage, still the plaintiff might have disaffirmed the contract and replevied the property or recovered its value." *Citing Miller v. Smith*, 26 Minn. 248; *Corey v. Burton*, 32 Mich. 30; *Chapin v. Shafer*, 49 N. Y. 407; *Callis v. Day*, 38 Wis. 643; *Tucker v. Moreland*, 10 Pet. (U. S.) 72; and *Stafford v. Roof*, *Ewell Lead. Cas.* 93.

Upon Disaffirmance of Contract by Infant.—Where a deed is made to an infant, and after he arrives at age he disaffirms it, but does not reconvey or offer to reconvey the property, and retains the deed, denying the grantor's right to a conveyance, the grantor may maintain a bill to procure a judicial ascertainment and the rescission of the contract and the enforcement of the rescission by cancellation of the deed, the grantor offering to restore what he has received from the infant. *McCarty v. Woodstock Iron Co.*, 92 Ala. 463.

3. *Alabama.*—*Burke v. Taylor* 94, Ala. 530; *Luffboro v. Foster*, 92 Ala. 477; *Smith v. Pearson*, 24 Ala. 355.

California.—*Wilson v. Moriarty*, 77 Cal. 596, in which case the plaintiff was of weak mind and illiterate and was unduly influenced; *Maggini v. Pezzoni*, 76 Cal. 631, in which case the party to the contract was of unsound mind, and the contract was made without consideration; *Richards v. Donner*, 72 Cal. 211; *Moore v. Moore*, 56 Cal. 89, in which case the plaintiff while not absolutely insane was so disturbed mentally that she was incapable of transacting business.

Indiana.—*Thrash v. Starbuck*, 145 Ind. 673, in which case the complaint alleged knowledge on the part of the grantee of the grantor's insanity; *Stumph v. Miller*, 142 Ind. 442, in which case it was shown that the plaintiff at the time of making the deed was demented and helpless, and that she was wronged and oppressed; *Raymond v. Wathen*, 142 Ind. 367, in which

Mental Weakness and Other Circumstances. — While mental weakness alone may not be sufficient as a ground for the rescission of a contract, or the cancellation of a deed, yet if it is accompanied by undue influence, duress, inadequacy of consideration, misrepresentation, concealment, taking advantage of ignorance, inexperience, and want of advice, and the like, equity will grant relief.¹

case a deed was set aside on the ground of the mental incapacity of the grantor, accompanied with undue influence in procuring its execution; *Ashmead v. Reynolds*, 134 Ind. 139, 39 Am. St. Rep. 238; *Peck v. Vinson*, 124 Ind. 121.

Iowa. — *Fitch v. Reiser*, 79 Iowa 34; *Warfield v. Warfield*, 76 Iowa 633; *Alexander v. Haskins*, 68 Iowa 73; *Van Patton v. Beals*, 46 Iowa 62; *Harris v. Wamsley*, 41 Iowa 671; *Behrens v. McKenzie*, 23 Iowa 333; *Corbit v. Smith*, 7 Iowa 60.

Kentucky. — *Musick v. Fisher*, 96 Ky. 15; *Bressey v. Gross*, (Ky. 1888) 7 S. W. Rep. 150.

Nebraska. — *Dewey v. Allgire*, 37 Neb. 6.

North Carolina. — *Riggan v. Green*, 80 N. Car. 236, 30 Am. Rep. 77, in which case Dillard, J., said: "Courts of equity ever watch with a jealous care every contract made with persons *non compos mentis*, and always interfere to set aside their contracts however solemn, in all cases of fraud, or when the contract or act is not seen to be just in itself, or for the benefit of such persons; but when a purchase is made in good faith, without knowledge of the incapacity, and no advantage is taken, for a full consideration, and that consideration goes manifestly to the benefit of the lunatic, courts of equity will not interfere therewith."

Ohio. — *Tracey v. Sacket*, 1 Ohio St. 54, in which case Bartley, J., said: "The rule to be collected from all the authorities, I take to be this: Where there is imbecility or weakness of mind arising from old age, sickness, intemperance, or other cause, and plain inadequacy of consideration, or where there is weakness of mind, and circumstances of undue influence and advantage, in either case, a contract may be set aside in equity."

Wisconsin. — *Brothers v. Kaukauna Bank*, 84 Wis. 381, in which case the contract was executed by a person of unsound mind wholly incapable of conducting business.

United States. — *Allore v. Jewell*, 94 U. S. 506.

England. — *Molton v. Camroux*, 2 Exch. 487, which case was cited in *Riggan v. Green*, 80 N. Car. 236, 30 Am. Rep. 77.

Purchase by Insane Husband in Name of Wife. — In *Hounshell v. Sams*, (Ky. 1888) 9 S. W. Rep. 410, it was held that a petition in an action to cancel and set aside a deed, which alleges that the plaintiff purchased certain land and caused it to be conveyed to his wife; that at the time of said conveyance, from mental weakness he was incapable of transacting his business, and that his wife by her overpowering influence caused him to have the conveyance made to her, stated a good cause of action.

Suit by Heirs of Insane Grantor. — In *Pike v. Pike*, 104 Ala. 642, the court said: "The general proposition on which the bill is founded, that a court of equity, at the instance of the heirs of an insane grantor, will intervene and vacate a deed conveying lands, which he may have executed while the insanity was existing, has not been controverted."

Suit by Grantor After Recovery of Reason. — "A person of full age, who has been insane, may after he has sufficiently recovered his reason to understand the character of his act, file a bill in equity to annul a deed or contract to his prejudice, made by him when he was of unsound mind and incapable of contracting." *Turner v. Rusk*, 53 Md. 65.

Old Age of Party to Contract. — The fact that a party to an instrument is very old is not of itself controlling. *Soberanes v. Soberanes*, 97 Cal. 140.

1. *Harding v. Wheaton*, 2 Mason (U. S.) 378, in which case a conveyance, executed to the grantor's son-in-law for a nominal consideration, was set aside after the grantor's death on the ground that it was obtained from him when his mind was enfeebled by age and other causes; Story, J., saying: "Extreme weakness will raise an al-

Actual Insanity. — It is not necessary in order to secure the aid of equity, to prove that the party was at the time insane, or in such a state of mental imbecility as to render him entirely incapable of executing a valid contract. It is sufficient that, from his sickness or infirmities, he was at the time in a condition of great mental weakness, and that there was gross inadequacy of consideration for the conveyance. From these circumstances, imposition or undue influence will be inferred.¹

Inability to Put Party in Statu Quo. — When it appears that the consideration is full and the lunatic is not able to put the other party *in statu quo*, or if the benefit received is actual and of a durable character, in either case, the courts of equity will not be inclined to set aside the conveyance.²

j. UPON BREACH OF CONTRACT — (1) In General. — As a general rule, a court of equity will not rescind a contract on the sole ground that the defendant has failed to perform his part of the contract or has broken its conditions, as in such a case the remedy at law is adequate.³

most necessary presumption of imposition, even when it stops short of legal incapacity; and though a contract in the ordinary course of things, reasonably made with such a person, might be admitted to stand, yet if it should appear to be of such a nature as that such a person could not be capable of measuring its extent or importance, its reasonableness or its value, fully and fairly, it cannot be that the law is so much at variance with common sense as to uphold it." See also, to the same effect, *Allore v. Jewell*, 94 U. S. 506; *Yount v. Yount*, 144 Ind. 133; *Ashmead v. Reynolds*, 134 Ind. 139.

Weakness of Mind Not Alone Sufficient. — Imbecility of mind is not sufficient, in the absence of fraud, to set aside a contract, when there is not an essential privation of the reasoning faculties or an incapacity of understanding and acting with discretion in the ordinary affairs of life. *Reeve v. Bonwill*, 5 Del. Ch. 1, in which case the court cited 2 Kent's Com. 451, 453. See also *Beller v. Jones*, 22 Ark. 92, in which case Fairchild, J., said: "There must be imposition, fraud, or undue influence, with weakness of mind, to call into exercise the power of canceling the acts and contracts of beings who are supposed to take care of themselves."

1. *Allore v. Jewell*, 94 U. S. 506; *Klose v. Hillenbrand*, 88 Cal. 473; *Ashmead v. Reynolds*, 134 Ind. 139.

Incapacity Not Amounting to Insanity.

— Although mere weakness of understanding or the liability to be sometimes deceived and duped will not in general suffice for the purpose of procuring equitable relief, and the mental incapacity must be such as to render the party in a legal sense *non compos*, yet in a case in which the party was not actually insane, the contract may be set aside where it appears that he was a person of very weak will and easily bent to the purposes of others. *Henderson v. McGregor*, 30 Wis. 78.

2. *Riggan v. Green*, 80 N. Car. 236, 30 Am. Rep. 77, in which case the court cited *Carr v. Holliday*, 1 Dev. & B. Eq. (N. Car.) 344, 5 Ired. Eq. (N. Car.) 167. But see *Dewey v. Allgire*, 37 Neb. 6; *Hovey v. Hobson*, 53 Me. 457; *Gibson v. Soper*, 6 Gray (Mass.) 279; *Crawford v. Scovell*, 94 Pa. St. 48.

3. *Alabama*. — *Birmingham Warehouse, etc., Co. v. Elyton Land Co.*, 93 Ala. 549.

California. — *Lawrence v. Gayetty*, 78 Cal. 126.

Florida. — *Harrington v. Rutherford*, 38 Fla. 321.

Indiana. — *Burt v. Bowles*, 69 Ind. 1; *Fouty v. Fouty*, 34 Ind. 433; *Shoup v. Cook*, 1 Ind. 135, in which case it was held that equity will not cancel a bond upon breach of the conditions thereof, when the plaintiff has an adequate remedy at law.

Iowa. — *Leonard v. Smith*, 80 Iowa 194, holding that equity will not set aside the contract for a breach of con-

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Inadequacy of Remedy at Law. — However, cases are not wanting in which it has been held that contracts relating to land may be set aside on the ground that the defendant has failed to perform his part of the contract, where the defendant is insolvent or for other reasons the plaintiff is without an adequate remedy at law.¹

Contract by Railroad Company for Right of Way. — It has been held that where a right of way is conveyed to a railroad company in

dition where the performance of the condition is rendered impossible by the plaintiff.

Maine. — Long v. Woodman, 58 Me. 49.

Nebraska. — Perkins v. Lougee, 6 Neb. 220.

Oregon. — Raley v. Umatilla County, 15 Oregon 172, in which case it was held that a bill does not lie to declare a forfeiture for breach of a condition subsequent, as the grantor has an adequate remedy at law.

Pennsylvania. — Grove v. Hodges, 55 Pa. St. 504.

Tennessee. — Farrar v. Bridges, 3 Humph. (Tenn.) 566.

Texas. — Moore v. Cross, 87 Tex. 557, reversing (Tex. Civ. App. 1894) 26 S. W. Rep. 122; Chicago, etc., R. Co. v. Titterton, 84 Tex. 218.

West Virginia. — Love v. Teter, 24 W. Va. 741.

England. — Feret v. Hill, 15 C. B. 207, 80 E. C. L. 207, which case was cited in Harrington v. Rutherford, 38 Fla. 321.

Contra — Failure to Pay Purchase Money. — In Kirby v. Harrison, 2 Ohio St. 326, 59 Am. Dec. 677, the court decreed the rescission of a contract for the sale of land because of the purchaser's failure to pay the purchase money. In the report of the case the allegations of the bill are not set out. See also Hutcheson v. McNutt, 1 Ohio 18.

Where There Is No Element of Fraud in Inception of Contract. — In Piedmont Land Imp. Co. v. Piedmont Foundry, etc., Co., 96 Ala. 389, the plaintiff agreed to assist a manufacturing company with land and money in consideration of its agreement to establish its works on the land and operate them for a stated time, and of the incidental benefits expected to accrue therefrom to the grantor, and on the failure of the company to operate its works for the stipulated time filed a bill for the cancellation of the deed, and the court, in holding that the bill was without equity, said: "The bill in its essential features seems to be predicated upon

the theory that this contract may be rescinded on either of two distinct grounds, viz., the mere failure of appellee to comply with the promise to operate its works for two years, and because such promise was fraudulently made. The mere breach of such a promise, after deed made on the faith of it, would no more authorize the grantor to have the deed annulled by a court of equity than would the failure of a grantee of lands to pay his note given for the purchase-money authorize the grantor to rescind the trade and have the title revested in himself.

* * * While the breach of such a contract may give rise to a cause of action at law, it does not invest the grantor with the right to rescind in a court of chancery, unless there is some element of fraud which entered into the contract or transaction at its inception. If, for instance, at the time the promise or contract was entered into, there was no intention of performing it, and by means of the promise the promisee, in reliance thereon, was induced to part with his property, this would be such a fraud as would authorize the latter to rescind upon discovery of the fraud, and to reclaim his property." *Citing* Birmingham Warehouse, etc., Co. v. Elyton Land Co., 93 Ala. 549, and Lawrence v. Gayetty, 78 Cal. 126.

1. Willard v. Ford, 16 Neb. 543, in which case jurisdiction is asserted to cancel a deed where the defendant refuses to perform an agreement which constitutes a part of the consideration; the court *citing* Reid v. Burns, 13 Ohio St. 49, and Stines v. Dorman, 25 Ohio St. 580.

Defendant's Breach of Contract to Marry. — It has been held that where a man conveys land to a woman in consideration of her promise to marry him, and she afterwards refuses to marry him, equity will grant relief. *Rockafellow v. Newcomb*, 57 Ill. 186; *Douthitt v. Applegate*, 33 Kan. 395.

Nonperformance Resulting in Waste. — A court of equity will cancel a lease

consideration of the railroad company's promise to construct a railroad upon the land and locate improvements and maintain buildings near by, which will enhance the value of the grantor's other land, without any provision for a reversion on the non-performance by the railroad company of its stipulations, the remedy against the railroad company upon nonperformance is an action for the breach of the contract, and not for the cancellation of the deed.¹

(2) *Deed Given in Consideration of Care and Maintenance of Grantor.* — Numerous cases have arisen in which aged and infirm people have conveyed land to their children or their other relatives in consideration of care and support for the remainder of their lives, and in such cases the courts of some of the states have construed the contracts to bind the children or other grantees to give such care and attention to the grantor as is stipulated for in the deed, and have held that failure to perform such stipulations is sufficient ground for setting aside the deed.²

where the lessee does not perform his covenants to care for and cultivate the land and cancellation is necessary to prevent waste. *Anderson v. Hammon*, 19 Oregon 446.

Where the Death of a Party to a contract for the conveyance of land renders the contract incapable of performance, the surviving party to the contract may maintain a suit in equity to set it aside. *Callahan v. Shotwell*, 60 Mo. 398, in which case a client conveyed to his attorney land to secure the attorney's fees for services to be performed and the attorney died before the performance of all the services.

Nonperformance of Covenant to Erect Improvements. — Where a grantee covenants to erect certain improvements on the premises, and fails to do so, the grantor may in a court of equity have a decree for specific performance, or a rescission of the contract. *Harris v. Calmes*, 100 Ky. 272.

Inability to Restore Occasioned by Defendant's Wrong. — Where the right to rescind is based upon the wrongful act of one of the parties to a contract, by reason of which the consideration has failed in whole or in part, inability to restore such party to his former condition, when occasioned solely by such wrongful act, is not alone sufficient to defeat an action to rescind such contract and recover the consideration paid thereunder. *Hilton v. Advance Thresher Co.*, 8 S. Dak. 412.

1. *Chicago, etc., R. Co. v. Titterington*, 84 Tex. 218, in which case the

court distinguished *Gulf, etc., R. Co. v. Dunman*, 74 Tex. 265.

Abandonment of Work by Railroad Company. — In *Savannah, etc., R. Co. v. Atkinson*, 94 Ga. 780, it was held that where a railroad company in consideration of a deed conveying a right of way agrees to construct its road over such right of way, and the company enters upon such right of way and clears it all, but afterwards abandons the work, a court of equity has jurisdiction to cancel the deed.

Cancellation of Railroad Aid Bonds. — In *Douglas County v. Walbridge*, 38 Wis. 179, it was held that equity has jurisdiction to cancel railroad aid bonds issued by a county in exchange for the stock of a railroad company, where it appears that the railroad company is insolvent, that no benefit can ever accrue to the county from what has been done by the railroad company, that the scheme has utterly failed, and that the bonds being negotiable will have to be paid without the county ever having received any benefit from them. The court said: "If a resort to equity for the cancellation or delivering up of securities can be sustained on the ground of protective justice, and considerations of what is just and reasonable, this case calls for the exercise of the power."

2. *Peck v. Hoyt*, 39 Conn. 9; *Patterson v. Patterson*, 81 Iowa 626; *Martin v. Martin*, 44 Kan. 295; *Reeder v. Reeder*, 89 Ky. 529; *Morgan v. Loomis*, 78 Wis. 594; *Hartstein v. Hartstein*, 74

Relief Against Purchasers with Notice. — Where a conveyance is made in consideration of promised support and maintenance, and there is an entire nonperformance on the part of the grantee, the plaintiff is entitled to the same relief against one who takes a conveyance from the grantee without any consideration therefor, and with full notice of the plaintiff's equities, as he is against the grantee.¹

(3) *Breach of Warranty of Title.* — When land is sold and conveyed with express covenants of warranty as to title, equity is without power to rescind the contract or cancel the deed on account of a defect in the title, in the absence of any showing of fraud or insolvency, or unless the vendor is a nonresident, as the vendee has an adequate remedy at law by an action upon the covenants of warranty in case of an eviction.²

k. **FOR INADEQUACY OR WANT OF CONSIDERATION.** — A court of equity will not set aside a contract on the ground of want or failure of consideration, unless the inadequacy of consideration is so gross as to carry with it evidence of fraud.³

Wis. 1; *Dickson v. Field*, 77 Wis. 439; *Divan v. Loomis*, 68 Wis. 150; *Stoel v. Flanders*, 68 Wis. 256; *Blake v. Blake*, 56 Wis. 392; *Delong v. Delong*, 56 Wis. 514; *Bresnahan v. Bresnahan*, 46 Wis. 385; *Bogie v. Bogie*, 41 Wis. 209; *White v. Johnson*, 4 Wash. 113.

Contra. — In other cases, however, it has been held that the grantor is not entitled to relief in equity, because he has an adequate remedy at law; *Lindsey v. Lindsey*, 62 Ga. 546; *Murray v. King*, 7 Ired. Eq. (N. Car.) 19; *Hale v. Witt*, 1 Heisk. (Tenn.) 567; *Deveraux v. Cooper*, 15 Vt. 88.

1. *Bogie v. Bogie*, 41 Wis. 209.

2. *Alabama.* — *Parker v. Parker*, 93 Ala. 80; *Lett v. Brown*, 56 Ala. 550; *Strong v. Waddell*, 56 Ala. 471; *Hughes v. Hatchett*, 55 Ala. 539; *Cullum v. Branch of State Bank*, 4 Ala. 21.

Arkansas. — *Griffith v. Maxfield*, 63 Ark. 548.

Kentucky. — *English v. Thomasson*, 82 Ky. 280; *Campbell v. Whittingham*, 5 J. J. Marsh. (Ky.) 96; *Gale v. Conn*, 3 J. J. Marsh. (Ky.) 538; *Miller v. Long*, 3 A. K. Marsh. (Ky.) 334; *Taylor v. Lyon*, 2 Dana (Ky.) 276; *Simpson v. Hawkins*, 1 Dana (Ky.) 303; *Upshaw v. Debow*, 7 Bush (Ky.) 442; *Trumbo v. Lockridge*, 4 Bush (Ky.) 415; *Duvall v. Parker*, 2 Duv. (Ky.) 182. See also *Am. and Eng. Encyc. of Law*, title *Vendor and Purchaser*.

In California it has been held that where land is sold with a covenant of warranty, equity will not relieve by

granting a rescission of the contract upon the allegation of the insolvency of the grantor and his inability to respond in damages to an action upon the covenant and a paramount outstanding title in another. *Norton v. Jackson*, 5 Cal. 262.

In Ohio it has been held that a purchaser from a vendor who cannot make a title may come into equity and ask a rescission of the contract and an injunction against a judgment which the vendor has recovered against him for the purchase money. *Brown v. Witter*, 10 Ohio 142.

Exchange of Land — Failure of Title. —

Where land is conveyed, and part of the consideration therefor is an agreement to convey land of the plaintiff, and the title to the land which the defendant has agreed to convey fails and the defendant cannot fully compensate the plaintiff for the loss of the land, a court of equity will rescind the contract. *Bell v. Hutchings*, 86 Ga. 562.

3. *Soberanes v. Soberanes*, 97 Cal. 140, in which case the court said: "To hold that gifts voluntarily made, and with full knowledge of all the facts, and of the nature and effect of the transfer, should be set aside because the donor had divested himself of his property, would be to establish a rule that no man can make a voluntary disposition of his estate except by will." See also the following cases:

Alabama. — *Lester v. Mahan*, 25 Ala. 445, 60 Am. Dec. 530.

Grossly Inadequate Consideration. — However, cases are not wanting in which it has been held that cancellation may be decreed where it is manifest that it would be inequitable for the party to enjoy the fruits of a contract procured for a grossly inadequate consideration, the test of such inadequacy being, as has been said by some of the judges, that it must be impossible to state the terms of the contract to a man of common sense without producing an exclamation at the inequality of the contract.¹

Inadequacy of Consideration and Other Circumstances. — Although it is firmly settled that inadequacy of consideration is not of itself a sufficient ground upon which to ask a court of equity to set aside a contract, it is equally well settled that when gross inadequacy of consideration is shown the law requires of the defendant strict avoidance of all false, deceitful, or unfair means calculated to advantage his design; and when in addition to inadequacy of price, weakness of mind, pecuniary distress, fraud, undue influence, or the like is shown, equity will rescind the contract.²

Colorado. — *Wier v. Johns*, 14 Colo. 493.

Delaware. — *Wiest v. Garman*, 3 Del. Ch. 422.

Florida. — *Stephens v. Orman*, 10 Fla. 9.

Illinois. — *Tuck v. Downing*, 76 Ill. 71.

Indiana. — *McCormick v. Malin*, 5 Blackf. (Ind.) 509.

Kansas. — *Missouri River, etc., R. Co. v. Miami County*, 12 Kan. 482.

Maine. — *McKown v. Whitmore*, 31 Me. 448; *Cole v. McGlathry*, 9 Me. 131.

Maryland. — *Goodwin v. White*, 59 Md. 503.

Massachusetts. — *Nudd v. Hamblin*, 8 Allen (Mass.) 130.

Montana. — *Maloy v. Berkin*, 11 Mont. 138.

New Hampshire. — *Enfield v. Colburn*, 63 N. H. 218.

New York. — *Coster v. Griswold*, 4 Edw. (N. Y.) 364; *Dunn v. Chambers*, 4 Barb. (N. Y.) 376.

North Carolina. — *Potter v. Everitt*, 7 Ired. Eq. (N. Car.) 152, wherein it was declared that it must appear that the inadequacy was so great as to amount to fraud, or that the situation of the parties was so unequal as to give one of them an opportunity to make his own terms. *Green v. Thompson*, 2 Ired. Eq. (N. Car.) 365.

Ohio. — *Watkins v. Collins*, 11 Ohio 31; *Knobb v. Lindsay*, 5 Ohio 468.

Texas. — *Saufley v. Jackson*, 16 Tex. 581.

Washington. — *Muzzy v. Tompkinson*, 2 Wash. 616.

West Virginia. — *Korne v. Korne*, 30 W. Va. 1.

United States. — *Ralston v. Turpin*, 129 U. S. 675.

1. *Watkins v. Stockett*, 6 Har. & J. (Md.) 435, in which case the court cited *Clarkson v. Hanway*, 2 P. Wms. 203, wherein the grantor was of weak mind, of great age, and capable of being easily imposed upon. See also *Wilson v. Morris*, 4 Colo. App. 242, wherein it was declared by Bissell, J., that cancellation may be decreed where it is manifest that it would be inequitable for the party to enjoy the fruits of a contract procured for a grossly inadequate consideration. And see *Maddox v. Simmons*, 31 Ga. 512, in which case Lumpkin, J., entered into an exhaustive review of the cases and authorities.

2. *Lester v. Mahan*, 25 Ala. 445, 60 Am. Dec. 530; *McCormick v. Malin*, 5 Blackf. (Ind.) 509; *Havlin v. Reed*, (Ky. 1887) 5 S. W. Rep. 554; holding that the court may set aside a deed made for grossly inadequate consideration where the vendor placed implicit confidence in the statements made by the purchaser and he misrepresented the value of the consideration paid by him; *Maloy v. Berkin*, 11 Mont. 138, in which case the court, in holding that the plaintiff was entitled to relief, used language much the same as that used in the text.

Inadequacy of Consideration and Mental Incapacity. — In *Wiest v. Garman*, 3

Indeed, it has been declared that where the inadequacy of consideration is so great that the mind revolts at it, the court will lay hold of the slightest circumstance of oppression or advantage to rescind the contract.¹

Part of Consideration Inadequate. — The court will not declare a contract void on the ground of inadequacy of consideration, when it simply appears that a part of the consideration is grossly inadequate, and there is no showing as to the extent and value of the remaining portion.²

l. AS RESPECTS PROPERTY INVOLVED. — A court of equity has jurisdiction to rescind or cancel a contract regardless of whether the property to which the contract relates is personal or real property.³

m. INABILITY TO PLACE PARTIES IN STATU QUO — (1) *In General.* — As a general rule a court of equity will not rescind a contract in part, or grant rescission where the parties cannot be substantially placed *in statu quo*.⁴

Del. Ch. 422, 4 Houst. (Del.) 119, Chancellor Bates said: "It is true that although for mere inadequacy of consideration, without other circumstances, a contract executed will not be rescinded, yet an unconscionable bargain made with a person of such weak understanding as to be incapable of self-protection, though not an idiot or a lunatic, raises a presumption that it was procured through some fraud or undue influence; and on this ground equity will relieve such a person against a transaction which would bind one of ordinary capacity, exempting him from the maxim *caveat emptor* before considered. It is, however, material to observe that the court interferes in this class of cases with great caution, and only where the mental weakness, to such a degree as disables the party for self-protection, is clearly made out in the proof." Citing *Clarkson v. Hanway*, 2 P. Wms. 203; *Bennet v. Wade*, 2 Atk. 324; *Gartside v. Isherwood*, 1 Bro. C. C. 558; *Blachford v. Christian*, 1 Knapp 73; *Gass v. Mason*, 4 Sneed (Tenn.) 497; *Johnson v. Chadwell*, 8 Humph. (Tenn.) 145; *Causey v. Wiley*, 27 Ga. 444, and *Ellis v. Mathews*, 19 Tex. 390.

1. Taking Advantage of Financial Embarrassment. — In *Hough v. Hunt*, 2 Ohio 495, 15 Am. Dec. 569, the court said: "When a person is encumbered with debts, and that fact is known to a person with whom he contracts, who avails himself of it to exact an unconscionable bargain, equity will relieve

upon account of the advantage and hardship. Where the inadequacy of price is so great that the mind revolts at it, the court will lay hold on the slightest circumstances of oppression or advantage to rescind the contract. So when a person borrowing money to relieve his necessities is induced to purchase property at an exorbitant price, and to an amount greatly beyond the loan obtained, and secure the payment by mortgage on his other lands, the necessity of the purchaser, connected with the exorbitancy of price, are sufficient evidence of unfair advantages to justify the interference of the court." But see *contra*, *Smith v. McCourt*, 8 Colo. App. 146.

2. *Missouri River, etc., R. Co. v. Miami County*, 12 Kan. 482.

3. *Bradberry v. Keas*, 5 J. J. Marsh. (Ky.) 446; *Hardwick v. Forbes*, 1 Bibb (Ky.) 213; *White v. Clarke*, 3 T. B. Mon. (Ky.) 390; *Taymon v. Mitchell*, 1 Md. Ch. 496.

4. *Watson Coal, etc., Co. v. Casteel*, 68 Ind. 476; *Johnson v. Cookerly*, 33 Ind. 151; *Shaeffer v. Sleade*, 7 Blackf. (Ind.) 178; *Stringer v. Keokuk, etc., R. Co.*, 59 Iowa 277; *Edwards v. Hanna*, 5 J. J. Marsh. (Ky.) 18; *Turner v. Clay*, 3 Bibb (Ky.) 52; *Lacey v. McMillen*, 9 B. Mon. (Ky.) 523, in which case the complainant, by acting upon the contract, after full knowledge of his equitable right to a rescission, and transferring to others large portions of the land, had put it out of his power to place the defendant *in statu quo*; *Car-*

Results Not Produced by Plaintiff. — It has been held, however, that the fact that the *status in quo* cannot be restored will not prevent a rescission where such condition resulted from the fraud of the defendant and without the fault of the plaintiff.¹

(2) **Rescission in Part.** — After a contract has been partly executed a court of equity will not at the suit of a party rescind such part of it as is disadvantageous to him, but if it affords any relief at all will rescind the entire contract.²

2. To Reform Written Contracts — *a.* **IN GENERAL.** — When an agreement is made and reduced to writing, but through mistake, inadvertence, or fraud the writing fails to express correctly the contract really made, a court of equity will reform the instrument in conformity with the real intention of the parties.³

The Statute of Frauds does not interfere, in any respect, with the power of courts of equity to reform deeds or other instruments, in which the parties intended to comply with the requirements of the statute, and failed through accident, mistake, or fraud.⁴

roll *v.* Rice, 1 Walk. (Mich.) 373; Hunter *v.* Holmes, 60 Minn. 496; Martin *v.* Martin, 1 Smed. & M. (Miss.) 176; Bedell *v.* Bedell, 3 Hun (N. Y.) 580.

Effect of Subsequent Conveyance by Plaintiff. — In Strong *v.* Lord, 107 Ill. 25, it was held that after a purchaser of land has conveyed an undivided interest in the land to another person, he is unable to place the grantor *in statu quo*, and is not entitled to equitable relief. See also to the same effect Lacey *v.* McMillen, 9 B. Mon. (Ky.) 523.

1. Shackelford *v.* Hendley, 1 A. K. Marsh. (Ky.) 496; Turner *v.* Clay, 3 Bibb (Ky.) 52; Brown *v.* Norman, 65 Miss. 369. But see *contra*, Davis *v.* Tarwater, 15 Ark. 286, in which case the court said: "If the vendor cannot be placed *in statu quo*, the contract cannot be rescinded. And the rule is the same, whether the rescission is sought on the ground of fraud, mistake, or for any other cause."

Diligence in Asking Rescission. — Even though the parties cannot be put *in statu quo*, rescission will be granted on the ground of fraud if it is asked immediately upon the discovery of the fraud. Dawson *v.* Sparks, 1 Tex. Unrep. Cas. 735.

Rescission in Part and Compensation. — In Myrick *v.* Jacks, 33 Ark. 425, it was declared by Eakin, J., that when courts cannot place parties wholly *in statu quo* they are not thereby precluded from granting relief against fraud, and that they may proceed to do so as

nearly as possible, and make compensation.

2. Nalle *v.* Virginia Midland R. Co., 88 Va. 948.

3. English *v.* Thorn, 96 Ga. 557, in which case it was said: "The reformation, in essential and material particulars, of a written contract which is plain and unambiguous in its terms, is peculiarly and exclusively a matter of equitable jurisdiction." Citing 20 Am. and Eng. Encyc. of Law (1st ed.), p. 719. See also Citizens' Nat. Bank *v.* Judy, 146 Ind. 322, in which case the court cited 20 Am. and Eng. Encyc. of Law, p. 714; and Foley *v.* Hamilton, 89 Iowa 686, in which case the court cited 20 Am. and Eng. Encyc. of Law (1st ed.) 713.

4. Blackburn *v.* Randolph, 33 Ark. 119; Hathaway *v.* Brady, 23 Cal. 121; Conaway *v.* Gore, 24 Kan. 389, in which case the court said that reformation "is not the substituting of acts *in pais* for the written contract; but it is making the written the expression of the real contract."

When Statute of Frauds Applies. — In Glass *v.* Hulbert, 102 Mass. 31, the court said: "When the proposed reformation of an instrument involves the specific enforcement of an oral agreement within the statute of frauds, or when the term sought to be added would so modify the instrument as to make it operate to convey an interest or secure a right which can only be conveyed or secured through an instrument in writing, and for which no

b. EXCLUSIVE JURISDICTION OF EQUITY. — At common law, the reformation or correction of written instruments was unknown. Courts of law could enforce or reject a written contract, but not reform it; hence the reformation of instruments is a subject which has always been within the exclusive cognizance of courts of equity.¹

c. DISCRETION OF CHANCELLOR. — The court in granting or declining to grant the reformation of an instrument exercises a discretion which will not be interfered with on appeal except in a very plain case of abuse,² and it has been declared frequently that the power of courts of equity to reform written instruments is one in the exercise of which great caution should be observed.³

d. STATUTORY PROVISIONS. — In some states equitable jurisdiction to reform mistakes in written contracts has been expressly recognized and conferred by statute.⁴

e. ON THE GROUND OF MISTAKE — (1) *In General.* — Where parties enter into a contract and attempt to reduce it to writing but by mistake the true intention of the parties is not expressed, it is a very ancient jurisdiction of courts of equity to correct the

writing has ever existed, the statute of frauds is a sufficient answer to such a proceeding." Quoted with approval in *Freed v. Brown*, 41 Ark. 495.

1. *English v. Thorn*, 96 Ga. 557, in which case the court quoted 20 Am. and Eng. Encyc. of Law (1st ed.), p. 719. See also *Trout v. Goodman*, 7 Ga. 383; *Cunningham v. Wrenn*, 23 Ill. 64; *Wiley v. Fitzpatrick*, 3 J. J. Marsh. (Ky.) 582; *Jordan v. Stevens*, 51 Me. 78; *Tucker v. Madden*, 44 Me. 206; *Winnipiseogee Paper Co. v. Eaton*, 64 N. H. 234; *Phillips v. Port Townsend Lodge No. 6*, 8 Wash. 529; *Hammel v. Queen Ins. Co.*, 50 Wis. 240; *Ivinson v. Hutton*, 98 U. S. 79.

Application to Equity in First Instance. — To correct and relieve against mistakes in writings is one of the principal grounds of equitable jurisdiction, and although it might, in some cases of mistake, be competent for a court of law to afford redress, it is said to be the usual and safer course in such cases, to apply to a court of equity for relief in the first instance. *Lyle v. Williamson*, 6 T. B. Mon. (Ky.) 142.

Forms of Actions Abolished. — In states in which the code has abolished the distinction between actions at law and suits in equity, an action for the correction of a mistake in a deed is a civil action under the code. *Clayton v. Freet*, 10 Ohio St. 544.

Equitable Action or Counterclaim. — In *Casgrain v. Milwaukee County*, 81

Wis. 113, the court, in speaking of reformation, said: "It must be done by equitable action or by equitable counterclaim. It cannot be by mere defense in an action at law."

2. *Monterey County v. Seegleken*, (Cal. 1894) 36 Pac. Rep. 515; *Lewis v. Lewis*, 5 Oregon 169.

3. *Cox v. Woods*, 67 Cal. 317; *Bishop v. Clay F. & M. Ins. Co.*, 49 Conn. 167; *Trout v. Goodman*, 7 Ga. 383; *U. S. v. Munroe*, 5 Mason (U. S.) 577.

In Georgia by Statute the court is required to exercise its power to reform instruments with caution. *Stricker v. Tinkham*, 35 Ga. 177; *Adair v. Adair*, 38 Ga. 46; *Ligon v. Rogers*, 12 Ga. 281.

4. **California Statute.** — Civ. Code Cal., § 3399; *Stevens v. Holman*, 112 Cal. 345, 53 Am. St. Rep. 216; *Capelli v. Dondero*, 123 Cal. 324; *Wilson v. Moriarty*, 88 Cal. 207; *Higgins v. Parsons*, 65 Cal. 280; *Cleghorn v. Zumwalt*, 83 Cal. 155.

Maine Statute. — Rev. Stat. Me. 1841, c. 96, § 10, confers jurisdiction in cases of accident and mistake where the parties have not a plain and adequate remedy at law. *Tucker v. Madden*, 44 Me. 206, in which case the court said: "So far as the power of the court extends upon this subject, the jurisdiction is to be exercised in the same manner as it is exercised by a court having full and general equity power."

mistake so as to cause the instrument to speak the facts, and put the parties as to each other in the true position in which they thought they had placed themselves.¹

1. *Henkle v. Royal Exch. Assur. Co.*, 1 Ves. 318, in which case the bill sought to reform an insurance policy after loss, and Lord Hardwicke said: "No doubt but this court has jurisdiction to relieve in respect of a plain mistake in contracts in writing as well as against frauds in contracts, so that, if reduced into writing contrary to intent of the parties, on proper proof that would be rectified." See also *Murray v. Parker*, 19 Beav. 305, wherein Lord Romilly said: "In matters of mistake, the court undoubtedly has jurisdiction, and though this jurisdiction is to be exercised with great caution and care, still it is to be exercised in all cases where a deed, as executed, is not according to the real agreement between the parties." See further article MISTAKE, vol. 14, p. 32; and Am. and Eng. Encyc. of Law, titles *Reformation and Cancellation of Contracts*, and *Mistake*. Among the numerous cases in which the doctrine stated in the text finds support are the following:

Alabama. — *Dulo v. Miller*, 112 Ala. 687; *Tillis v. Smith*, 108 Ala. 264; *Burnell v. Morris*, 106 Ala. 349; *Tyson v. Chestnut*, 100 Ala. 571; *Dexter v. Ohlander*, 95 Ala. 467; *Weathers v. Hill*, 92 Ala. 492; *Parker v. Parker*, 88 Ala. 362; *Houston v. Faul*, 86 Ala. 232; *Gardner v. Moore*, 75 Ala. 394; *Turner v. Kelly*, 70 Ala. 85; *Clark v. Hart*, 57 Ala. 390; *Campbell v. Hatchett*, 55 Ala. 548; *Alexander v. Caldwell*, 55 Ala. 517; *Johnson v. Crutcher*, 48 Ala. 368; *Trapp v. Moore*, 21 Ala. 697; *Stone v. Hale*, 17 Ala. 562; *Clopton v. Martin*, 11 Ala. 187.

Arkansas. — *Griffith v. Sebastian County*, 49 Ark. 24; *Blackburn v. Randolph*, 33 Ark. 119; *Pickett v. Merchants' Nat. Bank*, 32 Ark. 346; *McCain v. Pickens*, 32 Ark. 399; *Allen v. McGaughey*, 31 Ark. 252; *Clark v. Roots*, 50 Ark. 179; *Steward v. Pettigrew*, 28 Ark. 372; *Simpson v. Montgomery*, 25 Ark. 367; *State v. Paup*, 13 Ark. 129.

California. — *Stonesifer v. Kilburn*, 122 Cal. 659; *Eureka v. Gates*, 120 Cal. 54; *Holt v. Holt*, 120 Cal. 67; *Stevens v. Holman*, 112 Cal. 345, 53 Am. St. Rep. 216; *Giselman v. Starr*, 106 Cal. 651; *Monterey County v. Seegleken*,

(Cal. 1894) 36 Pac. Rep. 515; *Ward v. Waterman*, 85 Cal. 488; *Eva v. McMahon*, 77 Cal. 467; *Meeker v. Dalton*, 75 Cal. 154; *Breen v. Donnelly*, 74 Cal. 301; *Savings, etc., Soc. v. Meeks*, 66 Cal. 371; *Hayford v. Kocher*, 65 Cal. 389; *Isenhoot v. Chamberlain*, 59 Cal. 630; *Donald v. Beals*, 57 Cal. 399; *Murray v. Dake*, 46 Cal. 644; *Murphy v. Rooney*, 45 Cal. 78; *Quivey v. Porter*, 37 Cal. 463; *Love v. Sierra Nevada Lake Water, etc., Co.*, 32 Cal. 639; *Cleghorn v. Zumwalt*, 83 Cal. 155; *Hathaway v. Brady*, 23 Cal. 121; *Piereson v. McCahill*, 21 Cal. 122; *Lestrade v. Barth*, 19 Cal. 661; *Eldridge v. See Yup Co.*, 17 Cal. 55; *Palmer v. Vance*, 13 Cal. 556; *Wagenblast v. Washburn*, 12 Cal. 212. See also *Russell v. Mixer*, 42 Cal. 475.

Colorado. — *Barth v. Deuel*, 11 Colo. 494; *Smith v. Brunk*, 14 Colo. 75; *Nixon v. Harmon*, 17 Colo. 276; *Wilson v. Morris*, 4 Colo. App. 242. See also *Horne v. Bramwell*, 23 Colo. 238; *Jaeger v. Whitsett*, 3 Colo. 105.

Connecticut. — *West v. Suda*, 69 Conn. 60; *Butler v. Barnes*, 60 Conn. 170; *Haussman v. Burnham*, 59 Conn. 117, in which case it was declared that a court of equity should be astute and diligent in its efforts to prevent manifest injustice; *Palmer v. Hartford F. Ins. Co.*, 54 Conn. 488; *Bishop v. Clay F. & M. Ins. Co.*, 49 Conn. 167; *Winchell v. Coney*, 54 Conn. 24; *Essex v. Day*, 52 Conn. 483; *Woodbury Sav. Bank, etc., Assoc. v. Charter Oak F. & M. Ins. Co.*, 31 Conn. 517; *Malleable Iron Works v. Phoenix Ins. Co.*, 25 Conn. 465; *Knapp v. White*, 23 Conn. 529; *Peck v. New London County Mut. Ins. Co.*, 22 Conn. 575; *Stedwell v. Anderson*, 21 Conn. 139; *Bunnell v. Read*, 21 Conn. 586; *Wooden v. Haviland*, 18 Conn. 108; *Holabird v. Burr*, 17 Conn. 556; *Chamberlain v. Thompson*, 10 Conn. 246; *Wheaton v. Wheaton*, 9 Conn. 96; *Carter v. Champion*, 8 Conn. 550; *Avery v. Chappel*, 6 Conn. 270; *Watson v. Wells*, 5 Conn. 468; *Smith v. Chapman*, 4 Conn. 344; *Peters v. Goodrich*, 3 Conn. 146; *Parsons v. Hosmer*, 2 Root (Conn.) 1; *Cook v. Preston*, 2 Root (Conn.) 78; *Matson v. Parkhurst*, 1 Root (Conn.) 404; *Washburn v. Merriells*, 1 Day (Conn.) 139.

The Office of a Bill for the Reformation of an Instrument is not to establish and effectuate rights—not to have the effect of the deed adjudged—but rather to declare the status which the parties

Delaware.—Pierson v. Pierson, 5 Del. Ch. 11; McMullen v. Lockwood, 4 Del. Ch. 568.

Florida.—Greeley v. De Cottes, 24 Fla. 475; Franklin v. Jones, 22 Fla. 526; Jackson v. Magbee, 21 Fla. 622; Lovell v. Wall, 31 Fla. 73; Stephens v. Orman, 10 Fla. 9; Ladd v. Chaires, 5 Fla. 395.

Georgia.—Burke v. Anderson, 40 Ga. 535; Adair v. Adair, 38 Ga. 46; Ward v. Allen, 28 Ga. 74; Wyche v. Greene, 16 Ga. 49; Greer v. Caldwell, 14 Ga. 207; Wall v. Arrington, 13 Ga. 88; Ligon v. Rogers, 12 Ga. 281; Wyche v. Greene, 11 Ga. 159; Reese v. Wyman, 9 Ga. 430; Trout v. Goodman, 7 Ga. 383; Collier v. Lanier, 1 Ga. 238; Rogers v. Atkinson, 1 Ga. 12; Carbine v. McCoy, 85 Ga. 185.

Illinois.—Snell v. Snell, 123 Ill. 403; Shay v. Pettes, 35 Ill. 360; Hunter v. Bilyeu, 30 Ill. 246.

Indiana.—Citizens' Nat. Bank v. Judy, 146 Ind. 322; Merchants, etc., Bldg. Assoc. v. Scanlan, 144 Ind. 11; Walls v. State, 140 Ind. 16; Parish v. Camplin, 139 Ind. 1; Sparta School Tp. v. Mendell, 138 Ind. 188; Hamilton County v. Owens, 138 Ind. 183; Comstock v. Coon, 135 Ind. 640; Collins v. Cornwell, 131 Ind. 20; Adams v. Wheeler, 122 Ind. 251, in which case the court said that "it is a well-established principle of equity jurisprudence that where, through the mutual mistake of the parties, the form of an instrument is such that it does not express the agreement as the parties intended it should, the aid of a court of chancery may be invoked to reform the contract or deed;" Calton v. Lewis, 119 Ind. 181; Keister v. Myers, 115 Ind. 312; Roszell v. Roszell, 109 Ind. 355; Baker v. Pyatt, 108 Ind. 61; Jones v. Sweet, 77 Ind. 187; Comer v. Himes, 49 Ind. 482; Monroe v. Skelton, 36 Ind. 302; German Mut. Ins. Co. v. Grim, 32 Ind. 249; 2 Am. Rep. 341; Hileman v. Wright, 9 Ind. 126; White v. Wilson, 6 Blackf. (Ind.) 448; Gray v. Woods, 4 Blackf. (Ind.) 432.

Iowa.—Herring v. Peaslee, 92 Iowa 391, in which case the land embraced in the deed was improperly described; Fritzier v. Robinson, 70 Iowa 500; Deford v. Mercer, 24 Iowa 118; Turpin v. Gresham, 106 Iowa 187; Franklin

Ins. Co. v. McCrea, 4 Greene (Iowa) 229.

Kansas.—Stephenson v. Elliott, 53 Kan. 550; Bodwell v. Heaton, 40 Kan. 36; Conaway v. Gore, 24 Kan. 389; Claypole v. Houston, 12 Kan. 324, holding that a court of equity has power to correct a misdescription in an administrator's deed; Critchfield v. Kline, 39 Kan. 721.

Kentucky.—Harris v. Calmes, 100 Ky. 272, wherein a covenant on the part of the purchaser had been omitted by mistake; German Nat. Bank v. Butchers' Hide, etc., Co., 97 Ky. 34; Barnes v. Barnes, (Ky. 1891) 15 S. W. Rep. 1; Lear v. Prather, 89 Ky. 501, in which case it was held that a mortgage might be reformed so as to make it include land which was intended to be included in it, but which by mistake was left out of the mortgage; Tichenor v. Yankey, 89 Ky. 508; Moye v. Lane, (Ky. 1889) 12 S. W. Rep. 154; Inskoe v. Proctor, 6 T. B. Mon. (Ky) 311; Athey v. McHenry, 6 B. Mon. (Ky.) 59; Franklin F. Ins. Co. v. Hewitt, 3 B. Mon. (Ky.) 231; Matingly v. Speak, 4 Bush (Ky.) 316; Worley v. Tuggle, 4 Bush (Ky.) 168; Crane v. Prather, 4 J. J. Marsh. (Ky.) 75; Wiley v. Fitzpatrick, 3 J. J. Marsh. (Ky.) 582; Parcels v. Gohegan, 2 J. J. Marsh. (Ky.) 133; Scales v. Ashbrook, 1 Met. (Ky.) 358.

Louisiana.—Lippincott v. Insurance Co., 3 La. 546.

Maine.—Andrews v. Andrews, 81 Me. 337; Cross v. Bean, 81 Me. 525; Fessenden v. Ockington, 74 Me. 123; Harding v. Jewell, 73 Me. 426; Foster v. Kingsley, 67 Me. 152; National Traders Bank v. Ocean Ins. Co., 62 Me. 519; Burr v. Hutchinson, 61 Me. 514; Adams v. Stevens, 49 Me. 362; Tucker v. Madden, 44 Me. 206; Farley v. Bryant, 32 Me. 474; Robinson v. Sampson, 23 Me. 388, in which case it was declared that there is not a more appropriate head of equity jurisprudence than that of "mistake;" Peterson v. Grover, 20 Me. 363.

Maryland.—Milligan v. Pleasants, 74 Md. 8; Delaware State F. & M. Ins. Co. v. Gillett, 54 Md. 219; Ben Franklin Ins. Co. v. Gillett, 54 Md. 212; Dulany v. Rogers, 50 Md. 524; Coale v. Merryman, 35 Md. 382; Ellinger v. Crowl, 17 Md. 361; National F. Ins.

intended to create, and upon which such rights as they would have acquired under a correct instrument may be asserted and

Co. v. Crane, 16 Md. 260; *Cooke v. Husbands*, 11 Md. 492; *Wood v. Patterson*, 4 Md. Ch. 335; *Moale v. Buchanan*, 11 Gill & J. (Md.) 314; *Aldridge v. Weems*, 2 Gill & J. (Md.) 36.

Massachusetts. — *Moors v. Bigelow*, 158 Mass. 60; *Goode v. Riley*, 153 Mass. 585, wherein a grantor used too extensive language in describing the premises; *Com. v. Reading Sav. Bank*, 137 Mass. 443; *Clark v. Higgins*, 132 Mass. 586; *German American Ins. Co. v. Davis*, 131 Mass. 316; *Wilcox v. Lucas*, 121 Mass. 25; *Hoar v. Goulding*, 116 Mass. 132; *Bennett v. City Ins. Co.*, 115 Mass. 241; *Chester Emery Co. v. Lucas*, 112 Mass. 424; *Glass v. Hulbert*, 102 Mass. 24; *Stockbridge Iron Co. v. Hudson Iron Co.*, 102 Mass. 45; *Buckland v. Adams Express Co.*, 97 Mass. 132; *Sawyer v. Hovey*, 3 Allen (Mass.) 331; *Miller v. Lord*, 11 Pick. (Mass.) 11.

Michigan. — *Cummings v. Freer*, 26 Mich. 128.

Minnesota. — *Crookston Imp. Co. v. Marshall*, 57 Minn. 333; *Smith v. Jordan*, 13 Minn. 264, 97 Am. Dec. 232.

Mississippi. — *Simmons v. North*, 3 Smed. & M. (Miss.) 71.

Missouri. — *Young v. Coleman*, 43 Mo. 179; *Henderson v. Dickey*, 35 Mo. 120; *Morgan v. Bouse*, 53 Mo. 219; *Hook v. Craighead*, 32 Mo. 405; *Leitensdorfer v. Delphy*, 15 Mo. 160, 55 Am. Dec. 140, wherein it was declared that "the power of a court of equity to reform an instrument which by reason of a mistake fails to execute the intention of the parties, is unquestionable;" *Mississippi Valley Trust Co. v. McDonald*, 146 Mo. 467.

Montana. — *Power v. Burd*, 18 Mont. 22; *Gassert v. Black*, 11 Mont. 185.

Nebraska. — *Beall v. Martin*, 48 Neb. 479; *Hilton v. Crooker*, 30 Neb. 707; *Parker v. Starr*, 21 Neb. 680; *Cox v. Ellsworth*, 18 Neb. 664; *Palmer v. Windrom*, 12 Neb. 494.

New Hampshire. — *Tilton v. Tilton*, 9 N. H. 392.

New Jersey. — *Waldron v. Letson*, 15 N. J. Eq. 126; *Read v. Cramer*, 2 N. J. Eq. 277, 34 Am. Dec. 208.

New York. — *Gillespie v. Moon*, 2 Johns. Ch. (N. Y.) 585, wherein Chancellor Kent said that "it appears to be the steady language of the English chancery for the last seventy years,

and of all the compilers of the doctrines of that court, that a party may be admitted to show, by parol proof, a mistake as well as fraud in the execution of a deed or other writing;" *Higginbotham v. Burnet*, 5 Johns. Ch. (N. Y.) 184; *Keisselbrack v. Livingston*, 4 Johns. Ch. (N. Y.) 148; *De Riemer v. De Cantillon*, 4 Johns. Ch. (N. Y.) 88; *Getman v. Beardsley*, 2 Johns. Ch. (N. Y.) 275; *Lyman v. United Ins. Co.*, 2 Johns. Ch. (N. Y.) 630; *Souverbye v. Arden*, 1 Johns. Ch. (N. Y.) 240; *Wiser v. Blachly*, 1 Johns. Ch. (N. Y.) 607; *Bush v. Hicks*, 60 N. Y. 298; *Jackson v. Andrews*, 59 N. Y. 244; *Van Tuyl v. Westchester F. Ins. Co.*, 55 N. Y. 657; *Rowley v. Empire Ins. Co.*, 36 N. Y. 550; *Rider v. Powell*, 28 N. Y. 312; *New York Ice Co. v. North Western Ins. Co.*, 23 N. Y. 357; *Bidwell v. Astor Mut. Ins. Co.*, 16 N. Y. 263; *Johnson v. Taber*, 10 N. Y. 319; *Coles v. Bowne*, 10 Paige (N. Y.) 526; *Marvin v. Bennett*, 8 Paige (N. Y.) 312; *Wisswall v. Hall*, 3 Paige (N. Y.) 313; *Phoenix F. Ins. Co. v. Gurnee*, 1 Paige (N. Y.) 278; *Matter of Howe*, 1 Paige (N. Y.) 125; *Wemple v. Stewart*, 22 Barb. (N. Y.) 154; *Masters v. Madison County Mut. Ins. Co.*, 11 Barb. (N. Y.) 624; *Weed v. Schenectady Ins. Co.*, 7 Lans. (N. Y.) 452; *De Peyster v. Hasbrouck*, 11 N. Y. 587; *Brioso v. Pacific Mut. Ins. Co.*, 4 Daly (N. Y.) 246; *Bunten v. Orient Mut. Ins. Co.*, 2 Keyes (N. Y.) 667; *Schelling v. Bischoff*, 61 N. Y. Super. Ct. 68; *Barton v. Sackett*, (Supm. Ct.) 3 How. Pr. (N. Y.) 358.

North Carolina. — *Huffman v. Fry*, 5 Jones Eq. (N. Car.) 415; *Springs v. Harven*, 3 Jones Eq. (N. Car.) 96; *Newsom v. Bufferlow*, 1 Dev. Eq. (N. Car.) 383.

Ohio. — *Meeks v. Stillwell*, 54 Ohio St. 541, wherein it was said that "a deed will be set aside when it is clearly shown that it does not conform to the intention of the donor, or was executed under a material misapprehension as to its effect;" *Neininger v. State*, 50 Ohio St. 394, 40 Am. St. Rep. 674; *Byers v. Chapin*, 28 Ohio St. 300; *Clayton v. Freet*, 10 Ohio St. 544; *Davenport v. Sovil*, 6 Ohio St. 460; *Harris v. Columbiana County Mut. Ins. Co.*, 18 Ohio 116; *Mansfield, etc., R. Co. v. Veeder*, 17 Ohio 385; *McNaughten*

defended. The real question is not what the real instrument was intended to mean, or how it was intended to operate, but what it was intended to be.¹

Deed Set Up by Way of Defense. — Equity will correct a mistake in a deed where the deed is set up by way of defense to a suit in equity, as well as where it is a subject of relief in a bill.²

Rights of Innocent Purchasers. — The court will not correct a mistake in an instrument to the prejudice of an innocent purchaser.³

v. Partridge, 11 Ohio 223; *Young v. Miller*, 10 Ohio 85.

Oregon. — *Haynes v. Whitsett*, 18 Oregon 454; *Finlayson v. Finlayson*, 17 Oregon 347; *Powell v. Heisler*, 16 Oregon 412; *Foster v. Schmeer*, 15 Oregon 363, in which case the court said that "reforming a written contract on the grounds of mistake is the exercise of the ordinary jurisdiction of a court of equity;" *Lewis v. Lewis*, 5 Oregon 169; *Osborn v. Ketchum*, 25 Oregon 352.

Pennsylvania. — *Moliere v. Pennsylvania F. Ins. Co.*, 5 Rawle (Pa.) 342; *Columbia Ins. Co. v. Cooper*, 50 Pa. St. 331.

South Dakota. — *MacVeagh v. Burns*, 2 S. Dak. 83.

Tennessee. — *Bailey v. Bailey*, 8 Humph. (Tenn.) 230.

Texas. — *Harrell v. De Normandie*, 26 Tex. 120.

Utah. — *Griffin v. Salt Lake City*, 18 Utah 132.

Vermont. — *May v. Adams*, 58 Vt. 74; *Tabor v. Cilley*, 53 Vt. 487; *Brown v. Lamphear*, 35 Vt. 258; *Blodgett v. Hobart*, 18 Vt. 414; *Goodell v. Field*, 15 Vt. 448; *Beardsley v. Knight*, 10 Vt. 185.

Washington. — *Murdoch v. Leonard*, 15 Wash. 142; *Phillips v. Port Townsend Lodge No. 6*, 8 Wash. 529; *Elwood v. Stewart*, 5 Wash. 736; *Jackson v. Tatebo*, 3 Wash. 456; *Jenkins v. Jenkins University*, 17 Wash. 160; *Gilbranson v. Squier*, 5 Wash. 99.

Wisconsin. — *Whitmore v. Hay*, 85 Wis. 240; *Kessel v. Kessel*, 79 Wis. 289; *Cordes v. Coates*, 78 Wis. 641; *Cameron v. White*, 74 Wis. 425; *Hagenah v. Geffert*, 73 Wis. 641; *Grossbach v. Brown*, 72 Wis. 458; *Lusted v. Chicago, etc., R. Co.*, 71 Wis. 396; *Silbar v. Ryder*, 63 Wis. 109; *Green Bay, etc., Canal Co. v. Hewitt*, 62 Wis. 331; *Sawyer v. Hanson*, 48 Wis. 611; *Harrison v. Juneau Bank*, 17 Wis. 340; *Waterman v. Dutton*, 6 Wis. 265; *James v. Cutler*, 54 Wis. 172.

United States. — *Walden v. Skinner*, 101 U. S. 577; *Snell v. Atlantic F. & M. Ins. Co.*, 98 U. S. 85; *North American Ins. Co. v. Whipple*, 2 Biss. (U. S.) 419; *Graves v. Boston Marine Ins. Co.*, 2 Cranch (U. S.) 419; *Oliver v. Mutual Commercial Marine Ins. Co.*, 2 Curt. (U. S.) 277; *Andrews v. Essex F. & M. Ins. Co.*, 3 Mason (U. S.) 10; *Allen v. Hammond*, 11 Pet. (U. S.) 71; *Hunt v. Rhodes*, 1 Pet. (U. S.) 1; *Daniel v. Mitchell*, 1 Story (U. S.) 172; *Hearne v. Marine Ins. Co.*, 20 Wall. (U. S.) 488; *Union Mut. Ins. Co. v. Wilkinson*, 13 Wall. (U. S.) 222; *Delaware Ins. Co. v. Hogan*, 2 Wash. (U. S.) 5.

England. — *Henkle v. Royal Exch. Assur. Co.*, 1 Ves. 319, wherein Lord Chancellor Hardwicke said the court had jurisdiction to relieve in respect to a plain mistake in contracts in writing as well as against fraud in contracts; *Wake v. Harrop*, 1 H. & C. 202; *Beaumont v. Bramley*, 1 T. & R. 47; *Scholfield v. Lockwood*, 33 L. J. Ch. 106; *Druiff v. Parker*, L. R. 5 Eq. 137; *Baker v. Paine*, 1 Ves. 458; *Bingham v. Bingham*, 1 Ves. 127; *Joynes v. Statham*, 3 Atk. 388; *Legal v. Miller*, 2 Ves. 299; *Pitcairn v. Ogbourne*, 2 Ves. 376; *Simpson v. Vaughan*, 2 Atk. 32; *Langley v. Brown*, 2 Atk. 203; *Burgh v. Francis*, 1 Eq. Cas. Abr. 320, par. 1; *Taylor v. Wheeler*, 2 Vern. 564; *Finch v. Winchelsea*, 1 P. Wms. 277; *Gee v. Spencer*, 1 Vern. 32; *Evans v. Llewellyn*, 2 Bro. C. C. 151.

Ireland. — *Law v. Warren*, 6 Ir. Eq. 299.

1. *Tillis v. Smith*, 108 Ala. 264, in which case the court cited *Alabama Midland R. Co. v. Brown*, 98 Ala. 647, and *Parker v. Parker*, 88 Ala. 362.

2. *Chamberlain v. Thompson*, 10 Conn. 243.

3. *Wilson v. Jasper*, 90 Ky. 211.

Reason for Rule. — The court will not, to cure one wrong, do another, and if the right of a *bona fide* purchaser without notice will be interfered with by the correction of the mistake, the re-

Negligence of Plaintiff. — Equity will not grant relief where the mistake was due to the plaintiff's negligence.¹

(2) *Kinds of Mistake* — (a) **In General.** — The jurisdiction of a court of equity to reform a written contract depends in a great measure upon the particular facts and circumstances surrounding the transaction,² but the English and American cases agree that relief should be granted wherever an instrument is drawn and executed which is intended to carry into execution an agreement previously entered into, but which, by mistake of the draftsman, either as to law or fact, does not fulfil that intention, or violates it.³

Mistake as to Seal. — Equity will reform a written contract where there has been an omission by mistake or accident to affix a seal,⁴ or the instrument may be reformed by rejecting a seal which was affixed to it through unskilfulness, ignorance, or mistake.⁵

Making New Contract for Parties. — Equitable relief will be granted

lief will not be granted. *Burke v. Anderson*, 40 Ga. 535.

Rights of Judgment Creditors. — In *Burke v. Anderson*, 40 Ga. 535, it was declared that the only exception to the rule that mistakes will be corrected in equity arises when there is a *bona fide* purchaser without notice. The rule extends to parties and all privies in a state and in law, with that exception. A judgment creditor does not occupy the position of a *bona fide* purchaser without notice, but is a privy. See also *Allen v. McGaughey*, 31 Ark. 252, in which case the court followed *Burke v. Anderson*, 40 Ga. 535, and *cited Gass v. Gass*, 1 Heisk. (Tenn.) 613, and *Click v. Click*, 1 Heisk. (Tenn.) 607.

1. *Pope v. Hoopes*, 90 Fed. Rep. 451; *Wilson v. Jasper*, 90 Ky. 211, in which latter case it was held that if at the time the purchaser made the purchase he was apprised of the existence of the mistake theretofore committed, the court will decree reformation.

2. *Per Lord, C. J.*, in *Powell v. Heisler*, 16 Oregon 412.

3. *Scales v. Ashbrook*, 1 Met. (Ky.) 358, in which case the court *cited Inskoe v. Proctor*, 6 T. B. Mon. (Ky.) 311, and *Hunt v. Rhodes*, 1 Pet. (U. S.) 1.

Real Agreement Not Expressed. — The mistake against which a court of equity grants relief is such as either discloses that the minds of the parties never met and that there was therefore no contract, or else that the contract was defectively executed so as not to ex-

press the real agreement of the parties. *Moore v. Scott*, 47 Neb. 346.

Defendant Not Guilty of Fraud. — Where relief is sought against a mistake it is immaterial that the defendant was not guilty of any fraud. *Stephens v. Orman*, 10 Fla. 9.

Use of Inapt Words. — In *Ohlander v. Dexter*, 97 Ala. 476, *Coleman, J.*, said: "If the parties undertake to draw up a particular agreement, and by the use of inapt words another and different agreement is executed, upon clear and satisfactory proof of the terms of the agreement intended to be made, and of the mistake, equity will reform the instrument so as to make it conform to the intended agreement." *Citing Larkins v. Biddle*, 21 Ala. 253.

Mistake in Note. — In *Parcels v. Gohegan*, 2 J. J. Marsh. (Ky.) 133, it was held that after a judgment has been obtained on a note, the maker is entitled to enjoin the enforcement of the judgment on the ground that there was a mistake in the note.

Contract of Suretyship. — Equity will administer the remedy of reformation on the ground of mistake as fully against a surety or guarantor, as against the principal party. *Neininger v. State*, 50 Ohio St. 394, in which case the court *cited Olmsted v. Olmsted*, 38 Conn. 309, and *Wiser v. Blachly*, 1 Johns. Ch. (N. Y.) 607.

4. *Montville v. Haughton*, 7 Conn. 543; *Missouri River, etc., R. Co. v. Miami County*, 12 Kan. 482.

5. *Webster v. Harris*, 16 Ohio 490.

in cases of mistake when the fact concerning which the mistake is made is material to the transaction, affecting its substance and not merely its incidents, and the mistake itself is so important that it determines the conduct of the mistaken parties,¹ but no relief will be granted unless the mistake is a material one;² and it is well settled that, although a court of equity will, upon proof of fraud, mistake, or surprise, rectify an agreement according to the intent of the parties, it will not interfere where the instrument is such as the parties themselves designed it to be.³

Inaccurate Description of Property.—A suit for the reformation of a deed lies when there is a material mistake in the description of the property intended to be conveyed; and there is no difference between a description which does not include all the property intended to be included, and a description which is different in any other respect.⁴

Mistake as to Quantity of Land.—Whether sales are made by the acre or in gross, courts of chancery will give relief if it appears that the parties were under a palpable mistake as to the quantity mentioned, and that that quantity is beyond what they intended to risk, or is less or more than might be reasonably calculated on as within the range of ordinary contingency.⁵

1. *Barth v. Deuel*, 11 Colo. 494, in which case the court cited 2 Pom. Eq. Jur., § 856.

2. *McCoy v. Bayley*, 8 Oregon 196.

3. *Farley v. Bryant*, 32 Me. 474; *Showman v. Miller*, 6 Md. 485; *McElderry v. Shipley*, 2 Md. 25; *Kennedy v. Umbaugh*, *Wright* (Ohio) 327, in which last case it was held that a court of equity will not so reform a contract as to defeat its object and make a new contract.

Mistake as to Estate Conveyed.—In *Clayton v. Freet*, 10 Ohio St. 545, a deed which conveyed an estate in fee simple was so reformed as to convey a life estate to a grantee with remainder to her children.

Enumeration of Correctable Mistake.—In *Neininger v. State*, 50 Ohio St. 394, *Williams, J.*, said that reformation may be made by correcting mistakes and "misdescriptions, including lands omitted by mistake, enlarging or restricting the character of the estate, inserting or qualifying covenants and conditions, and in other respects." See also *Lestrade v. Barth*, 19 Cal. 660, in which case it was said: "It matters not whether the error be in the insertion or omission of a material stipulation; or, as alleged in the present case, in an inaccurate description of the subject matter of the agreement."

Mistake of Both Parties as to Value.—

A court of equity will not interfere to relieve against a contract made in good faith where both the parties are mistaken as to the value of the property embraced in the contract. *Hunter v. Goudy*, 1 Ohio 449.

4. *Gwyer v. Spaulding*, 33 Neb. 573, in which case the court said: "That a court of equity will reform the description contained in a deed of conveyance, where it is established by clear and satisfactory evidence that the instrument fails to express the intention of the parties, cannot longer be questioned. The doctrine is as firmly settled as anything in the law, and the citation of authorities is unnecessary." See also *Stevens v. Holman*, 112 Cal. 345, 53 Am. St. Rep. 216; *Hayford v. Kocher*, 65 Cal. 389; *Lestrade v. Barth*, 19 Cal. 660.

Gilmore v. Morgan, 2 J. J. Marsh. (Ky.) 65, in which it was intended to convey one hundred acres of land, and through a mistake of the surveyor in laying it off the complainant conveyed one hundred and eighteen acres, believing that he was conveying only one hundred.

5. *Grundy v. Grundy*, 12 B. Mon. (Ky.) 269. But the courts have not been uniform in their decisions upon this question, as will appear from a

(b) **Mutuality of Mistake.** — In order to enable a court to reform an instrument evidenced by writing, on the ground of a mistake, it must affirmatively appear that the mistake was common to both parties and that the writing as executed expresses the contract as understood by neither.¹

A Written Instrument Will Not Be Reformed unless the correction asked for will make the contract express the understanding of both

learned discussion of the question by Bennett, J., in *Noel v. Gill*, 84 Ky. 241, in which case the court, adopting the view that has been taken by a large majority of the states, held that contracts required by the statute of frauds to be in writing may be reformed by courts of equity so as to enlarge or restrict the terms of the subject matter of the contract, wherever it is clearly shown that the written contract, by fraud or mistake, does not embrace the terms of the subject matter of the contract as it was intended and understood by the parties to it. See further for an exhaustive citation of the case upon this subject, Am. and Eng. Encyc. of Law, title *Mistake*.

Suit for Restitution of Purchase Money. — Where a deed conveying land describes the land as containing a named number of acres, and there is no warranty of quantity, if it appears that there was a material mistake as to the number of acres, the purchaser may maintain a bill in equity for a restitution of a proportionate part of the purchase money which he has paid. *Crane v. Prather*, 4 J. J. Marsh. (Ky.) 75.

1. *Connecticut.* — *Essex v. Day*, 52 Conn. 483.

Georgia. — *Werner v. Rawson*, 89 Ga. 619; *Carbine v. McCoy*, 85 Ga. 185; *Bell v. Americus, etc.*, R. Co., 76 Ga. 754.

Illinois. — *Douglas v. Grant*, 12 Ill. App. 273.

Indiana. — *Citizens' Bank v. Judy*, 146 Ind. 322; *Roszell v. Roszell*, 109 Ind. 355.

Maryland. — *Dulany v. Rogers*, 50 Md. 524.

Montana. — *Fitschen v. Thomas*, 9 Mont. 52.

New York. — *Lyman v. United Ins. Co.*, 17 Johns. (N. Y.) 376.

Oregon. — *Mitchell v. Holman*, 30 Oregon 280; *Meier v. Kelly*, 20 Oregon 86; *Stephens v. Murton*, 6 Oregon 193.

Rhode Island. — *Diman v. Providence, etc.*, R. Co., 5 R. I. 134.

Vermont. — *Brown v. Lamphear*, 35 Vt. 252.

England. — *Mortimer v. Shortall*, 2 Dr. & War. 372; *Fowler v. Fowler*, 4 De G. & J. 265; *Eaton v. Bennett*, 34 Beav. 196; *Townshend v. Stangroom*, 6 Ves. Jr. 334.

Ireland. — *Fallon v. Robbins*, 16 Ir. Ch. 422, which case was cited in *Dulany v. Rogers*, 50 Md. 524.

Nominal Party to Contract. — When the actual grantor in a deed is merely a nominal party who has parted with his interest, but through third persons, and the contract is in fact between them, and the mistake is mutual between the parties at interest, equity will correct a mistake mutual as to the several parties, though the grantor has made no mistake but merely done as he was directed. *Murray v. Sells*, 53 Ga. 257.

Mutual Mistake Defined. — In *MacVeagh v. Burns*, 2 S. Dak. 83, Bennett, J., said: "A mutual mistake which will afford a ground for relief by a reformation of a written instrument means a mistake reciprocal and common to both parties, when each alike labors under a misconception in respect to the facts."

Whether Mistake of Law or of Fact. — Whether the mistake is in a matter of law or in a matter of fact it is necessary that it should be a mistake in which each and all of the parties to the contract participated. *Newell v. Stiles*, 21 Ga. 118, in which case the court cited *Adams Eq.* 171.

Restraining Deed in Part. — In *Hileman v. Wright*, 9 Ind. 127, the mistake was not mutual, and it was contended that the contract could not be reformed but only rescinded, and the court held that equity had jurisdiction to reform or to restrain so much of the deed as went beyond the intention of the parties. Cited in *Clark v. Roots*, 50 Ark. 179.

Under the California Statute (Civ. Code, § 3399), it is not necessary that the mistake shall have been mutual. *Capelli v. Dondero*, 123 Cal. 324.

parties thereto at the time it was executed, because where the plaintiff only was mistaken and there was no fraud or other inequitable conduct on the part of the defendant, reformation would result only in the inequitable consequence of shifting from the plaintiff to the defendant the burden of abiding by a contract which he never made.¹

Mistake Accompanied by Fraud. — If one of the parties to a contract is mistaken as to a matter, and the other knows that he is and does not apprise him of it, the mistake, although it is a mistake of one of the parties only, is a subject of correction, because the case is one which shows a mistake in one party and fraud in the other.²

(c) **Mistake of Law.** — As a General Rule, for mere ignorance of law on the part of the plaintiff, where the facts were all known, and there was no misplaced confidence, and no artifice or deception or fraudulent practice used by the other party to induce the mistake of law, or to prevent its correction, equity will not intervene.³

1. *Diman v. Providence, etc., R. Co.*, 5 R. I. 134, in which case Ames, C. J., said: "A court of equity has no power to alter or reform an agreement made between parties, since this would be in truth a power to contract for them, but merely to correct the writing executed as evidence of the agreement so as to make it express what the parties actually agreed to. It follows that the mistake which it may correct in such a writing must be, as it is usually expressed, the mistake of both parties to it; that is, such a mistake in the draughting of the writing as makes it convey the intent or meaning of neither party to the contract. If the court were to reform the writing to make it accord with the intent of one party only to the agreement, who averred and proved that he signed it as it was written by mistake when it exactly expressed the agreement as understood by the other party, the writing when so altered would be just as far from expressing the agreement of the parties as it was before; and the court would have been engaged in the singular office, for a court of equity, of doing right to one party at the expense of a precisely equal wrong to the other." *Quoted* with approval in *Werner v. Rawson*, 89 Ga. 619. See also *Murray v. Sells*, 53 Ga. 257; *Andrews v. Andrews*, 81 Me. 337; *National Traders Bank v. Ocean Ins. Co.*, 62 Me. 519; *Young v. McGown*, 62 Me. 56; *Adams v. Stevens*, 49 Me. 362; *Lumbert v. Hill*, 41 Me. 475; *Butman v. Hussey*, 30 Me. 263; *German Amer-*

ican Ins. Co. v. Davis, 131 Mass. 317; *Kilmer v. Smith*, 77 N. Y. 226; *Meiswinkel v. St. Paul F. & M. Ins. Co.*, 75 Wis. 147; *Harter v. Christoph*, 32 Wis. 245; *Ledyard v. Hartford F. Ins. Co.*, 24 Wis. 496; *Andrews v. Essex F. & M. Ins. Co.*, 3 Mason (U. S.) 6.

Mutual Error and Surprise. — In *Harrell v. De Normandie*, 26 Tex. 120, upon a sale and transfer of government securities, the parties contracted on the basis of a certain percentage to be discounted from the estimated value of the securities. But in estimating their value, the seller by mistake omitted to include interest that had already accrued, and the buyer took the seller's estimate. This was held to be such a case of mutual error and surprise as was relievable in equity. *Cited* with approval in *Griffith v. Sebastian County*, 49 Ark. 24.

2. *Wyche v. Greene*, 26 Ga. 415.

3. **Mistake of Law Not Ground for Relief in Equity.** — In *Lyon v. Richmond*, 2 Johns. Ch. (N. Y.) 60, Chancellor Kent said: "Courts do not undertake to relieve parties from their acts and deeds fairly done on a full knowledge of facts, though under a mistake of the law. Every man is to be charged at his peril with a knowledge of the law. There is no other principle which is safe and practicable in the common intercourse of mankind." *Quoted* with approval in *State v. Paup*, 13 Ark. 129, 56 Am. Dec. 306.

In *Wheaton v. Wheaton*, 9 Conn. 96, it was declared that the only English authority in support of the proposition

Exceptions to Rule. — However, although mistakes in matters of law are not in general admitted as a ground of relief in equity, this rule is not of universal or unqualified application and there are various exceptions to the rule.¹

Where Fraudulent Advantage Is Taken of Party's Ignorance. — One of the well-established exceptions to the rule is where one party is ignorant of a matter of law, and another takes advantage of such circumstance to make the contract, although perhaps, in such cases, equity grants relief more properly on account of fraud in the one party than of ignorance of law in the other.²

Mutuality of Mistake of Law. — Another familiar exception to the general rule is where a mistake of law is mutual. Where both parties to a contract labor under the same mistake of the law, so that the written instrument does not express the meaning of the parties, the court of equity will upon a proper bill open it.³

that parol proof is admissible to show a mistake in law is *Lansdown v. Lansdown*, Mosely 364, and that that case has been often *questioned* and *overruled* by a whole train of decisions.

See also in support of the doctrine that equity will not relieve against mistakes of law, and for a full treatment of the exceptions to the rule, Am. and Eng. Encyc. of Law, titles *Mistake*, and *Reformation and Cancellation of Contracts*; and see the following cases:

Alabama. — *Ohlander v. Dexter*, 97 Ala. 476; *Kelly v. Turner*, 74 Ala. 518; *Hemphill v. Moody*, 64 Ala. 473; *Clark v. Hart*, 57 Ala. 390; *Hardigree v. Mitchum*, 51 Ala. 151.

California. — *Smith v. McDougal*, 2 Cal. 586.

Connecticut. — *Haussman v. Burnham*, 59 Conn. 117.

Florida. — *Jackson v. Magbee*, 21 Fla. 622.

Georgia. — *Allen v. Elder*, 76 Ga. 674; *Ferguson v. Ferguson*, 1 Ga. Dec. (pt. i.) 135.

Indiana. — *Comstock v. Coon*, 135 Ind. 640.

Iowa. — *Baker v. Massey*, 50 Iowa 399.

Maine. — *Stover v. Poole*, 67 Me. 217.

New York. — *Lyon v. Richmond*, 2 Johns. Ch. (N. Y.) 51.

United States. — *U. S. Bank v. Daniel*, 12 Pet. (U. S.) 32; *Hunt v. Rousmaniere*, 1 Pet. (U. S.) 1.

England. — *Pullen v. Ready*, 2 Atk. 587; *Irnham v. Child*, 1 Bro. C. C. 92; *Underhill v. Horwood*, 10 Ves. Jr. 228.

1. *U. S. Bank v. Daniel*, 12 Pet. (U. S.) 55, in which case the court said: "The remedial power claimed by

courts of chancery to relieve against mistakes of law is a doctrine rather grounded upon exceptions than upon established rules." *Quoted* with approval in *State v. Paup*, 13 Ark. 129, 56 Am. Dec. 306. See also *Haussman v. Burnham*, 59 Conn. 117, in which case the court *cited* *Stedwell v. Anderson*, 21 Conn. 144, and *Patterson v. Bloomer*, 35 Conn. 64. In the latter case the parties were mistaken as to the legal effect of a chattel mortgage. See further *Baker v. Massey*, 50 Iowa 399.

2. *Champlin v. Laytin*, 1 Edw. (N. Y.) 467, which case was *cited* with approval in *State v. Paup*, 13 Ark. 129, 56 Am. Dec. 306.

Mistake of Law Occasioned by Fraud. — The rule is firmly established, that where the mistake of law is occasioned by fraud, imposition, misrepresentation, a party suffering thereby may have relief in equity. *Per* Cassoday, J., in *Kyle v. Fehley*, 81 Wis. 67. *Citing* *Lansdown v. Lansdown*, Mosely 364; *Hardigree v. Mitchum*, 51 Ala. 151; *Goodenow v. Ewer*, 16 Cal. 470; *Anderson v. Tydings*, 8 Md. 427, 63 Am. Dec. 708; *Spurr v. Home Ins. Co.*, 40 Minn. 425; *Ladd v. Rice*, 57 N. H. 374; *Whelen's Appeal*, 70 Pa. St. 410; *Brown v. Rice*, 26 Gratt. (Va.) 467; *Hagenah v. Geffert*, 73 Wis. 641; *Green Bay, etc., Canal Co v. Hewitt*, 62 Wis. 331; *Silbar v. Ryder*, 63 Wis. 108, and *Griswold v. Hazard*, 141 U. S. 260.

3. *Lee v. Percival*, 85 Iowa 639, in which case the court said: "The law as thus announced finds ample support in the authorities: 15 Am. and Eng. Encyc. of Law (1st ed.), p. 642, note 3;

Mistake as to Legal Effect or Import of Instrument. — Upon the question whether a court of equity will interpose to reform a written instrument when the parties understood its tenor but were mistaken as to its legal effect or import there is much conflict of authority;¹ but it would seem that according to the weight of authority mistakes as to the legal effect of an instrument are relievable in equity.²

p. 643, notes 1, 2; p. 644, notes 2, 3." See also *Woodbury Sav. Bank, etc., Assoc. v. Charter Oak F. & M. Ins. Co.*, 31 Conn. 517; *Stedwell v. Anderson*, 21 Conn. 139; *Parish v. Camplin*, 139 Ind. 1; *Stover v. Poole*, 67 Me. 217; *Canedy v. Marcy*, 13 Gray (Mass.) 373; *Eastman v. Provident Mut. Relief Assoc.*, 65 N. H. 176, 23 Am. St. Rep. 29, and *Kennard v. George*, 44 N. H. 440.

1. *Per* Boise, J., in *Stephens v. Murton*, 6 Oregon 193.

2. *Clayton v. Bussey*, 30 Ga. 946; *Stafford v. Fettes*, 55 Iowa 484. But see *Freed v. Brown*, 41 Ark. 495. For a full citation of cases on this question, see Am. and Eng. Encyc. of Law, titles *Mistake*, and *Reformation and Cancellation of Contracts*.

Mistake as to Description of Land. — In *Bush v. Hicks*, 60 N. Y. 301, it was said: "It is claimed that as the plaintiff knew the terms of the description inserted in his deed, and as the language employed was that intended to be used, there was no mistake. The answer is that the mistake consisted in supposing the description applied to the land intended to be conveyed, whereas it embraced much more, and a mutual mistake of this character is a ground for reforming a deed in equity."

Quoted with approval in *Clark v. Roots*, 50 Ark. 179. See also *Stedwell v. Anderson*, 21 Conn. 139, in which case the court said: "When property has been conveyed, through mistake, by deed, which the parties never intended should be conveyed, which the grantor was under no legal or moral obligation to convey, and which the grantee, in good conscience, has no right to retain, a court of chancery will interfere and correct that mistake, whether it arose from a misapprehension of the facts or of the legal operation of the deed." See further *Stafford v. Fettes*, 55 Iowa 484; *Nowlin v. Pyne*, 47 Iowa 293; *Reynolds v. Mee-lick*, 17 Iowa 585; *Wilcox v. Lucas*, 121 Mass. 21; *Glass v. Hulbert*, 102 Mass.

24; *Hunt v. Rousmanier*, 8 Wheat. (U. S.) 174, 1 Pet. (U. S.) 1, and *Jones v. Clifford*, 3 Ch. D. 779.

In *Arkansas* it has been held that where the mistake is not in the instrument itself, but in the legal construction of it, the mistake is one of law such as will not be rectified in a court of equity. *Hicks v. Coody*, 49 Ark. 425, in which case the court followed *Rector v. Collins*, 46 Ark. 167.

In *Georgia* it has been held that where there is an honest mistake of the law as to the effect of an instrument, on the part of both contracting parties, especially where it operates as a gross injustice to one and gives an unconscientious advantage to the other, such mistake may be relieved in equity. *Allen v. Elder*, 76 Ga. 674, in which case the parties attempted to execute a valid and legal mortgage, but in consequence of a mutual mistake of the law no scroll was attached to the signature of the mortgagor, and it was held that equity had jurisdiction to reform the instrument.

Distinction Not of Much Importance. — The distinction between the mistakes of law and mistakes of fact is certainly recognized in the text books and decisions, and to a certain extent is a valid distinction; but it is not practically so important as it is often represented to be. *Park v. Blodgett, etc., Co.*, 64 Conn. 28, in which case the court said: "Under certain circumstances it will, and under others it will not, reform an instrument founded upon a mistake of law. It is no longer true, if it ever was, that a mistake of law is no ground for relief in any case, as will be seen by the cases hereinafter cited." Citing *Cooper v. Phibbs*, L. R. 2 H. L. 170; *Northrop v. Graves*, 19 Conn. 548; *Chamberlain v. Thompson*, 10 Conn. 243; *Stedwell v. Anderson*, 21 Conn. 144; *Woodbury Sav. Bank, etc., Assoc. v. Charter Oak F. & M. Ins. Co.*, 31 Conn. 518; *Palmer v. Hartford F. Ins. Co.*, 54 Conn. 488; *Haussman v. Burnham*, 59 Conn. 117; *Andrews v.*

(3) *Kinds of Contracts Reformable.* — The power of a court of equity to reform a contract is not confined to any description of contracts; it extends to executed as well as to executory contracts, however solemn they may be in their character. When the mistake is admitted there is an equity *dehors* the deed or instrument, and the power to relieve is said to be as clear as when the mistake is shown by proof, either parol or written.¹

Void Contracts. — The original contract must be a valid one or no reformation of the instrument will be decreed, however clearly the mistake is established.² It sometimes happens that where

Andrews, 81 Me. 337; Canedy v. Marcy, 13 Gray (Mass.) 373; Goode v. Riley, 153 Mass. 585; Benson v. Markoe, 37 Minn. 30; Griffith v. Townley, 69 Mo. 13; Kennard v. George, 44 N. H. 440; Eastman v. Provident Mut. Relief Assoc., 65 N. H. 176; Trusdell v. Lehman, 47 N. J. Eq. 218; Bush v. Hicks, 60 N. Y. 298; Clayton v. Freet, 10 Ohio St. 544; Gump's Appeal, 65 Pa. St. 476; May v. Adams, 58 Vt. 74; Snell v. Atlantic F. & M. Ins. Co., 98 U. S. 85, and Griswold v. Hazard, 141 U. S. 260.

In *Park v. Blodgett, etc., Co.*, 64 Conn. 28, it was declared that *Wheaton v. Wheaton*, 9 Conn. 96, was correctly decided not on the ground that the mistake was one of law, but on the ground that the mistake of law was not mutual, and was therefore one which under the circumstances a court of equity would not correct.

1. *Per Sharkey, C. J.*, in *Simmons v. North*, 3 Smed. & M. (Miss.) 71, which case was cited with approval in *Allen v. McGaughey*, 31 Ark. 252. See also *Leitensdorfer v. Delphy*, 15 Mo. 160, 55 Am. Dec. 140, wherein it was held that when the reformation of a mistake is sought it is not material whether the instrument is an executory or executed contract.

Reformation of Insurance Policy. — "Equity will interpose not only in cases of fraud, but also of mistake, where a policy is drawn up in a form different from the application, or anything is omitted which it is the duty of the company to insert or indorse on the instrument." *National F. Ins. Co. v. Crane*, 16 Md. 260, citing *Collett v. Morrison*, 12 Eng. L. & Eq. 171.

Reformation of Mortgage. — In *Citizens' Nat. Bank v. Judy*, 146 Ind. 322, it was said: "It is settled law that when it appears that by the mutual mistake of all the parties to a mort-

gage, as to a matter of fact, the instrument does not express their agreement, a court of equity will reform the instrument by correcting such mistake." *Citing Walls v. State*, 140 Ind. 16; *Parish v. Camplin*, 139 Ind. 1; *Sparta School Tp. v. Mendell*, 138 Ind. 188; *Hamilton County v. Owens*, 138 Ind. 183; *Dutch v. Boyd*, 81 Ind. 146, and *Easter v. Severin*, 78 Ind. 540.

Mistake in Auctioneer's Memorandum. — Equity has jurisdiction to correct a mistake in an auctioneer's memorandum of sale of land. *Pugh v. Chesseldine*, 11 Ohio 109.

Omission of Part of Contract. — When a written agreement fails to express the contract as expressed between the parties, by an unintentional omission of part of it, or by expressing something different from their true intent, equity will reform the contract, whether it be executed or executory. *Allen v. McGaughey*, 31 Ark. 252, in which case the court cited *Steward v. Pettigrew*, 28 Ark. 376.

2. *Petes v. Hambach*, 48 Wis. 443, in which case the court cited *Henkle v. Royal Exch. Assur. Co.*, 1 Ves. 317, where Lord Hardwicke declared that if the contract relates to an illicit subject, the relief will not be granted.

See further, to the effect that equity will not reform a void deed, *Elwood v. Stewart*, 5 Wash. 736, in which case, however, the deed was not void.

In *Petes v. Hambach*, 48 Wis. 443, it was said: "The cases which uphold the reformation of written instruments in proper cases, without regard to the statute of frauds, are in entire harmony with the rule above stated that there must be a valid binding contract to reform by, or reformation will not be decreed."

Contract in Violation of Statute. — In *Dickinson v. Glenney*, 27 Conn. 104, it was said: "Equity will not contra-

equity is thus compelled to yield to the absolute requirements of law, restraining its efficacy in reforming agreements, some other agreement behind the defective contract may subsist, of which equity can lay hold, and thus indirectly, though in strict conformity with established principles, afford a remedy for the deficiency. A defective deed is sometimes treated practically as an executory contract for the sale of land and its execution is decreed.¹

Contract Void for Uncertainty. — Where a written instrument is so vague and uncertain that its specific execution could not be decreed, equity will not reform it by importing into the agreement terms which were omitted.²

Voluntary Contracts. — It is a well-settled rule that equity will not interfere against a grantor in favor of a volunteer to correct a mistake or reform a defective conveyance, the rule being based upon the reasonable proposition that the volunteer has no claim on the grantor.³

vene the positive enactments or requirements of law and defeat its policy, by supplying, under the guise of amending defective instruments, those deficient elements of form without which the agreement is absolutely void, even as between the parties to it; that it will not fabricate for contracting parties those essential ingredients of a contract, without which in the eye of the law there subsists no valid contract whatever. In such cases the intent of parties to conform to the enactments or rules of law will not avail them, and, having fallen short of its requirements, they have consummated no agreement at all." *Citing Hibbert v. Rolleston*, 3 Bro. C. C. 571, in which case the court refused to validate, on the score of making an instrument conform to the intent of the parties, a mortgage of a ship, which did not contain a recital of its registry.

In *Parish v. Camplin*, 139 Ind. 1, the court said: "If the instrument [of a wife] is absolutely void, it is as if it never had been written, or signed. In that case, to reform it would be to make a deed for her, by a court of equity, that she never made, and no part of which she ever made."

1. *Per Storrs, C. J., obiter in Dickinson v. Glenney*, 27 Conn. 104. In this case reformation of a void deed by a married woman was sought and denied, and the court held that the plaintiff was entitled to no relief whatever, because the agreement lying back of the deed was only a void contract, and

said: "It would hardly seem to need authority to determine that if the defective deed of a married woman cannot as such be corrected, no executory agreement of hers evidenced by the deed can be enforced against her."

2. *Osborn v. Phelps*, 19 Conn. 63, in which case the court *distinguished* *Gillespie v. Moon*, 2 Johns. Ch. (N. Y.) 585, and *cited* *Elder v. Elder*, 10 Me. 80, wherein it was said that "it is one thing to limit the effect of an instrument, and another to extend it beyond what its terms import." See also in support of the text *Freed v. Brown*, 41 Ark. 495; *Glass v. Hulbert*, 102 Mass. 31.

3. *Dickinson v. Glenney*, 27 Conn. 104, in which case it was said: "It is a familiar doctrine that chancery will not enforce voluntary contracts *inter vivos*; and that, at all events, where a gift is imperfect from one living person to another, equity will leave the donee where it finds him. Such a party having acquired his imperfect title without the payment of any actual consideration, or under such circumstances as raise no equitable obligation against the giver, has in reality no equity."

In *Adair v. McDonald*, 42 Ga. 506, the court said: "If there is a mistake or a defect, it is a mere failure in a bounty, which, as the grantor was not bound to make, he is not bound to perfect. So in a contest between a prior and subsequent voluntary grantee. As the grantor was free to do as he

Controversy to Which Grantor Is Not a Party. — Although a volunteer is not a proper party complainant in a suit against a grantor for the reformation of a defective conveyance, the rule is otherwise where both complainant and defendant claim under the same deed and the grantor's interests are not at stake, and the claim of the plaintiff is that the grantor did not in fact make the instrument set up by the defendant.¹

Mistake in Will. — A rule somewhat analogous to the one that a voluntary contract will not be reformed is that a court of equity will not correct a mistake in a will.²

Declaring Deed Absolute to Be Mortgage. — A favorite exercise of the jurisdiction of equity to rectify mistakes is where the parties to a deed intended to execute a mortgage, but through mistake the deed imports on its face to be a mortgage.³

Rectification of Insurance Policy. — The jurisdiction of equity to reform a policy of insurance which through mistake does not

pleased, and was not compellible to perform his deed, he was equally at liberty to make a second deed." See also to the same effect: *Wait v. Smith*, 92 Ill. 385; *Comstock v. Coon*, 135 Ind. 640; *German Mut. Ins. Co. v. Grim*, 32 Ind. 249; *Randall v. Ghent*, 19 Ind. 271; *Froman v. Froman*, 13 Ind. 317; *Andrews v. Andrews*, 12 Ind. 348; *Conaway v. Gore*, 24 Kan. 389; *Quirk v. Thomas*, 6 Mich. 76; *Meeks v. Stillwell*, 54 Ohio St. 541; *Petesich v. Hambach*, 48 Wis. 447; *Hanson v. Michelson*, 19 Wis. 498; *Eaton v. Eaton*, 15 Wis. 259; *Smith v. Wood*, 12 Wis. 382.

1. *Adair v. McDonald*, 42 Ga. 506, in which case the court said: "Neither the authorities nor the principles on which this rule is founded apply to cases where the grantor is indifferent, has done nothing inconsistent with the deed proposed to be reformed, and the contest is, in fact, not between claimants under different deeds, under two independent acts of the voluntary grantor, but under the same deed."

2. *Sherwood v. Sherwood*, 45 Wis. 357, in which case it was said: "The reason why courts of equity will not interfere in such cases seems to be, that an action to reform a written instrument is in the nature of an action for specific performance, and the making of a will being a voluntary act there is no consideration, as in actions to reform deeds or contracts, to support the action." See also to the same effect: *Cheyney's Case*, 5 Coke 68; *West v. Errissey*, 2 P. Wms. 354; *Fry v. Porter*, 1 Mod. 310; *Towers v. Moor*,

2 Vern. 98; *Purse v. Snaplin*, 1 Atk. 415; *Nicholls v. Osborn*, 2 P. Wms. 421; *Ulrich v. Litchfield*, 2 Atk. 373; *Murray v. Jones*, 2 Ves. & B. 318; *Cope v. Parry*, 1 Madd. 81; *Avery v. Chappel*, 6 Conn. 270; *Goode v. Goode*, 22 Mo. 518; *Mann v. Mann*, 1 Johns. Ch. (N. Y.) 231; *Rothmahler v. Myers*, 4 Desaus. (S. Car.) 215; *Petesich v. Hambach*, 48 Wis. 443.

3. *Alabama*. — *Peagler v. Stabler*, 91 Ala. 308; *Mitchell v. Wellman*, 80 Ala. 19; *Parish v. Gates*, 29 Ala. 261.

Arkansas. — *Freed v. Brown*, 41 Ark. 495.

California. — *Gumpel v. Castagnetto*, 97 Cal. 15.

Delaware. — *Pierson v. Pierson*, 5 Del. Ch. 11, wherein the court said that "a court of equity will regard what purports to be an absolute conveyance as a mortgage, in order to prevent the commission of frauds, if the proofs taken according to the principles of evidence justify them in so regarding the conveyance."

Florida. — *Chaires v. Brady*, 10 Fla. 133.

Maine. — *Knapp v. Bailey*, 79 Me. 195; *Reed v. Reed*, 75 Me. 264; *Stinchfield v. Milliken*, 71 Me. 567; *Lewis v. Small*, 71 Me. 552; *Rowell v. Jewett*, 69 Me. 293; *Freeman's Bank v. Vose*, 23 Me. 98.

Maryland. — *Grove v. Rentch*, 26 Md. 367.

Ohio. — *Davenport v. Sovil*, 6 Ohio St. 459, wherein it was held that a mortgage might be reformed so as to include land not described in it, and then enforced against the same.

express the real contract of the parties is well settled and has been asserted in numerous cases.¹

Deeds of Married Women. — Upon the question whether a court of equity will reform a mistake in a deed made by a married woman the cases are in conflict. It has been held that a court of equity has no jurisdiction to reform a mistake of description in a deed executed by a married woman unless such jurisdiction is conferred by statute.² On the other hand it has been held by courts of great respectability that mistakes in the deed of a married woman may be reformed, especially where she has duly executed the deed in the manner prescribed by the statute, and according to these authorities it would seem that it is immaterial that the land embraced in such deed consists of a homestead.³

1. *Thomason v. Capital Ins. Co.*, 92 Iowa 72; *Fitchner v. Fidelity Mut. F. Assoc.*, (Iowa 1896) 68 N. W. Rep. 710; *Esch v. Home Ins. Co.*, 78 Iowa 334; *Barnes v. Hekla F. Ins. Co.*, 75 Iowa 11; *Longhurst v. Star Ins. Co.*, 19 Iowa 364; *National Traders Bank v. Ocean Ins. Co.*, 62 Me. 519; *Williams v. North German Ins. Co.*, 24 Fed. Rep. 625; *Fink v. Queen Ins. Co.*, 24 Fed. Rep. 318; *Bailey v. American Cent. Ins. Co.*, 13 Fed. Rep. 250; *Henkle v. Royal Exch. Assur. Co.*, 1 Ves. 318.

2. *Montana Nat. Bank v. Schmidt*, 6 Mont. 609, in which case the court cited *Leonis v. Lazzarovich*, 55 Cal. 52, wherein it was said: "In the case now in hand there was no conveyance whatever of the land in controversy. The description in the deed does not embrace it, and it is sought to prove a parol agreement on the part of the wife to convey this particular tract of land. A *feme covert* can only be bound by a written instrument, executed and acknowledged by her in the manner prescribed by law, and it is not competent for a court of equity to supply defects in description, any more than it can reform a certificate of acknowledgment."

In *Dickinson v. Glenney*, 27 Conn. 104, the court said: "We have no doubt that the rule which, by creating an arbitrary disability, protects married women from the alienation of their real estate through the acts or coercion of their husbands, is so far founded on policy as to disqualify courts of equity to validate instruments made in contravention of the rule." Citing *Bolton v. Williams*, 2 Ves. Jr. 156. See also *Bowden v. Bland*, 53

Ark. 53, wherein it was declared that "by a decided weight of authority it is well settled that a court of chancery cannot reform the deed of a married woman not acting as a *feme sole*;" *Holland v. Moon*, 39 Ark. 124; *Martin v. Hargardine*, 46 Ill. 322; *Purcell v. Goshorn*, 17 Ohio 105; *Carr v. Williams*, 10 Ohio 310; *Petesich v. Hambach*, 48 Wis. 443.

3. *Witherington v. Mason*, 86 Ala. 345, 11 Am. St. Rep. 41; *Hamar v. Medsker*, 60 Ind. 413; *Murdoch v. Leonard*, 15 Wash. 142.

View that Wife's Deed Is Reformable. — In *Stevens v. Holman*, 112 Cal. 345, 53 Am. St. Rep. 216, which was an action to reform a mortgage which covered the homestead of a husband and wife and did not include all the land which they had agreed to mortgage, the court said: "The provisions of the statute invoked merely prescribe the things which are requisite to the due execution of a written instrument by a married woman. It may be readily conceded that she is not bound by any instrument not executed by her in the manner prescribed by the statute. When, however, she has duly executed a contract, there is no reason why she does not bear the same relation to it, and to rights and remedies under it, as any other contractor." In which case the court cited *Savings, etc., Soc. v. Meeks*, 66 Cal. 371; *Hayford v. Kocher*, 65 Cal. 389; *Banbury v. Arnold*, 91 Cal. 610, and *Hamar v. Medsker*, 60 Ind. 413; and distinguished *Barrett v. Tewksbury*, 9 Cal. 14, in which case it was merely held that the consent of a married woman to execute an instrument must be perfectly free, and that "it is not in the power of a

f. ON THE GROUND OF FRAUD. — Equity has jurisdiction, it would seem, to reform a written contract at the suit of a party thereto, where its failure to express the actual agreement of the parties is due to the fraud or imposition of the other party.¹

IV. JURISDICTION OF PARTICULAR COURTS. — The jurisdiction of suits for the rescission, cancellation, or reformation of contracts resides in those courts which, under the constitution, are authorized to grant equitable relief, such as the circuit, district, or superior courts, as they are respectively styled in the various states.² Thus, where district courts are given equity and

court of equity to compel a married woman to correct an insufficient acknowledgment," and declared that statements in *Leonis v. Lazzarovich*, 55 Cal. 52, to the effect that the reformation of a married woman's deed cannot be compelled in equity, are mainly dicta, and that that case has been *overruled*.

Failure of Husband to Join. — It has been held in *Indiana*, where the defect in the conveyance sought to be cured is the failure of a husband to join in the deed of his wife, equity will not reform the instrument, for the reason that the statute provides that "the wife shall have no power to encumber or convey her lands except by a deed in which her husband shall join." *Baxter v. Bodkin*, 25 Ind. 172; *Stevens v. Parish*, 29 Ind. 260.

Mistake in Description. — It has been held, however, that the deed of a married woman may be reformed on account of a mistake in the description of the premises, or estate, or interest, intended to be conveyed. *Parish v. Camplin*, 139 Ind. 1; *Comstock v. Coon*, 135 Ind. 640; *Travellers Ins. Co. v. Noland*, 97 Ind. 217; *Dunn v. Tousey*, 80 Ind. 288; *Styers v. Robbins*, 76 Ind. 547; *McKay v. Wakefield*, 63 Ind. 27; *Wilson v. Stewart*, 63 Ind. 294; *Carper v. Munger*, 62 Ind. 481; *Hamar v. Medsker*, 60 Ind. 413; *Behler v. Weyburn*, 59 Ind. 143.

Deed from Husband to Wife. — A married woman is entitled to the reformation of a deed from her husband to herself, the same as if it had been executed to her by one not her husband. *Comstock v. Coon*, 135 Ind. 640; *Merchants', etc., Bldg. Assoc. v. Scanlan*, 144 Ind. 11.

1. *Newsom v. Bufferlow*, 1 Dev. Eq. (N. Car.) 383, in which case Hall, J., declared that where a clause is either inserted in an instrument or is omitted

through fraud, equity will give relief; *Taylor v. Deverell*, 43 Kan. 469, in which case the plaintiff took a conveyance of land and the defendant fraudulently deceived the plaintiff as to the quantity of land and induced him to take a deed for less quantity than he supposed he was purchasing. See also *Winans v. Huyck*, 71 Iowa 459; *Inskoe v. Proctor*, 6 T. B. Mon. (Ky.) 311; *Coale v. Merryman*, 35 Md. 382; *Gillespie v. Moon*, 2 Johns. Ch. (N. Y.) 593. See further *Goodenow v. Curtis*, 18 Mich. 298; *Wiswall v. Hall*, 3 Paige (N. Y.) 313; *De Peyster v. Hasbrouck*, 11 N. Y. 582; *Rider v. Powell*, 28 N. Y. 310; *Bryce v. Lorillard F. Ins. Co.*, 55 N. Y. 240; *Dane v. Derber*, 28 Wis. 216, and *James v. Cutler*, 54 Wis. 172.

California Statute. — The only fraud necessary to sustain a judgment under Civil Code Cal., § 3399, reforming an instrument, is such as may be inferred from the failure of the defendant to correct the mistake of the plaintiff, known to or suspected by the former at the time of the execution of the instrument. *Wilson v. Moriarty*, 88 Cal. 207, in which case the court cited *Cleghorn v. Zumwalt*, 83 Cal. 156, and *Higgins v. Parsons*, 65 Cal. 280.

2. *English v. Thorn*, 96 Ga. 557, in which case the court, in holding that the jurisdiction to reform a written contract resides in the superior court, and not in the city court of Atlanta, said: "Under our constitution no court of this state other than the superior court can grant affirmative equitable relief of this kind; and we have been unable to find any case in our reports which would seem to lead to a contrary conclusion."

Triable at Special Term. — In *New York* it has been held that an action for the reformation of an instrument is an equitable one, and that as such it is triable at special term, and when in

common-law jurisdiction, a suit to set aside a contract on the ground of fraud should be brought in the district court.¹

V. VENUE — Suits Respecting Title to Land. — A bill to cancel a deed conveying land is not a suit affecting title to land within the meaning of statutes requiring such suits to be instituted in the county in which the land lies.²

Court of Limited Territorial Jurisdiction. — It has been held that where by the statute creating a court it is given jurisdiction of suits affecting real estate only where the real estate lies within certain limits the court has not jurisdiction to set aside a contract respecting land lying without such limits even though it has jurisdiction over the parties.³

County in Which One of Several Defendants Resides. — Although, as a rule, a defendant has the right to be sued in the county of his residence it has been held that a suit against several defendants for the cancellation of a deed may be brought in the county in which any one of them resides, even though substantial relief is prayed against all of them.⁴

an action on an instrument the defense is a counterclaim asking the reformation of the instrument, the defense must be tried in precisely the same form as though it arose in an action brought by the defendant against the plaintiff. *Colville v. Chubb*, (Supm. Ct. Gen. T.) 20 Civ. Pro. (N. Y.) 352.

1. *Perea v. Barela*, 6 N. Mex. 239, in which case it was held that where a beneficiary under a will is fraudulently induced by an administrator to execute a release of all her rights in the decedent's estate, jurisdiction to grant relief resides in the district court, and not in the probate court.

2. *McArthur v. Matthewson*, 67 Ga. 134. See also generally article VENUE.

Transitory Action. — An action for a rescission of a contract of sale of land is transitory — not *in rem* but *in personam*. *Bullitt v. Eastern Kentucky Land Co.*, 99 Ky. 324, citing *Kendrick v. Wheatley*, 3 Dana (Ky.) 34, and *Parish v. Oldham*, 3 J. J. Marsh. (Ky.) 344. But in the first of these cases it was held that when in the action it is sought to enforce a lien on land which results from the rescission, the action becomes local.

In Kansas it has been held that an action to rescind a contract relating to land is local, and that therefore such action may be brought in a county other than that in which the defendant resides. *Neal v. Reynolds*, 38 Kan. 432.

In Texas it has been held that an ac-

tion to cancel a deed is properly brought in the county in which the land described in the deed is situated. *Moore v. Byars*, (Tex. Civ. App. 1898) 47 S. W. Rep. 752.

Land Lying in Several Counties. — In *Neal v. Reynolds*, 38 Kan. 432, the action was brought to rescind a contract for the exchange of land, and it was held under Code Kan., § 46, that the action was properly instituted in a county in which a part of the property exchanged was situated.

Action for Rescission and Damages. — In *Neal v. Reynolds*, 38 Kan. 432, it was held that, although an action for the rescission of a contract relating to real estate is local, and may be brought in a county other than that in which the defendant resides, yet it is improper to join in such action a claim for damages for the breach of the covenants in a deed, because the defendant has a right to be sued therefor in the county in which he resides.

3. *Watts v. White*, 13 Cal. 321.

4. *Wynne v. Lumpkin*, 35 Ga. 208.

Rescission Asked by Defendant in Ejectment. — Where the grantee in a deed brings an action of ejectment alleging that some of the purchase money remains unpaid, and the defendant sets up as equitable defense that he has been defrauded and prays rescission, the court in which the action is brought has jurisdiction to hear and determine the controversy, and the plaintiff cannot object that he does not reside

VI. JOINDER OF CAUSES OF ACTION — 1. In General. — In drafting a bill for the rescission, cancellation, or reformation of a contract the pleader must be guided by the general rules of equity pleading which forbid the statement of inconsistent causes of action but which permit the pleader, where he has stated a good cause of action, to pray for all such incidental relief as is germane and incidental to the gravamen of the bill.¹

2. Inconsistent Causes of Action — Rescission and Damages for Breach. — Thus, the bill should not ask the rescission of a contract for fraud, and damages for breach of the contract, because such causes of action are inconsistent with each other.²

Suit for Rescission of Separate Contracts. — A bill which asks the rescission of several contracts made separately at different times with relation to different subjects and capable only of violation by different acts is bad for multifariousness.³

3. Consistent Causes of Action — In General. — As will be seen from the cases cited in the notes the bill need not always be drawn for the sole purpose of obtaining the rescission, cancella-

in the county in which the action was brought. *Leyden v. Hickman*, 75 Ga. 684, in which case the court cited *Markham v. Huff*, 72 Ga. 874.

1. See generally article MULTIFARIOUSNESS.

2. Action for Rescission and Damages for Breach of Warranty. — In *Neal v. Reynolds*, 38 Kan. 432, the plaintiff asked the rescission of a contract for the exchange of land, and also damages for a breach of the covenants of warranty contained in the deed to him; and the court said: "The amended petition states causes of action entirely inconsistent with each other. One cause of action is based upon the affirmation of the contract of exchange; the other seeks to set aside and rescind the contract for causes which, if well founded, would make it inequitable to enforce it. It is true that the motion to dismiss the second cause of action alleged in the amended petition was heard and sustained before the ruling on the demurrer as to the remaining causes of action was made; but this only emphasizes the fact that the pleader was in doubt as to his remedy, and, in his eagerness to avail himself of all, he did not fairly state a cause of action that entitled him to one."

Rescission in Part and Damages. — A party cannot ask a rescission in part only, and money damages as to the balance. *Daly v. Brennan*, 87 Wis. 36.

Action for Cancellation and Enforcement of Vendor's Lien. — The plaintiff in an

action to cancel a deed and regain his title to the land embraced therein cannot, at the same time, maintain the position of a lienholder, and claim a lien on the purchase price of the land as having been sold and conveyed by the deed, as such claims are incompatible. *West v. Badger Lumber Co.*, 56 Kan. 287.

3. *Coe v. Turner*, 5 Conn. 86.

Rescission of Several Deeds by Tenants in Common. — Where tenants in common execute at different times several deeds conveying several of their respective interests in the land to a common grantee they cannot join in one action asking that all the said deeds be set aside and canceled. *Jeffers v. Forbes*, 28 Kan. 174.

Rescission of Several Conveyances by Partners. — Where two partners are induced by fraud to make several and separate sales of their interest in the partnership to another partner it is not proper in one action to seek to set aside such sales, as the causes of action are separate and distinct, nor can such causes of action be joined in the same complaint with a cause of action for an accounting and dissolution of the partnership. *Behlow v. Fischer*, 102 Cal. 208.

Cross-complaint for Reformation of Several Deeds. — In an action of ejectment to recover two separate parcels of land, a cross-complaint asking for the reformation of two deeds to different grantees made by the defendant, under

tion, or reformation of a contract, but the plaintiff in addition to stating such cause of action may without rendering the bill multifarious ask other relief which is consistent with the main object of the bill and which is necessary for the administration of full equity.¹

Rescission — Prayer for Accounting for Rents and Profits. — Where the instrument the cancellation of which is sought affects real estate, and the bill presents grounds for equitable jurisdiction, a prayer that the defendant be held to account for the rents and profits of the property is appropriate to the purpose of restoring the grantor to as favorable position in reference to the property as he was in before the execution of the instrument.²

which deeds the plaintiff claims title, is not multifarious. *Eureka v. Gates*, 120 Cal. 54.

1. Rescission of Contract and Dissolution of Partnership. — Where a contract is procured by fraud, under which the plaintiff and defendant become tenants in common of property and a partnership arises, the plaintiff may in one action ask the rescission of the contract and the dissolution of the partnership. *Paetz v. Stoppleman*, 75 Wis. 510, in which case the court said: "Both remedies are necessary, and when a court of equity obtains jurisdiction it proceeds to administer full equity. There could be no election in such a case. The dissolution of the partnership follows as a matter of course on the rescission of the contract and placing the parties *statu quo*. There is no force in the point. The remedies are not inconsistent but in harmony, and without the latter only part of the relief would be administered."

Cancellation of Tripartite Agreement. — Where a tripartite agreement is made between a county, a railroad company, and contractors to build a railroad for the railroad company, by which the county agrees to issue bonds in aid of the construction of a railroad in exchange for stock of the railroad company, and the railroad company as principal and the contractors as sureties execute to the county a bond conditioned for the performance of the contract on the part of the railroad company, the county upon the failure of the scheme to build the road and the abandonment of the project may bring an action against the railroad company and the contractors and ask for a rescission of the contract between the county and the railroad company, for the cancellation of bonds deposited

in trust, for the cancellation of bonds retained by the contractors, and to have the tripartite agreement adjudged void, and in such action there is no misjoinder of causes. *Douglas County v. Walbridge*, 38 Wis. 179, in which case the court said: "If the grounds of action be not entirely distinct and unconnected — if they arise out of one and the same transaction, or a series of transactions forming one course of dealing, and all tending to one end — the objection does not apply. * * * This complaint is not multifarious within these rules. All the matters stated in it are more or less connected, and all the defendants are more or less concerned or interested in them."

Reformation and Damages for Trespass. — A cotenant in an action for the reformation of a deed made by the other cotenant, which was fraudulently made to embrace more land than was really intended to be conveyed, may ask damages for trespasses upon other land owned by the plaintiff and the grantor which was not included in the deed. *Prater v. Bennett*, 98 Ga. 413.

2. Luffboro v. Foster, 92 Ala. 477. See also *Bowden v. Achor*, 95 Ga. 243, holding that in a bill to cancel a deed for fraud where it is alleged that the defendant has been placed in possession of the property conveyed, the plaintiff may pray for a decree against the defendant for the recovery of the land and for mesne profits.

Bill to Cancel Mortgage and Set Aside Foreclosure. — In *Dickerson v. Winslow*, 97 Ala. 491, the bill alleged the foreclosure of a mortgage under a power of sale and that the mortgage debt was paid before the foreclosure, and the prayer was for the cancellation of the mortgage and also that the foreclosure

Fraudulent Acts of Several Defendants in Combination.—Where a bond and mortgage have been obtained by a fraudulent combination among several, the maker may maintain a bill against all of the parties to the fraudulent combination for the cancellation of both the bond and mortgage.¹

Reformation of Contract and Enforcement as Reformed.—A bill or complaint which asks the rectification of a mistake in a written contract and the enforcement of the instrument as reformed, states but one cause of action even though the enforcement of the contract involves matters purely cognizable in a court of law.²

sale be set aside because the mortgagee became the purchaser at his own sale, and there was a further prayer that the plaintiff be let in to redeem if any balance should be found to be due on the mortgage debt. It was held that the bill was not demurrable for multifariousness or as seeking different sorts of relief upon rights antagonistic to each other, and that either aspect or both aspects of the bill presented equitable grounds of relief, and both were of such a character that they might be united in one bill. *Citing American Freehold Land Mortg. Co. v. Turner*, 95 Ala. 272; *American Freehold Land Mortg. Co. v. Sewell*, 92 Ala. 168; *Sanders v. Askew*, 79 Ala. 433, and *Askew v. Sanders*, 84 Ala. 356.

1. *Bissell v. Beckwith*, 33 Conn. 357.

Series of Fraudulent Transactions.—

Where the plaintiff alleges that he has been defrauded of his property by a series of transactions which involved him in a complete network of fraud in which all of the defendants were more or less concerned, even although all of them did not participate directly in all of the alleged fraudulent acts, the petition is not demurrable for multifariousness, or for misjoinder of parties, or for misjoinder of causes of action, where it is averred that the acts of each defendant were so connected with the acts of the others as to make them all necessary parties to proceedings to undo the consequences of all frauds alleged to have been committed. *Bowden v. Achor*, 95 Ga. 243.

Fraudulent Conspiracy Operating upon Several Parties.—In *Ashmead v. Colby*, 26 Conn. 287, the defendants perpetrated the fraud by means of inducing the individuals who were plaintiffs to take the capital stock of the corporation and advance their money for it, that the money might be immediately withdrawn from the corporation for the

benefit of the defendants under the form of a purchase of valuable property suited to the objects of the corporation, but in fact of very little value for any purpose compared with the price for which it was sold, and of none whatever for the purposes for which it was purchased. It was held that a bill seeking, in behalf of the stockholders alone, the cancellation of the subscriptions for the stock, and, for the benefit of the corporation, the repayment of the money and cancellation of the notes, was properly brought in the names of the stockholders and of the corporation as plaintiffs, and was not multifarious.

Suit for Rescission—Claim for Incidental Damages.—In *Swihart v. Harless*, 93 Wis. 211, the complaint alleged that certain of the defendants held school land certificates belonging to the plaintiff as security for a loan, that they fraudulently refused to accept payment of said loan, and procured patents to be issued to themselves and then sold the property to others who were joined as defendants, and granted a right of cutting timber to another defendant, under which timber was cut, and that all of the last named defendants had knowledge of the plaintiff's right and interest. It was held that the plaintiff was entitled to have the defendants convey the title to him, and that, as incidental to this relief, it was proper also to claim damages for the timber cut upon the property, and that including such claim did not make the complaint multifarious.

2. *Hutchinson v. Ainsworth*, 73 Cal. 452; *Franklin Ins. Co. v. McCrea*, 4 Greene (Iowa) 229; *McClurg v. Phillips*, 49 Mo. 315; *Meyer v. Van Collem*, (Supm. Ct. Gen. T.) 7 Abb. Pr. (N. Y.) 222.

Reformation and Action on Note.—The plaintiff may in one action ask the

Reformation and Damages for Breach of Contract. — Thus the plaintiff may in one bill ask a court of equity to reform a contract, and by way of equitable relief to give damages for the breach of the contract as reformed.¹

Reformation and Specific Performance. — A bill which seeks the reformation of an instrument and also a decree for its specific performance as reformed, is not multifarious.²

Reformation and Foreclosure of Mortgage. — It is well settled that it is permissible in one bill to ask the reformation of a mortgage and also a decree foreclosing the mortgage as reformed.³

4. Objections for Multifariousness. — As in other suits the court will apply the general rule that the objection that there is a misjoinder of actions must be seasonably made in the trial court, otherwise it will not be considered on appeal.⁴

reformation of a note and a judgment for the amount of the note as reformed. *Gilbranson v. Squier*, 5 Wash. 99.

Reformation and Action on Insurance Policy. — The plaintiff may in one petition ask for the reformation of an insurance policy where a mistake has been made in executing it, and also for a judgment for the amount due upon the policy as reformed. *Esch v. Home Ins. Co.*, 78 Iowa 334, in which case, however, no question was made as to the propriety of joining the causes of action.

Reformation and Action on Bond. — Where the word "dollars" is omitted by mistake from a joint and several single bill given for the payment of money lent, equity has jurisdiction to correct the mistake because the obligee is entitled to a security of higher dignity than a mere parol promise, and, the money being due, equity has jurisdiction to pass a decree against the obligors for the payment of principal and interest. *Newcomer v. Kline*, 11 Gill & J. (Md.) 457.

1. *West v. Suda*, 69 Conn. 60; *Butler v. Barnes*, 60 Conn. 170.

Wisconsin Statute. — Under Rev. Stat. Wis., § 2647, the plaintiff may, in one action, ask the reformation of a contract, and damages for the breach of the contract. *Cameron v. White*, 74 Wis. 425, in which case the court followed *Harrison v. Juneau Bank*, 17 Wis. 340.

2. *Waterman v. Dutton*, 6 Wis. 265, in which case the court said: "There does not seem to be any room to doubt but courts of equity in this country will reform a contract, so as to make it correspondent with the real intent and meaning of the parties; and will also,

in the same suit, proceed to decree specific performance of the contract thus reformed, in favor of the party asking reformation and performance of the contract, if it would be equitable and proper to do so." See also to the same effect *Nicholson v. Tarpey*, 89 Cal. 617; *Murphy v. Rooney*, 45 Cal. 78; *Adams v. Wheeler*, 122 Ind. 251, and *Hall v. Clagett*, 2 Md. Ch. 151.

3. *Allen v. Elder*, 76 Ga. 674, wherein it was held that the plaintiff may in one action ask the reformation of an instrument so as to make it read as a mortgage, and also ask that the instrument be foreclosed as a mortgage. See also *Winchell v. Coney*, 54 Conn. 24; *Clay v. Banks*, 71 Ga. 363; *Walls v. State*, 140 Ind. 16; *Axtel v. Chase*, 83 Ind. 546; and *Haynes v. Whitsett*, 18 Oregon 454.

Rescission and Damages for Fraud. — In *Higgins v. Crouse*, 63 Hun (N. Y.) 134, it was held that the plaintiff may in one action ask the rescission of a contract for fraud and also the recovery of damages for the fraud. See, however, *Newman v. Smith*, 77 Cal. 22, in which case it was held that in an action to set aside a written contract for the sale of land on the ground of fraud, no claim can be made for damages for the anxiety, worry, and harassment caused by the fraudulent acts of the defendant, but that allegations on the subject may be treated as surplusage.

4. *Hines v. Horner*, 86 Iowa 594, in which case the action was brought for a partition of certain lands, and there was joined therewith an action in behalf of one of the plaintiffs and against two of the defendants to set aside a deed touching an undivided interest in

VII. PARTIES — 1. **In General.** — Where the rescission, cancellation, or reformation of a contract is sought the court applies the familiar rule that all parties interested in the subject matter of the suit should be joined as either plaintiffs or defendants, to the end that their rights may be adjudicated and finally determined.¹

2. Plaintiff — *a.* **IN GENERAL.** — In a suit for the rescission, cancellation, or reformation of an instrument the plaintiff must be one who has an interest in the subject matter of the suit;² thus, when a deed misdescribes the property intended to be conveyed the grantee therein named is a proper party to maintain a suit to correct the mistake.³

Subsequent Grantee of Grantor. — Where a deed has been obtained by fraud the grantor is a proper party plaintiff to maintain a suit for its cancellation, and such suit is not maintainable by a subsequent grantee of the grantor.⁴

Contract Made with Agent. — Where a written contract is made with an agent in behalf of his principal, and the principal is the sole party in interest, the principal is the proper party plaintiff in a suit for the correction of a mistake in the instrument.⁵

the property in controversy. As no objection was made on the trial that there was a misjoinder of causes of action, the appellate court declined to consider the question.

Objection by Demurrer Only. — The objection that the bill is multifarious can be taken by demurrer only. *Bissell v. Beckwith*, 33 Conn. 357.

1. *Oliver v. Clifton*, 59 Ark. 187; *Hornner v. Bramwell*, 23 Colo. 238; *Montville v. Haughton*, 7 Conn. 543, which was an action to reform a bond; *Gefken v. Graef*, 77 Ga. 340; *Smith v. Mitchell*, 6 Ga. 458; *Hardy v. Newton First Nat. Bank*, 46 Kan. 88.

Objection Not Available to Plaintiff. — If the plaintiff proceeds to a hearing and decree without bringing the proper parties into court, the error is his own and one of which he cannot complain. *Jaeger v. Whitsett*, 3 Colo. 105.

Objection by Special Demurrer. — The objection that some of the parties are improper or unnecessary should be taken by special demurrer. *Reese v. Reese*, 89 Ga. 645.

Interplea Asking Reformation. — Where real estate is attached, the holder of a mortgage which purports to be a lien upon a different piece of land may, under Comp. Laws Kan. 1888, c. 80, § 45a, interplead and ask in his interplea that the mortgage may be reformed on the ground of mutual mistake of the defendant and himself in

the description, so that the mortgage may be a lien upon the property attached, as was intended by both parties to the mortgage. *Bodwell v. Heaton*, 40 Kan. 36.

2. *Giselman v. Starr*, 106 Cal. 651; *Roberts v. Chamberlain*, 30 Kan. 677; *Gwyer v. Spaulding*, 33 Neb. 573.

3. *Gwyer v. Spaulding*, 33 Neb. 573, in which case the court cited *Mattingly v. Speak*, 4 Bush (Ky.) 316; *Parker v. Starr*, 21 Neb. 680; *Cox v. Ellsworth*, 18 Neb. 664; *Busby v. Littlefield*, 31 N. H. 193; and *May v. Adams*, 58 Vt. 74.

4. *Yeamans v. James*, 27 Kan. 195, in which case the court cited *Wall v. Cockerell*, 10 H. L. Cas. 229; *Leach v. Fowler*, 22 Ark. 143; *Gray v. Ulrich*, 8 Kan. 112; and *Cowan v. Barret*, 18 Mo. 257.

Conveyance Made in Contemplation of Another. — Where the plaintiff is induced by fraud to convey land under an agreement that the land shall afterwards be conveyed to another, notwithstanding such agreement he is a proper party plaintiff in an action to set aside the deed of conveyance. *Douthitt v. Applegate*, 33 Kan. 395.

5. *Montville v. Haughton*, 7 Conn. 543, in which case a bond was executed to the selectmen of a town and their successors in office, and the selectmen were merely agents of the town; it was held that the town was a proper party plaintiff to a suit for the correc-

The Nonresidence of the Plaintiff does not affect his right to maintain an action to rescind a contract.¹

b. JOINDER OF PARTIES PLAINTIFF. — The plaintiff must join with himself as parties plaintiff all others who stand in the same relation to the contract as he does, and who are entitled to the same relief as he is, unless he alleges facts excusing his failure to join them.²

c. STRANGERS TO CONTRACT. — One who does not appear from the contract to be a party to it is not a proper party to ask its reformation unless he alleges facts connecting himself with the contract as a party;³ and it has been held that plaintiffs who are

tion of a mistake in the bond. *Citing* *Watson v. Wells*, 5 Conn. 468; *Smith v. Chapman*, 4 Conn. 344; *Peters v. Goodrich*, 3 Conn. 146; *Wadsworth v. Wendell*, 5 Johns. Ch. (N. Y.) 224; *Crosby v. Middleton*, Prec. Ch. 309; and *Skip v. Huey*, 3 Atk. 93.

1. *Loaiza v. Superior Ct.*, 85 Cal. 11, in which case the court said: "They have submitted themselves to the jurisdiction of the court by becoming suitors before it. They are amenable to its process, and must obey its commands before they can obtain relief. If conditions are attached to the relief awarded them, then performance by them can be compelled." *Citing* *Cleveland v. Burrill*, 25 Barb. (N. Y.) 532.

2. One of Two Grantees cannot bring an action for the rescission of a contract of sale, and the recovery back of the purchase money paid without joining the other grantee as a party plaintiff, or alleging facts excusing his failure to join such other grantee, and making him a party defendant. *Goddard v. Decker*, 3 Colo. App. 198. See also to the same effect *Crittenden v. Craig*, 2 Bibb (Ky.) 474. See further *Oliver v. Clifton*, 59 Ark. 187, and *Wyche v. Green*, 32 Ga. 341, which latter case was a suit for reformation.

Contract Executed in Partnership Name — Joinder of Absconding Partner. — Where a partner, after his copartner has absconded, is induced by fraud to execute a note in the firm's name, he may bring an action for the cancellation of the note without joining the absconding partner as a plaintiff or defendant. *Salter v. Krueger*, 65 Wis. 217.

Defect of Parties Not Apparent on Face of Pleading. — A demurrer on the ground that there is a defect of parties plaintiff is not sustainable unless it appears on the face of the petition that

other parties plaintiff are necessary or wanting. *McKee v. Eaton*, 26 Kan. 226.

Joinder of Improper Party Plaintiff. — If the plaintiff in an action for the rescission of a contract improperly joins with himself another plaintiff the remedy is not by a demurrer alleging a defect of parties. *McKee v. Eaton*, 26 Kan. 226.

Rule that All Complainants Must Be Entitled to Relief. — In *Dickerson v. Winslow*, 97 Ala. 491, in which case the cancellation of a mortgage was sought, the court said: "It may be well for the complainants to consider in this connection another principle of equity pleading, that unless all the complainants to the bill when submitted for final decree are entitled to relief, no relief can be granted." *Citing* *Taylor v. Robinson*, 69 Ala. 269, and *Brewer v. Browne*, 68 Ala. 215.

Joinder of Grantee Who Has Parted with His Interest. — Where, by mistake, a deed of conveyance does not convey all of the land that was intended to be conveyed, an execution creditor of the grantee, who has had the property described in the deed set off to him, is a proper party plaintiff in a suit to reform the deed; and it would seem that the original grantee, who has no remaining interest in the property in dispute, is not a necessary party. *Bunnell v. Read*, 21 Conn. 586.

3. *Pape v. Kaough*, (Ind. 1899) 55 N. E. Rep. 775, in which case Kaough sought the reformation of a contract in which his name did not appear except in the signature as follows: "Fleming Manufacturing Company, by A. Fitzsimmons. William Kaough." See also *Ballentine v. Clark*, 38 Mich. 396, holding that a deed will not be reformed at the suit of a person not a party thereto unless it is shown that he

not parties to a deed, or heirs at law of a party, or otherwise privy to the deed, are not proper parties plaintiff in a suit for reformation, even though they allege that they are beneficiaries under the deed as it was intended to be made.¹

d. PRIVIES — (1) *In Suits for Cancellation* — **Heirs.** — Where a deed has been made under such circumstances as entitle the grantor to have it set aside in equity after his death intestate, his heirs are proper parties plaintiff in a suit for its cancellation.²

(2) *In Suits for Reformation* — **Heirs.** — After the death of a party to a deed who is entitled to have it reformed his heirs are proper parties plaintiff to a suit for its reformation.³

Subsequent Grantees. — Where the same mistake has each time repeated itself, occurring between the vendor and vendee upon each transfer, under such circumstances as to entitle any one of the vendees to a reformation as against his immediate vendor, the equity will work back through all, and entitle the last vendee to a reformation against the original grantor;⁴ but it has been

holds under it. See further *Tillis v. Smith*, 108 Ala. 264.

1. *Cook v. Walker*, 21 Ga. 370, in which case it was held that a court of equity will reform a marriage settlement at the instance of the husband or wife or issue, and the heir-at-law of either, but not at the instance of any one else. *Citing Colyear v. Mulgrave*, 2 Keen 81, and *Hill v. Gomme*, 1 Beav. 540.

2. *Kent v. Davis*, 89 Ga. 151.

Judgment Creditors of Grantor's Heir. — In *Booth v. Fuller*, 35 N. Y. App. Div. 117, it was held that where a deed is void because of the insanity of the grantor, judgment creditors of an heir of the grantor may sue to have it set aside.

Breach of Covenants for Support of Grantor — **Suit by Heirs.** — Where a deed is made in consideration that the grantee shall support the grantor, after the death of the grantor his children and heirs cannot maintain an action or cancel the contract on the ground that the grantee wholly failed to comply with his agreement, where it is not alleged that the plaintiffs have suffered any pecuniary loss on account of the grantee's failure to perform his part of the contract, and by the terms of the deed the land would in the event of the cancellation of the deed revert to the widow who is not made a party to the suit. *Hensley v. Hensley*, (Ky. 1865) 30 S. W. Rep. 613.

3. *Gwyer v. Spaulding*, 33 Neb. 573.

4. *Blackburn v. Randolph*, 33 Ark.

119, in which case the court said:

"What is meant when the cases say that the mistake will only be corrected between the original parties and those claiming under them in privity, is, in effect, that the court will not interfere in favor of subsequent purchasers who were simply ignorant of the former mistake and may be presumed to have intended to take by the description used, nor against subsequent purchasers by the true description for valuable consideration, without notice of the former mistake." *Citing Steward v. Pettigrew*, 28 Ark. 372. See also *Wall v. Arrington*, 13 Ga. 88.

Assignee of Real Covenants. — In *Butler v. Barnes*, 60 Conn. 170, in which case, after the execution of a deed which contained a mistake, the plaintiff acquired title under the grantee, the court in holding that the plaintiff was a proper party to maintain an action for reformation said: "The plaintiff, as assignee of the real covenants of the deed, has also a right of action against the defendant for the reformation of the deed, for the purpose of enabling him to take advantage of the breach of such covenants." *Citing Bunnell v. Read*, 21 Conn. 586.

Mistake in Series of Conveyances. — When a mistake occurs in a series of conveyances, the last vendee is a proper party plaintiff to a bill to have the deeds corrected. *Tillis v. Smith*, 108 Ala. 264, in which case the court cited *Blackburn v. Randolph*, 33 Ark. 119; *Greeley v. De Cottes*, 24 Fla. 475;

declared that equity will not interfere in favor of subsequent purchasers who are simply ignorant of the former mistake, and may be presumed to have intended to take by the description used, nor against subsequent purchasers by the true description for valuable consideration without notice of the former mistake.¹

3. Defendant — *a.* IN GENERAL. — The bill or complaint should not join improper parties defendant;² but all parties in interest ought to be brought in, as the court will not determine the rights of persons who are not parties.³

Parker v. Starr, 21 Neb. 680; and *May v. Adams*, 58 Vt. 74.

1. *Per Eakin, J.*, in *Blackburn v. Randolph*, 33 Ark. 119.

Where Plaintiff Is Not Assignee of Original Grantee. — *Norris v. Colorado Turkey Honestone Co.*, 22 Colo. 162, in which case the court said: "The mere fact that the appellant's [the plaintiff's] grantors are defendants here, and in their answer disclaim any rights adverse to appellant, is not equivalent to an allegation of an assignment to it of their rights, nor does it supplement the complaint so as to make it complete in this respect. An examination of the answer shows that this defect in the complaint is not thereby cured." *Citing Lawrence v. Montgomery*, 37 Cal. 183; *Chambliss v. Miller*, 15 La. Ann. 713; *Willoughby v. Middlesex Co.*, 8 Met. (Mass.) 296; *Davis v. Clark*, 33 N. J. Eq. 579; and *Collins v. Suau*, 7 Robt. (N. Y.) 623.

2. *Peay v. Wright*, 22 Ark. 198, holding that in suits to rescind a contract the general rule is applied that only those shall be made parties against whom a decree may be had; *Mattair v. Payne*, 15 Fla. 682.

One Having No Interest. — In an action for the reformation of a deed, one who has no interest in the land described therein need not be made a party defendant. *Power v. Burd*, 18 Mont. 22.

Joinder of One Claiming Paramount Title. — In an action for the reformation and foreclosure of a mortgage one whose title is adverse and paramount to that of the mortgagor is not a necessary or proper party defendant. *Murdoch v. Leonard*, 15 Wash. 142.

Notary Public Who Acknowledged Deed. — To a suit for the reformation of a notary's certificate so as to make it show that the acknowledgment of a deed was taken in compliance with the statute, the notary who took the ac-

knowledgment was not a necessary party defendant. *Hutchinson v. Ainsworth*, 73 Cal. 452, in which case the court said: "The notary was not a necessary party defendant to the reformation of his certificate. The reformation, if made at all, could only be so made by the judgment of the court."

Parties Without the Jurisdiction. — In *Ashmead v. Colby*, 26 Conn. 287, which was a suit for the cancellation of a contract on the ground of fraud, the court, after referring to the general rule that all parties in interest ought to be brought in, said: "But one of the well-established exceptions to this rule is said to be founded upon the impracticability of making the new or necessary parties, and getting them before the court, which is also said to occur when such new parties are without the jurisdiction of the court, and consequently cannot be served by its process."

Parties Who Refuse to Join as Plaintiffs. — If those having an interest identical with the plaintiff refuse to join them they must be made defendants. *Wyche v. Green*, 32 Ga. 341, in which case the court said: "No court of equity should undertake to reform a written instrument conveying title to property, in an essential matter, without having before it all the parties to be affected by the proposed reformation."

3. *Snyder v. Voorhes*, 7 Colo. 296, which was an action to rescind a deed for fraud. The court said: "In real actions, or one like this, in which the title to realty is affected, it is as important to the parties plaintiff as to parties defendant to have the proper and necessary parties before the court, in order that they may be bound by the judgment." See also *Peay v. Wright*, 22 Ark. 198; *Ashmead v. Colby*, 26 Conn. 287; *Mattair v. Payne*, 15 Fla.

Beneficiaries in Trust Deed. — In a suit to reform a declaration of trust it is sufficient to bring in the beneficiaries who will be affected by the reformation, and other beneficiaries whose interest will not be in any manner affected by the proposed reformation need not be made parties.¹

6. ORIGINAL PARTIES TO CONTRACT. — In a Suit for the Rescission or Cancellation of a Contract it is necessary to have before the court all the parties with whom the plaintiff made the contract and whose rights will be affected by the decree, as a decree will not be awarded against persons who are not parties to the suit;² and where the cancellation of a deed is sought the plaintiff must have all the parties who join in its execution and in its covenants before the court.³

In Suits for Reformation. — In a suit by the grantee in a deed, or his privy, to reform the deed, the grantor in the deed ought to be made a party, or if he is dead, his heirs, or those claiming under him, should be made parties.⁴

682; and *Trecothick v. Austin*, 4 Mason (U. S.) 42.

Objection Waived. — After a hearing of the cause upon its merits, an objection that a necessary party was not joined, comes too late. *Ferguson v. Fisk*, 28 Conn. 501, which was a suit for reformation.

1. *Ward v. Waterman*, 85 Cal. 488, in which case the court said: "As to each of these separate interests, the contract or declaration was several, and not joint; and to reform it as to one of these interests, it was only necessary to make those persons parties who were interested in that interest. * * * This instrument contains the several and separate agreements of many parties. It is proposed to revise it only as to one of those agreements. This may be done without bringing in any but the parties to that particular agreement." *Citing Moss v. Wilson*, 40 Cal. 159, and *Settembre v. Putnam*, 30 Cal. 490.

Bill to Set Aside Marriage Settlement — Children. — To a bill by a wife to set aside a marriage settlement entered into between herself and her husband by which certain property which belonged to her was conveyed to a trustee for the joint use of herself, husband, and such children as she might have, and at her death to her children, the children should be made parties defendant. *Gefken v. Graef*, 77 Ga. 340.

2. *Douglas County v. Walbridge*, 38 Wis. 179, in which case the court said: "It is a general rule, that where a

party is directly affected by the decree, he is an indispensable party; and the courts only depart from the rule when the parties are so numerous that it would be inconvenient or impossible to comply with it." See also *Constant v. Lehman*, 52 Kan. 227, and *Freeman's Bank v. Vose*, 23 Me. 98.

3. *Hill v. Lewis*, 45 Kan. 162.

Necessity to Make Trustee Party. — Where the cancellation of a trust deed is sought the trustee is a necessary party; but the cancellation of an indebtedness which is secured by a trust deed may be decreed although the trustee is not made a party. *Barth v. Deuel*, 11 Colo. 494, in which case the court said: "The court is authorized to cancel the indebtedness secured by the trust deed, and such cancellation must operate as an extinguishment of the interest of the beneficiary in the premises conveyed, as well as of the power of sale in the trustee; and, as the decree of the court may be made a matter of record, it may thus be made a notice to all the world, with the same effect as notice by a recorded conveyance, that by the extinguishment of the interest of the beneficiary under the trust deed such deed was rendered wholly inoperative as a conveyance."

4. *Oliver v. Clifton*, 59 Ark. 187, in which case the court cited *Hellman v. Schneider*, 75 Ill. 423; *Durham v. Bischof*, 47 Ind. 211; *Pierce v. Faunce*, 47 Me. 507; *Haley v. Bagley*, 37 Mo. 363; *Daggett v. Ayer*, 65 N. H. 82; and *Busby v. Littlefield*, 31 N. H. 193.

c. PRIVIES—SUBSEQUENT PURCHASERS AND INCUMBRANCERS—(1) *In Suits for Rescission or Cancellation*—**Heirs and Personal Representatives.**—In an action by a grantor, or one privy to the grantor, to cancel a deed, if the grantee is dead his heirs who claim under the deed are necessary parties defendant.¹

Purchaser or Assignee Claiming under Plaintiff's Grantee.—Where the object of the bill is to cancel a deed on the ground that the grantee has failed to perform his covenants and the consideration has wholly failed, the grantee's assignee is a proper party defendant;² and where rescission or cancellation is sought on the ground of fraud on the part of the grantee in a deed it is proper to join with the grantee a purchaser from whom he took title with knowledge of the fraud.³

Mortgagor Who Has Parted with Title.—Where, by a mistake, one of the witnesses present at the execution of a mortgage omits to subscribe his name as such pursuant to a statutory requirement, and afterwards the mortgagor conveys the land covered by the mortgage to a purchaser with notice, the mortgagor, as well as the subsequent purchaser, is a proper party defendant to a suit for reformation. *Watson v. Wells*, 5 Conn. 468.

1. *Snyder v. Voorhes*, 7 Colo. 296, holding that it is insufficient to make the personal representatives parties defendant.

Heir Who Claims No Interest in Property.—To a bill to set aside a deed procured by fraud against two of the children of a deceased grantee, a third child of the deceased grantee who is not claiming any interest in the property conveyed is a proper but not a necessary party defendant, and failure to join such child does not render the bill demurrable. *Ellesworth v. McCoy*, 95 Ga. 44.

Necessity to Join Administrator.—In a suit against the children of a deceased grantee to set aside a deed procured by fraud, where it is not alleged in the bill that the grantee was insolvent or in debt at the time of his death, or that the administrator has any right to administer the real estate of his intestate, the administrator is not a necessary party defendant. *Ellesworth v. McCoy*, 95 Ga. 44.

2. *Savannah, etc., R. Co. v. Atkinson*, 94 Ga. 780, in which case the plaintiff had made a deed conveying the right of way to a railroad company, the consideration of which was the benefits which were expected to accrue to the plaintiff from the con-

struction of the contemplated railroad, and there was an express promise on the part of the company to construct the road, by virtue of which agreements a conveyance was secured. The railroad company failed to construct the contemplated railroad, and sold out to another railroad company with the intent that the whole enterprise should be abandoned, and it was held that such other railroad company was a proper party defendant.

3. *Swihart v. Harless*, 93 Wis. 211.

Present Holders of Bonds.—Where it is sought to cancel a note and mortgage given a railroad company on the ground that they were procured by fraud, and it appears that the same have been deposited by the railroad company as collateral security to indemnify a city against the payment of bonds issued by the city in aid of the construction of the railroad, and it is claimed that the city bonds are void, the holders of the bonds are necessary parties defendant. *Burhop v. Milwaukee*, 18 Wis. 431, 20 Wis. 338.

Subsequent Purchaser Proper but Not Necessary Party.—In an action by the maker of a deed against the grantee to cancel the deed on the ground that it was procured by fraud, the plaintiff may join a vendee of the grantee as a defendant if he sees proper to do so, but such vendee is not a necessary party, as his rights, if he has any, will not be affected by the judgment. *Silberberg v. Pearson*, 75 Tex. 287, citing *Chapman v. Lacour*, 25 Tex. 94, and *Wood v. Loughmiller*, 48 Tex. 205.

Necessity to Make Incumbrancer Party.—In an action to rescind a deed procured by fraud, where it is alleged that the defendant has encumbered the land, and the prayer is for a money

(2) *In Suits for Reformation.* — Equity has jurisdiction to relieve against mistake, not only against original parties to the contract, but also against those claiming under them as heirs, devisees, judgment creditors, or purchasers from them with notice of the facts;¹ and such persons claiming under the original parties to the contract are proper and, it would seem, necessary parties defendant.²

Innocent Purchasers. — A bill to reform a deed by correcting a mistake therein will not lie against an innocent purchaser for value without notice.³

d. JOINDER OF ALL PARTICIPATORS IN FRAUD. — Where the plaintiff alleges that he has been defrauded of his property by a series of transactions, and that the acts of each of the several defendants, although all of them did not participate directly in all of the alleged fraudulent acts, were connected with the acts of the others, and appropriate relief is asked as to each wrongdoer, it is proper to join them as defendants in one suit.⁴

judgment against the grantee for the value of the land to be discharged by his conveying to the plaintiff within sixty days after the termination of the suit an unencumbered title to the land, the incumbrancer is not a proper party defendant. *Edwards v. Richards*, 95 Ga. 655.

1. *Simpson v. Montgomery*, 25 Ark. 367, in which case the court cited *Simmons v. North*, 3 Smed. & M. (Miss.) 67; *Gouverneur v. Titus*, 6 Paige (N. Y.) 347. See also *Holabird v. Burr*, 17 Conn. 556; *Adams v. Stevens*, 49 Me. 362; *Freeman's Bank v. Vose*, 23 Me. 98; and *Taylor v. Wheeler*, 2 Vern. 565.

Assignee for Benefit of Creditors. — Equity will grant relief not only against the party himself and his heirs, but against his assignee and creditors, if he become bankrupt. *Per Williams, C. J.*, in *Holabird v. Burr*, 17 Conn. 556. *Citing Taylor v. Wheeler*, 2 Vern. 565.

Purchasers with Notice. — In *Citizens' Nat. Bank v. Judy*, 146 Ind. 322, it was said that a mistake in a mortgage "may not only be corrected against the mortgagor, but against subsequent purchasers with notice of the facts and against judgment creditors of the mortgagor or such purchaser with notice." *Citing Shirk v. Thomas*, 121 Ind. 147; *Boyd v. Anderson*, 102 Ind. 217; *Figart v. Halderman*, 75 Ind. 564; *Busenbarke v. Ramey*, 53 Ind. 499; *Sample v. Rowe*, 24 Ind. 208; *White v. Wilson*, 6 Blackf. (Ind.) 448, 39 Am. Dec. 437; and *Gillespie v.*

Moon, 2 Johns. Ch. (N. Y.) 585, 7 Am. Dec. 559. See also *Watson v. Wells*, 5 Conn. 468.

2. *Smith v. Brunk*, 14 Colo. 75; *Wyche v. Greene*, 11 Ga. 159.

Personal Representatives of Grantor. — In an action by a tenant in common for the reformation of a deed made by his cotenant, which by reason of fraud practiced on the grantor was made to embrace more land than was intended, the grantor, or if he is dead his personal representative, is a proper party defendant. *Prater v. Bennett*, 98 Ga. 413.

Where Heir of Grantee Has Parted with Interest. — To a bill to have a deed absolute reformed so as to make it read as a mortgage an heir of the grantee is not a necessary party where it appears that since the execution of the instrument the grantee has conveyed the land to a third person. *Adams v. Stevens*, 49 Me. 362. See also *Lestrade v. Baith*, 19 Cal. 660.

3. *Foster v. Kingsley*, 67 Me. 152, in which case the court cited *Whitman v. Weston*, 30 Me. 285, and *Kilpatrick v. Strozier*, 67 Ga. 247. See also Am. and Eng. Encyc. of Law, title *Reformation and Cancellation of Contracts*.

4. *Bowden v. Achor*, 95 Ga. 243. **Joinder of Causes of Action.** — As to what causes of action may be joined in one suit, see *supra*.

Payee of Note Procured by Fraud of Several. — Where two persons have separate claims against a partnership and by false representations procure the

VIII. THE BILL OR COMPLAINT — 1. In General. — In many respects a bill or complaint in a suit for the rescission, cancellation, or reformation of a contract is governed by ordinary rules of pleading, as will be seen hereinafter.¹

2. Definiteness and Certainty — Statement of General Rule. — The bill or complaint in a suit for the rescission, cancellation, or reformation of a contract must be definite and certain in its allegations, and must contain direct and positive averments of facts showing that the plaintiff is entitled to relief. General and vague allegations are insufficient.²

execution of a note in the firm name to one of such claimants for their combined claims, the only necessary party defendant is the payee of the note. *Salter v. Krueger*, 65 Wis. 217, in which case it was held that the payee of the note was as to the other claimants the trustee of an express trust, and that, assuming that the note was valid, it was enforceable in the name of the payee alone.

Grantee Named in Deed Instead of Intended Grantee. — Where it is alleged that the intended grantee of a deed fraudulently procured the deed to be made to another, such other is a proper party defendant to a suit to cancel the deed under allegations that she was a party to and cognizant of the fraud. *Rasmussen v. McKnight*, 3 Utah 315.

Action to Cancel Deed — Persons Who Assisted in Fraud. — One who has merely assisted in the procurement by fraud of a deed to another is not a proper party to an action to cancel the deed. *Seiferd v. Mulligan*, 36 N. Y. App. Div. 33, 28 Civ. Pro. (N. Y.) 373.

1. See generally article **BILLS IN EQUITY**, vol. 3, p. 335; and **COMPLAINTS AND PETITIONS IN CODE PLEADING**, vol. 4, p. 587.

Motion to Dismiss — Amendable Defects. — In a suit to cancel a deed, the court will apply the general rule that, on a motion to dismiss the bill for want of equity, amendable defects in the bill will not be considered, but will be regarded as amended. *Piedmont Land Imp. Co. v. Piedmont Foundry, etc.*, Co., 96 Ala. 389.

Adequate Remedy at Law. — If after the issues are formed in an action to rescind a contract, it is agreed to try them as an equitable action, it cannot be objected on appeal that there was an adequate remedy at law in an action for breach of warranty. *McCorkell v. Karhoff*, 90 Iowa 545.

2. See generally article **DEFINITENESS AND CERTAINTY IN PLEADING**, vol. 6, p. 246, and, for the application of the general rule of pleading to suits such as here under consideration, the following cases:

California. — *Pedrorena v. Hotchkiss*, 95 Cal. 636; *Maggini v. Pezzoni*, 76 Cal. 631; *Russell v. Mixer*, 42 Cal. 475; *Purdy v. Bullard*, 41 Cal. 444, which was an action to rescind a sale on the ground of fraud; *Thomason v. De Greayer*, (Cal. 1892) 31 Pac. Rep. 567.

Colorado. — *Norris v. Colorado Turkey Honestone Co.*, 22 Colo. 162.

Connecticut. — *Thompsonville Scale Mfg. Co. v. Osgood*, 26 Conn. 16, wherein it was held that general and vague allegations were insufficient.

Florida. — *Harrington v. Rutherford*, 38 Fla. 321, holding that the plaintiff must state a clear *prima facie* case by positive averments.

Indiana. — *Citizens' Nat. Bank v. Judy*, 146 Ind. 322.

New Jersey. — *Brown v. Carpenter*, 57 N. J. Eq. 23.

Oregon. — *Osborn v. Ketchum*, 25 Oregon 352; *Meier v. Kelly*, 20 Oregon 86.

Wisconsin. — *Hagenah v. Geffert*, 73 Wis. 636; *Grossbach v. Brown*, 72 Wis. 458, which was an action for the reformation of a deed.

Inconsistent Allegations of Fact. — If the complaint contains inconsistent allegations of fact of which the parties must have had personal knowledge it will be construed against the pleader. *Sackman v. Campbell*, 15 Wash. 57.

Matters Foreign to Issues. — In *Horner v. Bramwell*, 23 Colo. 238, in which case the reformation of a deed was sought, the court made the following criticism of the complaint: "This pleading is very voluminous, containing, as it does, many matters of evi-

Sufficient Accuracy and Precision. — It is immaterial that the bill or complaint lacks accuracy and precision, if, taking it all together with the aid of the exhibits annexed, it alleges facts substantially sufficient to show that the plaintiff is entitled to the relief asked.¹

Waiver of Objections. — A bill or complaint which does not make it clear whether the gravamen of the suit is fraud or mistake is faulty, but if sufficient facts are alleged to authorize a decree, the objection may be waived.²

3. Legal Conclusions. — Whatever may be the nature of the relief sought, and whatever may be the theory upon which the bill or complaint is framed, the pleader must not allege mere legal conclusions, but must allege facts which will enable the court to see that he is entitled to the relief sought.³

Sufficiency of Averment of Facts. — However, where facts are alleged

dence which should not be included therein, and other matters entirely foreign to the issues between the parties." See also *Balue v. Taylor*, 136 Ind. 368, wherein it was held that the complaint should not contain redundant matter.

1. *Grossbach v. Brown*, 72 Wis. 458, which was an action for the reformation of a deed.

Deviation from Technical Form. — Although a bill for the reformation of a deed is not in the accurate and technical form which is desirable, it is sufficient if the question whether there was a material mistake in the deed is substantially presented so that it cannot be misapprehended. *Tucker v. Madden*, 44 Me. 206.

Sufficiency of Ordinary and Plain Language. — If the bill or complaint in an action for the rescission of a contract is couched in ordinary and plain language, such as can be readily understood, and sets up grounds for equitable relief, it will be upheld on demurrer. *Wilson v. Moriarty*, 77 Cal. 596.

2. *Baldock v. Johnson*, 14 Oregon 542.

3. See generally article **LEGAL CONCLUSIONS**, vol. 12, p. 1020, and specific subdivisions under the head of this article; and see as illustrating the application of the general rule stated in the text the following cases:

Alabama. — *Piedmont Land Imp. Co. v. Piedmont Foundry, etc., Co.*, 96 Ala. 389; *Goree v. Clements*, 94 Ala. 337, which was a suit for cancellation; *Reynolds v. Excelsior Coal Co.*, 100 Ala. 296.

California. — *Pedrorena v. Hotch-*

kiss, 95 Cal. 636; *Hick v. Thomas*, 90 Cal. 289; *Thomason v. De Greayer*, (Cal. 1892) 31 Pac. Rep. 567.

Connecticut. — *Thompsonville Scale Mfg. Co. v. Osgood*, 26 Conn. 16, in which case the court in holding a bill for reformation insufficient, said: "An unwarranted inference was drawn by the pleader from the instrument which he sets forth in his bill."

Florida. — *Mattair v. Payne*, 15 Fla. 682.

Iowa. — *Harding v. Des Moines Nat. Bank*, 81 Iowa 499.

Kansas. — *State v. Williams*, 39 Kan. 517, which was an action for the rescission of a contract on the ground of fraud.

Oregon. — *Hyland v. Hyland*, 19 Oregon 51, wherein Thayer, C. J., said that "attorneys who prepare complaints to reform written instruments are too apt to state conclusions instead of facts;" *Lewis v. Lewis*, 5 Oregon 169, in which case reformation was sought.

Averment that Instrument Is "Null and Void." — In *Harding v. Des Moines Nat. Bank*, 81 Iowa 499, it was declared that an allegation that the instrument as signed and delivered was null and void was the averment of a conclusion from the alleged fact that it was signed in blank, and not the statement of an additional ground for relief.

Facts as to Making of Contracts. — An averment that the complainant relied upon the "assurances and promises of Caldwell to complete the belt road, as he agreed to do at the time he sold the land," will not supply a failure to aver facts necessary to constitute an assur-

showing that the plaintiff has grounds for relief, *e. g.*, fraud or mistake, this is sufficient, and the pleader need not allege *in totidem verbis* the grounds upon which he relies.¹

4. Multifariousness. — As in other suits the bill must not be multifarious.²

5. Grounds for Equitable Relief. — A general rule compliance with which is always insisted upon by the courts is that the bill or complaint must present a state of facts bringing the case within some one of the well-defined grounds of equitable jurisdiction, and must be founded upon a theory under which the plaintiff is entitled to the relief sought, and state all the facts essential to support such theory.³

Some Special Ground for Equitable Relief must be alleged, and the mere fact that the instrument ought not to be enforced is insufficient, standing alone, to justify a resort to an equitable action.⁴

Title of Plaintiff to Relief. — The bill must show that the plaintiff

ance or promise to complete the road. Birmingham Warehouse, etc., Co. v. Elyton Land Co., 93 Ala. 549.

Surplusage. — In *State v. Williams*, 39 Kan. 517, charges of fraud, without any allegation of the facts constituting the fraud, were treated as surplusage.

1. *Grove v. Rentch*, 26 Md. 367, in which case it was also declared that the charge may be substantially made by stating the facts from which the grounds for relief will be necessarily implied.

2. *Marshall v. Means*, 12 Ga. 61, which was an action to reform a contract.

Dismissal. — In *Mattair v. Payne*, 15 Fla. 682, it was held that as the matters grouped together in the bill were incompatible and multifarious the bill should be dismissed.

Joinder of Causes of Action. — As to the causes of action which may and may not be joined see *supra*, VI. *Joinder of Causes of Action*.

3. *Alabama.* — *Moore v. Tate*, 102 Ala. 320.

California. — *Buena Vista Fruit, etc., Co. v. Tuohy*, 107 Cal. 243; *Barfield v. Price*, 40 Cal. 535; *Lewis v. Tobias*, 10 Cal. 574.

Colorado. — *Travelers Ins. Co. v. Redfield*, 6 Colo. App. 190; *People v. Tynon*, 2 Colo. App. 131; *Walker v. Pogue*, 2 Colo. App. 149.

Connecticut. — *Coe v. Turner*, 5 Conn. 86.

Iowa. — *Brainard v. Holsapple*, 4 Greene (Iowa) 485.

New York. — *Venice v. Woodruff*, 62 N. Y. 462.

North Dakota. — *Little v. Little*, 2 N. Dak. 175.

Ohio. — *Knobb v. Lindsay*, 5 Ohio 468.

Oregon. — *Lewis v. Lewis*, 5 Oregon 169.

Washington. — *Drown v. Ingels*, 3 Wash. 424.

West Virginia. — *Beard v. Arbuckle*, 19 W. Va. 135.

Wisconsin. — *McMillen v. Mason*, 71 Wis. 405; *Kyes v. Merrill Furniture Co.*, 92 Wis. 32.

Action by Assignee for Benefit of Creditors. — The statute (Sanb. & B. Annot. Stat. Wis., §§ 702a, 1693, 1693a, making an assignee for the benefit of creditors the representative of creditors, and authorizing him, or in his default a creditor, to bring an action, to set aside fraudulent transfers of property by the assignor, limits the assignee's right of action to such transfers as have been made by the assignor before assignment, and does not apply to an action to avoid a transfer made by the assignee in administering the estate, and where such action is brought, the complaint must allege fraud or a mistake of fact as distinguished from a mistake of law as is necessary in ordinary actions to avoid contracts. *Kyes v. Merrill Furniture Co.*, 92 Wis. 32.

4. *Per Rapallo, J.*, in *Venice v. Woodruff*, 62 N. Y. 462, 20 Am. Rep. 495. *Citing Allerton v. Belden*, 49 N. Y. 373; *Minturn v. Farmers' L. & T. Co.*, 3 N. Y. 498; *Morse v. Hovey*, 9 Paige (N. Y.) 197; *Perrine v. Striker*, 7 Paige (N. Y.) 598; *Reed v. Newburgh Bank*, 1 Paige (N. Y.) 215; *Field v. Holbrook*,

has title to the relief sought,¹ and must allege some equity superior to that of the party against whom he asks it.² Thus, where the reformation of a contract is sought, and the contract as set out does not disclose that the plaintiff is a party to it, the plaintiff must allege facts connecting himself with the contract as a party.³

Grounds Not Alleged. — The plaintiff is entitled to a decree only upon the case as made by his bill or complaint, and the court will not hear evidence of or base its decree upon fraud, mistake, or other grounds of equitable relief which are not alleged in the bill or complaint, or which are not sufficiently alleged.⁴

Definite Theory of Bill. — The bill or complaint must proceed upon a definite theory, and the cause must be tried upon the theory presented upon the pleadings, and no other or different one.⁵

Suit for Reformation. — Where the reformation of a contract is sought it is necessary to allege some of the well-understood

6 Duer (N. Y.) 597; and *Grand Chute v. Winegar*, 15 Wall. (U. S.) 355.

1. *Coe v. Turner*, 5 Conn. 86, which was a suit for rescission on the ground of fraud.

2. *Lumbert v. Hill*, 41 Me. 475, in which case relief was sought against a mistake.

3. *Pape v. Kaough*, (Ind. App. 1899) 55 N. E. Rep. 775, in which case Kaough sought the reformation of a contract in which his name did not appear except in the signature as follows: "Fleming Manufacturing Company, by A. Fitzsimmons. William Kaough."

4. *Smith v. Ramer*, 6 Colo. App. 177; *Dotterer v. Freeman*, 88 Ga. 479; *Grove v. Rentch*, 26 Md. 367; *Watkins v. Stockett*, 6 Har. & J. (Md.) 445; *Timms v. Shannon*, 19 Md. 312; *Wesley v. Thomas*, 6 Har. & J. (Md.) 28.

Suit for Reformation — Averment of Fraud. — In *Park v. Blodgett*, 64 Conn. 28, in which case the defendant asked the reformation of a contract, the court said: "No fraud is properly charged, and certainly none is found, and whatever claim to relief the defendant may have must rest wholly on the ground of mistake." To the same effect is *Stephens v. Murton*, 6 Oregon 193, in which case the court used similar language.

Averment of Accident. — In *Segur v. Tingley*, 11 Conn. 134, the court said: "It is not claimed that there is any accident which is a ground for interposition. The plaintiff must, then, rely either upon fraud or mistake."

Insufficient Basis for Decree. — In *Meier v. Kelly*, 20 Oregon 86, the court

in holding the complaint insufficient said: "If we should undertake to reform this instrument under the present complaint, we would do so without any allegations to support the decree, and would be deciding a case not presented by the record." See also *Crittenden v. Craig*, 2 Bibb (Ky.) 474, wherein it was held that the bill must contain sufficient equity to warrant the decree.

5. *Balue v. Taylor*, 136 Ind. 368. See also *Lemon v. Phoenix Mut. L. Ins. Co.*, 38 Conn. 294; *Harkness v. Fraser*, 12 Fla. 336, in which case the cancellation of a deed was sought; *Indianapolis First Nat. Bank v. Root*, 107 Ind. 224; *Western Union Tel. Co. v. Reed*, 96 Ind. 195; *Mescall v. Tully*, 91 Ind. 96; *Constant v. Lehman*, 52 Kan. 227; *Cross v. Bean*, 81 Me. 525; *McElderry v. Shipley*, 2 Md. 25; *Tilden v. Streeter*, 45 Mich. 533.

Averment that Deed Was Defective. — In a suit by a purchaser to rescind the contract of sale, if he does not allege that the deed made to him was defective and that it failed to convey title, this matter is not in issue between the parties. *Butler v. Miller*, 15 B. Mon. (Ky.) 617.

Failure to Aver Insanity. — In *Hines v. Horner*, 86 Iowa 594, fraud was alleged, and it was held that it was improper to grant relief on the ground that the grantor in the deed had not sufficient mental capacity to make the deed.

Assumption of Facts by Court. — In *Missouri River, etc., R. Co. v. Miami County*, 12 Kan. 482, the court said: "We cannot assume a fact, not

grounds of reformation, such as fraud, accident, or mistake, and if this is not done and the bill or complaint presents simply a case where the plaintiff has made a written contract and seeks to add a verbal stipulation which alters its meaning and purpose, in a material respect, a demurrer will be sustained.¹

6. Inadequacy of Remedy at Law. — Equity will not rescind, cancel, or reform a contract, except in extraordinary cases, and where a bill asking such relief shows that the plaintiff has a perfect remedy at law it is without equity and should be dismissed.²

alleged, to exist, for the sake of upholding a pleading deficient without it."

1. *Stricker v. Tinkham*, 35 Ga. 177; *Newell v. Stiles*, 21 Ga. 118; *Brintnall v. Briggs*, 87 Iowa 538; *Roberts v. Chamberlain*, 30 Kan. 677; *Evarts v. Steger*, 5 Oregon 147; *Lewis v. Lewis*, 5 Oregon 169.

2. *Alabama*. — *Piedmont Land Imp. Co. v. Piedmont Foundry, etc., Co.*, 96 Ala. 389; *Shelby v. Tardy*, 84 Ala. 327.

California. — *Lewis v. Tobias*, 10 Cal. 574.

Connecticut. — *Grant v. Halkins*, 2 Root (Conn.) 479.

Georgia. — *Trammell v. Marks*, 44 Ga. 166; *Davis v. Moorefield*, 40 Ga. 185; *Butler v. Durham*, 2 Ga. 413.

Idaho. — *Ada County v. Bullen Bridge Co.*, (Idaho 1896) 47 Pac. Rep. 818.

Illinois. — *Imperial F. Ins. Co. v. Gunning*, 81 Ill. 236; *Reedy v. Chicago Vinegar, etc., Co.*, 30 Ill. App. 153.

Indiana. — *Shoup v. Cook*, 1 Ind. 135.

Iowa. — *Brainard v. Holsapple*, 4 Greene (Iowa) 485.

Kansas. — *Hardy v. Newton First Nat. Bank*, 46 Kan. 88.

Kentucky. — *Blanchard v. Kenton*, 4 Bibb (Ky.) 451; *Hieronimus v. Hicks*, 3 J. J. Marsh. (Ky.) 701.

Maine. — *Farmington Village Corp. v. Sandy River Nat. Bank*, 85 Me. 46.

Massachusetts. — *Allen v. Storer*, 132 Mass. 372, wherein it was held that a bill to cancel a deed which shows that the plaintiff has an adequate remedy at law should be dismissed; *Nathan v. Nathan*, 166 Mass. 294, which was a suit to cancel an antenuptial contract for fraud; *Boardman v. Jackson*, 119 Mass. 161; *White v. Thayer*, 121 Mass. 226.

Michigan. — *Welles v. River Raisin, etc., R. Co.*, Walk. (Mich.) 35, which was a bill for cancellation.

New York. — *Globe Mut. L. Ins. Co.*

v. Reals, 79 N. Y. 202; *Venice v. Woodruff*, 62 N. Y. 462, 20 Am. Rep. 495; *Rankin v. Atherton*, 3 Paige (N. Y.) 143.

North Carolina. — *Potter v. Everitt*, 7 Ired. Eq. (N. Car.) 152, in which case rescission was sought for mere inadequacy of price; *Murray v. King*, 7 Ired. Eq. (N. Car.) 19.

Ohio. — *Quebec Bank v. Weyand*, 30 Ohio St. 126.

Oregon. — *Raley v. Umatilla County*, 15 Oregon 172.

Pennsylvania. — *Travis's Appeal*, (Pa. 1887) 8 Atl. Rep. 601.

Tennessee. — *Barnett v. Clark*, 5 Sneed (Tenn.) 435; *Stipe v. Stipe*, 2 Head (Tenn.) 169; *Young v. Butler*, 1 Head (Tenn.) 640; *Hale v. Witt*, 1 Heisk. (Tenn.) 567.

Vermont. — *Deveraux v. Cooper*, 15 Vt. 88.

West Virginia. — *Anderson v. Snyder*, 21 W. Va. 632; *Jones v. Fox*, 20 W. Va. 370.

Wisconsin. — *Reuter v. Lawe*, 86 Wis. 106; *Becker v. Trickel*, 80 Wis. 484; *McMillen v. Mason*, 71 Wis. 405.

United States. — *San Diego Flume Co. v. Souther*, 90 Fed. Rep. 164, 61 U. S. App. 134, which was a bill for cancellation; *Ætna L. Ins. Co. v. Smith*, 73 Fed. Rep. 318; *Cincinnati, etc., R. Co. v. McKeen*, 64 Fed. Rep. 36, 24 U. S. App. 218; *U. S. Bank v. Lyon County*, 46 Fed. Rep. 514; *Yeatman v. Bradford*, 44 Fed. Rep. 536; *Morse Arms Mfg. Co. v. Winchester Repeating Arms Co.* 33 Fed. Rep. 170; *Read v. Dingess*, 8 U. S. App. 526; *Home Ins. Co. v. Stanchfield*, 2 Abb. (U. S.) 1, 1 Dill. (U. S.) 424; *Harding v. Wheaton*, 2 Mason (U. S.) 378; *Phoenix Mut. L. Ins. Co. v. Bailey*, 13 Wall. (U. S.) 616.

Irreparable Injury — *Suit for Cancellation*. — It has been held that the jurisdiction to cancel an instrument exists only when its cancellation is necessary to prevent irreparable injury. *Field v. Holbrook*, (N. Y. Super.

Suit in United States Court — Provisions of Judiciary Act. — Suits for the rescission or cancellation of instruments are within the provisions of the Judiciary Act that suits in equity shall not be sustained in any of the courts of the United States in any case where plain, adequate, and complete relief may be had at law.¹

Averments Entitling Plaintiff to Damages. — Where the only object of the bill is to recover damages sustained by reason of the defendant's fraud it is without equity.²

Payment or Performance. — Where payment or performance of a contract by the plaintiff is alleged as a ground for relief it is necessary to allege facts showing that a complete and adequate remedy is not obtainable at law.³

The Pendency of an Action at Law against the maker of an instrument is not to be taken as conclusive that the maker has a remedy at law, and a suit by the maker for the cancellation of the instrument will be entertained if the bill presents a case showing grounds for equitable relief, notwithstanding the pendency of such action at law, as the action at law may be dismissed at the option of the plaintiff therein and another brought at his convenience.⁴

Objection Waived by Answering to the Merits. — It would seem that the fact that the plaintiff has an adequate remedy at law may be an insufficient reason for dismissing the complaint where the defendant has answered upon the merits without raising the objection.⁵

7. Coming into Equity with Clean Hands. — In a suit to rescind

Ct. Gen. T.) 14 How. Pr. (N. Y.) 103; *Balestier v. Mechanics' Nat. Bank*, (Supm. Ct. Gen. T.) 15 N. Y. St. Rep. 46.

Suit for Reformation. — In *Phillips v. Port Townsend Lodge No. 6*, 8 Wash. 529, Anders, J., said with reference to the power of equity to reform instruments: "Equity will not interfere except in extraordinary cases and where irreparable injury would otherwise result. Where compensatory damages may be recovered in an action at law, there is no occasion for the interference of equity."

Right to Trial by Jury. — A court of equity will not entertain jurisdiction where the plaintiff has an adequate remedy at law, because to do so would be to deprive the defendant of a trial by jury. *Ada County v. Bullen Bridge Co.*, (Idaho 1896) 47 Pac. Rep. 878.

1. *Phoenix Mut. L. Ins. Co. v. Bailey*, 13 Wall. (U. S.) 616.

2. *Coe v. Turner*, 5 Conn. 86. See also *Edwards v. Hanna*, 5 J. J. Marsh. (Ky.) 18, in which case the court in denying the rescission of a contract said:

"Where there seems to be no necessity of resorting to a court of chancery, and the object of a complainant is for the liquidation of damages only, the chancellor ought not to afford redress; for that is the province of a common-law court."

Averment of Breach of Contract. — Where the rescission of a contract is sought, it is insufficient to allege merely a breach of the contract on the part of the plaintiff which would confer a right of action at law, without averring that the defendant is insolvent, that he has been guilty of fraud, or other facts furnishing a foundation for equity jurisdiction. *Brainard v. Holsapple*, 4 Greene (Iowa) 485.

3. *Butler v. Durham*, 2 Ga. 413.

4. *Buxton v. Broadway*, 45 Conn. 540, in which case the court cited *Ferguson v. Fisk*, 28 Conn. 501, and *Hartford v. Chipman*, 21 Conn. 488.

5. *Becker v. Trickle*, 80 Wis. 484, which was an action for the rescission of a contract on the ground of fraud. See also *Sherry v. Smith*, 72 Wis. 342.

or cancel an instrument the court will apply to the bill or complaint the maxim of equity that he who invokes its aid must come with clean hands.¹

Rescission of Contract Made in Fraud of Creditors. — A bill asking the reconveyance of land conveyed by the complainant must not disclose the existence of an intention on the part of the complainant in making the deed to hinder, delay, or defraud creditors; and if it does it is without equity and the defendant need not set up such defense by way of answer.²

8. Averment of Fraud — *a. IN GENERAL.* — Where the rescission or cancellation of a contract is sought on the ground of fraud, fraud is a fundamental averment. Such fraud as will appeal to a court of equity must be alleged, and the plaintiff will be required to stand upon the allegations in his bill or complaint.³

1. *Shattuck v. Watson*, 53 Ark. 147, in which case the instrument sought to be canceled was given to compound a felony.

Bill Alleging Suspicious Circumstances. — In a suit to cancel an instrument a bill alleging a transfer by the complainant to the defendant of the property in dispute without any valuable consideration, without alleging the reasons for the transfer, is without equity. *Scanlan v. Gillan*, 5 Cal. 182, in which case the court said: "When courts are called upon to set aside contracts, there must be some substantial reasons shown, and a court of chancery, particularly, will not act when it is kept in the dark as to the reasons or purposes of a transaction in reference to which relief is sought."

2. *Pierson v. Pierson*, 5 Del. Ch. 11, in which case the bill alleged that the complainant had conveyed land upon certain trusts, and asked a reconveyance of the land upon the ground that the terms of the trust had been fully performed. And see Am. and Eng. Encyc. of Law, title *Fraudulent Conveyances*.

3. See generally article **FRAUD**, vol. 9, p. 684 *et seq.*, and see the following cases:

Alabama. — *Johnson v. Rogers*, 112 Ala. 576; *Goree v. Clements*, 94 Ala. 337; *Bailey v. Litten*, 52 Ala. 282.

Arkansas. — *Wilson v. Strayhorn*, 26 Ark. 28, wherein it was held that fraud must be charged and not left to inference.

California. — *Witmer Brothers Co. v. Weid*, 108 Cal. 569.

Colorado. — *Travelers Ins. Co. v. Redfield*, 6 Colo. App. 190, wherein the

court, in holding that a decree of cancellation was not sustained by the allegations of the complaint, said: "It is not averred that the execution of the note and deed of trust was induced by any fraudulent representations or conduct on the part of the defendant."

Connecticut. — *Park v. Blodgett*, 64 Conn. 28. See also *Palmer v. Hartford F. Ins. Co.*, 54 Conn. 488, to the effect that unless fraud is specifically alleged in the bill it is to be excluded from the case.

Florida. — *Chaires v. Brady*, 10 Fla. 133.

Kentucky. — *Forwood v. Forwood*, 86 Ky. 114; *Coleman v. McKinney*, 3 J. J. Marsh. (Ky.) 246.

Maine. — *Stover v. Poole*, 67 Me. 217.

Maryland. — *Showman v. Miller*, 6 Md. 479; *Watkins v. Stockett*, 6 Har. & J. (Md.) 435.

Washington. — *Drown v. Ingels*, 3 Wash. 424.

United States. — *Atlantic Delaine Co. v. James*, 94 U. S. 207.

Insufficient Complaint. — In *Smith v. McCourt*, 8 Colo. App. 146, it was said: "We may say, however, in relation to the suit for rescission, that the matters set forth in the complaint are not sufficient to authorize the granting of the relief prayed. No fraud, misrepresentation, concealment, or mistake is alleged, nor any fact of any nature which would give a court of equity jurisdiction to interfere in behalf of the complainants, to protect them against the consequences of a transaction into which they deliberately and voluntarily entered."

Averment of Mistake. — Where in a

Contract Voluntarily Entered into. — Where the bill or complaint in a suit for the rescission of a contract shows that the plaintiff deliberately and voluntarily entered into it, alleges no fraud, misrepresentation, concealment, or mistake, and does not state any fact which would give a court of equity jurisdiction to interfere, it is without equity.¹

Insolvency of Defendant. — It is not necessary to allege that the defendant is insolvent where it is sought to set aside a contract on the ground of fraud.²

Financial Distress of Plaintiff. — It is not sufficient to allege that at the time of the making of the instrument sought to be rescinded the plaintiff was in financial distress, but such allegation is a material one in connection with other allegations that the plaintiff was by false and fraudulent representations unduly influenced to make the instrument.³

Intoxication of Maker of Instrument. — It would seem that it is not sufficient to allege merely that the plaintiff was drunk when he made the instrument, and had no knowledge of the making of it, and that there was a lack of consideration, but it must be alleged that the defendant induced the drunkenness and took advantage thereof.⁴

Nonperformance of Contract. — It is not sufficient to allege that the defendant has failed to perform his part of the contract, but it must be alleged that the plaintiff was induced to enter into the contract by false representations, or facts must be alleged showing that the defendant had the fraudulent intention not to perform the contract.⁵

bill to correct an alleged mistake in a deed, the aid of the court is invoked exclusively on the ground of mistake, and there is no allegation of fraud, relief will be granted upon no other ground than mistake. *Showman v. Miller*, 6 Md. 479. See also *Watkins v. Stockett*, 6 Har. & J. (Md.) 435, in which case the court cited *Wesley v. Thomas*, 6 Har. & J. (Md.) 24.

1. *Smith v. McCourt*, 8 Colo. App. 146.

Enumeration of Facts Which Must Be Alleged. — Where the grantor in a deed seeks its cancellation on the ground that the execution of the instrument was fraudulently procured by the making of promises which the defendant has failed to perform, the material facts necessary to be alleged are as follows: (1) the making of the promises; (2) that the plaintiff relied upon and had a right to rely upon them; (3) that he was induced thereby to, and did, make the conveyances; (4) that the defendants have not performed the

acts promised, and had no intention of doing so, at the time of making them. *Lawrence v. Gayetty*, 78 Cal. 128.

2. *Leyden v. Hickman*, 75 Ga. 684, in which case it was said: "A contract which is procured to be made by a solvent person by false and fraudulent representations cannot be permitted to stand any more than if such person were insolvent."

3. *Clough v. Adams*, 71 Iowa 17. See also *Smith v. McCourt*, 8 Colo. App. 146.

4. *Hale v. Stery*, 7 Colo. App. 165.

5. *Birmingham Warehouse, etc., Co. v. Elyton Land Co.*, 93 Ala. 549, in which case the court said: "A promise, strictly speaking, is not a representation. The failure to make it good may give a cause of action, but it is not a false representation which will authorize the rescission of a contract like the present. The making of a promise, and having no intention at the time of performing it, constitutes a fraud for which a contract may be

Allegation of Actual Fraud. — If the pleader omits facts which exist to his knowledge, which would entitle him to relief on the ground of constructive fraud, and stands upon other facts which constitute actual fraud only, he is bound by his pleading, both in the reception of evidence and in the disposition of the case, unless he amends in time.¹

b. NECESSITY TO ALLEGE FACTS. — The acts of fraud must be specifically set out,² and the allegations of fraud must be direct and positive;³ and the rule is uniformly declared and applied that the particulars of the misrepresentations and fraud must be distinctly alleged, and that general charges of fraud and illegality, without stating the facts upon which the charges are based, are insufficient.⁴

rescinded." See also to the same effect *Piedmont Land Imp. Co. v. Piedmont Foundry, etc., Co.*, 96 Ala. 389; *Harrington v. Rutherford*, 38 Fla. 321.

In Indiana it has been held that the representations "must be of alleged existing facts and not upon a promise to do something in the future, although the party promising had no intention of fulfilling the promise at the time it was made." *Balue v. Taylor*, 136 Ind. 368, in which case the court cited *Bennett v. McIntire*, 121 Ind. 231; *Caylor v. Roe*, 99 Ind. 1, and *Fry v. Day*, 97 Ind. 348.

1. *Per Stiles, J.*, in *Muzzy v. Tompkinson*, 2 Wash. 616, in which case it was said: "But the statement of facts which support actual fraud does not establish the case as one based on that theory alone, if there are other ultimate facts as clearly alleged in the pleading which would support the theory of constructive fraud, whether with or without the additional allegations of actual fraud."

2. *Hick v. Thomas*, 90 Cal. 289.

Failure to Allege Fraudulent Representations. — In *Adams v. Schiffer*, 11 Colo. 15, it was alleged that the defendant "entered into said contract with the intent to deceive and defraud plaintiff;" and it was objected by the court that there was no allegation of fraudulent representations.

3. *Leyden v. Hickman*, 75 Ga. 684, to which case reference is made for allegations that were considered sufficient.

4. *State v. Williams*, 39 Kan. 517, in which case the court said: "Allegations of fraud and illegality, without a statement of the facts constituting the same, are mere legal conclusions, and

of no force in a pleading. No issue is presented by such averments, and no proof is admissible thereunder." Citing *Ockendon v. Barnes*, 43 Iowa 615; *Leavenworth, etc., R. Co. v. Douglas County*, 18 Kan. 169; *Memphis, etc., R. Co. v. Neighbors*, 51 Miss. 412; *Clark v. Dayton*, 6 Neb. 192; *Smith v. Lockwood*, 13 Barb. (N. Y.) 209, and *Pelton v. Bemis*, 44 Ohio St. 51. See also article **LEGAL CONCLUSIONS**, vol. 12, p. 1020. And see further, for cases in which the familiar rule of pleading stated in the text has been applied in suits for rescission and cancellation:

Alabama. — *Reynolds v. Excelsior Coal Co.*, 100 Ala. 296; *Loucheim v. Talladega First Nat. Bank*, 98 Ala. 521; *Goree v. Clements*, 94 Ala. 337.

California. — *Thomason v. De Greayer*, (Cal. 1892) 31 Pac. Rep. 567; *Schultz v. McLean*, (Cal. 1890) 25 Pac. Rep. 427; *Lawrence v. Gayetty*, 78 Cal. 128, in which last named case the court cited *Capuro v. Builders' Ins. Co.*, 39 Cal. 123; *Meeker v. Harris*, 19 Cal. 278, and *Kinder v. Macy*, 7 Cal. 206.

Florida. — *Mattair v. Payne*, 15 Fla. 682.

Georgia. — *MacIntyre v. Cotton States L. Ins. Co.*, 82 Ga. 478.

Kansas. — *McKee v. Eaton*, 26 Kan. 226.

Maryland. — *Wenstrom Consol. Dynamo, etc., Co. v. Purnell*, 75 Md. 113.

Nebraska. — *Dunn v. Remington*, 9 Neb. 82.

Motion to Make More Definite and Certain. — In *McKee v. Eaton*, 26 Kan. 226, it was held that the allegations of fraud were sufficient to withstand a demurrer and that the only remedy was by a motion to have the petition made

Sufficient Averments. — Although the acts of fraud must be set out this rule does not require or justify a minute detail of all the conversations by which the fraudulent representations are to be proven;¹ and where the plaintiff states the facts out of which the fraud arises, clearly and distinctly, and does not leave the court in uncertainty as to the grounds of the relief sought, the bill or complaint is sufficient.²

more definite and certain. See also article DEFINITENESS AND CERTAINTY IN PLEADINGS, vol. 6, p. 248.

Insufficient Averments. — In *Thomason v. De Greayer*, (Cal. 1892) 31 Pac. Rep. 567, averments that "said De Greayer, by fraud, deceit, and misrepresentations, omitted to have the plaintiff's name inserted in the contract with said corporation defendant for said work," and "that such omission was done through the fraud, deceit, and trickery practiced by said De Greayer on said corporation defendant and said plaintiff, and by mistake of said corporation," were held insufficient. *Citing Spring Valley Water Works v. San Francisco*, 82 Cal. 321; *Capuro v. Builders' Ins. Co.*, 39 Cal. 123, and *Kent v. Snyder*, 30 Cal. 674.

Forms. — In the following cases will be found set forth, either in full or in substance, bills, petitions, or complaints in which sufficient facts were alleged to entitle the plaintiffs to relief:

Iowa. — *Wood v. Lambert*, 85 Iowa 580.

Kansas. — *Curtis v. Stilson*, 38 Kan. 302, in which case is set forth the substance of a petition that was sufficient on demurrer; *Paddock v. Pulsifer*, 43 Kan. 718, in which case the petition is set out in full; *McKee v. Eaton*, 26 Kan. 226, in which case the substance of the petition is set forth.

Massachusetts. — *Nathan v. Nathan*, 166 Mass. 294, wherein will be found the substance of a bill by a widow to set aside an antenuptial contract for fraud.

Montana. — *Muller v. Buyck*, 12 Mont. 354, in which case will be found the material allegations of a complaint which was held sufficient.

Nebraska. — *Hartnett v. Hartnett*, 42 Neb. 23, which was an action to cancel a deed for duress and fraud; *Kithcart v. Larimore*, 34 Neb. 273, which was an action to cancel a deed procured by fraud and undue influence; *Armstrong v. Helfrich*, 34 Neb. 358; *Loder v. Loder*, 34 Neb. 824.

Oklahoma. — *Day v. Mooney*, 3 Okla. 608.

South Dakota. — *Taylor v. National Bank*, 6 S. Dak. 511, in which case will be found set forth the substance of a complaint that was held sufficient.

Washington. — *Jackson v. Tatebo*, 3 Wash. 456, in which case will be found set forth the material allegations of the complaint; *Muzzy v. Tompkinson*, 2 Wash. 616, in which case will be found set forth material allegations of the complaint; *Jackson v. Tatebo*, 3 Wash. 456.

Wisconsin. — *Potter v. Taggart*, 54 Wis. 395, in which case will be found set forth the substance of a complaint that was held sufficient to withstand a demurrer *ore tenus* at the trial.

Insufficient Complaints. — In the following cases the complaints were insufficient:

California. — *Bailey v. Fox*, 78 Cal. 389, wherein will be set forth in full so much of an insufficient complaint as stated the grounds for cancellation.

Utah. — *Rushton v. Hallett*, 8 Utah 277, in which case will be found set forth in full a complaint which was held insufficient because it stated no facts which constituted fraud on the part of the defendants.

1. *Hick v. Thomas*, 90 Cal. 289.

2. *Reynolds v. Excelsior Coal Co.*, 100 Ala. 296; *Baker v. Maxwell*, 99 Ala. 558, to which case reference is made for a statement of the substance of the bill.

Alternative Allegations. — In *Rasmusen v. McKnight*, 3 Utah 315, which was a suit to set aside a deed which the plaintiff's intended grantee fraudulently procured to be made to another, the plaintiff alleged that the plaintiff did not know whether the intended grantee misread the deed to the plaintiff or obliterated his own name and put in the name of another, and concluded with an allegation "that by whatever means it was done it was done fraudulently and for the purpose of robbing and wronging the said plaintiff;" and it was held that under the circumstances the plaintiff's statement of how the fraud was accomplished

c. FALSITY OF REPRESENTATIONS — (1) *In General.* — The bill or complaint must allege not only what representations were made by the defendant, but that they were false.¹

(2) *Defendant's Knowledge of Falsity of Representations.* — It is sufficient, it would seem, to allege either that the defendant knew that the representations were false, or that he made them as positive statements of a known fact, without knowledge of their truth or falsity.²

was necessarily in the alternative and that the complaint was good.

Averments in Action to Rescind Settlement. — In *Titus v. Rochester German Ins. Co.*, 97 Ky. 567, which was an action to rescind a settlement of a claim against an insurance company for a loss under a policy of insurance, the court said: "The petition charges, in the fullest and strongest terms, appellant's ignorance of the rights and obligations of the parties under the policy of insurance, and full knowledge on part of appellee, both as to the rights of the parties and as to appellant's ignorance of them, as well as false and fraudulent misrepresentations made by appellee's agents for the purpose of deceiving, and which did deceive, appellant as to the validity of his claim under the policy. It charges, among other things, that appellee fully understood its liability to appellant for the full amount of his loss, that he was ignorant of the law governing his right and appellee's obligations, while appellee both knew his rights and knew that he was ignorant of them, and, with this knowledge and intending to deceive and defraud him, fraudulently represented to him that, by reason of an incumbrance on a part of the insured property, his entire claim under the policy was forfeited; that these false representations were made to him by appellee for the purpose of deceiving and defrauding him, and that, by these false and fraudulent representations, and through ignorance of his legal rights, he was induced to accept the sum of four hundred dollars in satisfaction of a loss of eight hundred dollars, when, except for these fraudulent representations and his ignorance, he would not have done so." It was held that this petition was good on demurrer, and presented something more than an effort to obtain relief purely on the ground of a mistake of law or mere ignorance on the part of the plaintiff as to his legal rights, and made out a case of actual fraud.

Action to Rescind Antenuptial Contract — Unchastity of Woman. — An action by a man to rescind an antenuptial contract on the ground that the defendant falsely and fraudulently represented that she was chaste and virtuous, does not lie, it would seem, unless the woman was at the time of marriage pregnant with child by another man, and the pregnancy was unknown to the husband. *Barnes v. Barnes*, 110 Cal. 418, in which case it was held that an allegation that the defendant represented at the time of the marriage that she was a worthy and chaste woman, and that said representation was false, was not sufficient.

1. *Bailey v. Fox*, 78 Cal. 389; *Burkle v. Levy*, 70 Cal. 250; *Wilson v. Morris*, 4 Colo. App. 242.

Falsity of Representations as to Value. — Where it is alleged that the fraudulent representations consisted of false statements as to the value of property which the plaintiff was to receive under the contract, the plaintiff must allege directly the value of such property, and not leave the court to indulge in speculations as to its value. *Purdy v. Bullard*, 41 Cal. 444. See also *Spence v. Geilfuss*, 89 Wis. 499, to the effect that where a vendee seeks the rescission of a contract for the sale of land on the ground of fraud, he should allege that the land was not worth what it was represented to be worth.

2. *Matthey v. Wood*, 12 Bush (Ky.) 293, in which case it was alleged in an answer and cross-petition by a purchaser that the vendor "falsely and fraudulently represented the house to be perfectly dry and free from dampness," and rescission was decreed, it being held that it was not necessary to aver specifically that the vendor knew when he made the representations that they were untrue. See also *Foley v. Holtry*, 43 Neb. 133; *Stetson v. Riggs*, 37 Neb. 797. See further, for an exhaustive treatment of the question whether equity will relieve against misrepresentations which were not

d. MATERIALITY OF AND RELIANCE UPON MISREPRESENTATIONS — In **General**. — The misrepresentation alleged must be material in its nature; ¹ and it is uniformly held that the bill or complaint must not only allege that the defendant committed fraud, but must aver facts showing that the plaintiff believed the representations made by the defendant to be true, and that he entered into the contract in reliance upon the truth of such representations; ² the rule being, in such case, that a misrepresenta-

made with knowledge of their falsity, Am. and Eng. Encyc. of Law, titles *Fraud and Deceit*, vol. 14, p. 12; *Reformation and Cancellation of Contracts*.

Contra. — In *Righter v. Roller*, 31 Ark. 170, in which case the court was asked to rescind a contract for the sale of a barge on the ground that it had been fraudulently represented that the barge was sound and seaworthy, it was said: "The misrepresentations in this case are not alleged to have been made fraudulently and falsely. The allegation is that the defendant knew, or ought to have known, that the barge was unsound. It has been held by this court that, though the representations may be false, they are not deceitfully fraudulent unless known to the maker of them to be false." *Citing Plant v. Condit*, 22 Ark. 454; *Morton v. Scull*, 23 Ark. 289, and *Campbell v. Hillman*, 15 B. Mon. (Ky.) 517.

Averments Considered Sufficient. — In *West v. Rouse*, 14 Ga. 715, the bill charged that the defendant fraudulently palmed off and imposed upon the plaintiff what the defendant "had reason to believe" was a forged title, and also that the defendant is now striving to avail himself of the legal advantage fraudulently obtained, and that he is seeking in bad faith and fraudulently to recover, etc., and it was held that although the allegations were not technical and did not positively affirm that the defendant knew that the title was forged, the bill was sufficient.

1. *Larimer County Land Imp. Co. v. Cowan*, 5 Colo. 320.

2. *Wilson v. Strayhorn*, 26 Ark. 28; *Bailey v. Fox*, 78 Cal. 389; *Purdy v. Bullard*, 41 Cal. 444; *Boyce v. Watson*, 20 Ga. 517; *Davis v. Hagler*, 40 Kan. 187; *McShane v. Hazlehurst*, 50 Md. 107; *Foley v. Holtry*, 43 Neb. 133; *Stetson v. Riggs*, 37 Neb. 797.

Misrepresentations as to Value and Ownership. — Where it is alleged that the value and ownership of the prop-

erty embraced in the contract were fraudulently misrepresented, but facts are alleged in the complaint showing that the parties were dealing at arm's length, and that no advantage was taken of the plaintiff, the complaint is insufficient. *Sackman v. Campbell*, 15 Wash. 57, in which case the court said: "While a want of knowledge of the value of the property is alleged, there is nothing to show that the plaintiffs did not have ample opportunity to inform themselves of its value and condition."

Statements of Matters of Opinion. — In *People v. Tynon*, 2 Colo. App. 131, the court said, in holding the complaint insufficient: "What are called misrepresentations are simply statements of opinion as to the value of the property considered generally with reference to its market price, and on which there might be wide differences of opinion. It is a matter about which the vendor has as full and ample knowledge and opportunity for information as are possessed by the vendee. They did not amount, taken with the most liberal intendment and broad significance, to anything approaching a warranty, and in no manner were brought within the scope of the well-settled law on this subject."

Ignorance and Illiteracy of Plaintiff. — A bare allegation that the plaintiff is an ignorant and illiterate person and did not understand the meaning and import of the language used in the contract is not sufficient of itself to entitle him to the cancellation or reformation of the contract, as it is the duty of such a person in entering into a contract to procure assistance, and it must be further alleged that some unfair advantage was taken of him by reason of the existence of the trust or confidence existing between the parties, or fraud or misrepresentation. *Archer v. California Lumber Co.*, 24 Oregon 341, to which case reference is made for allegations that were held sufficient.

tion, in order to affect the validity of a contract, must relate to some matter of inducement to the making of the contract, in which, from the relative position of the parties and their means of information, the one must necessarily be presumed to contract upon the faith and trust which he reposes in the representations of the other, on the subject of the contract.¹

Bill Showing Plaintiff's Knowledge of Falsity of Representations. — A bill which shows that before the execution of the instrument sought to be rescinded the plaintiff was in any manner informed of the falsity of the defendant's representations is without equity.²

As to Injury Resulting from Fraud. — In a suit for the rescission or cancellation of a contract it is not sufficient to allege that the defendant was guilty of fraud, but it must be averred that the plaintiff was injured thereby;³ however, it would seem that

Signing Instrument Without Reading It. — In an action to rescind a contract on the ground of fraud, a complaint alleging that the plaintiff signed the instrument without reading or examining it, and afterwards discovered that a fraud had been practiced upon him, without averring that any relation of special trust or confidence existed between the parties to the contract, or that the means of knowledge as to the terms and conditions of the writing were not equally open and accessible to both, is insufficient, even though it is alleged that the plaintiff was illiterate and scarcely able to read writing. *Hawkins v. Hawkins*, 50 Cal. 558.

1. *Hill v. Bush*, 19 Ark. 522, in which case the court cited *Attwood v. Small*, 6 Cl. & F. 444; *Evans v. Bicknell*, 6 Ves. Jr. 174; *Yeates v. Pryor*, 11 Ark. 66; *Ball v. Lively*, 4 Dana (Ky.) 370, and *Clarke v. White*, 12 Pet. (U. S.) 178.

Subsequent Affirmance of Contract. — A bill which shows that after the execution of the instrument the plaintiff, with knowledge of the true state of the facts, affirmed the contract, is without equity, as the contract will be regarded as one which was originally made by the plaintiff with knowledge of the falsity of the defendant's representations. *Pratt v. Philbrook*, 33 Me. 17.

Ignorance of Plaintiff's Attorney of Falsity of Representations. — In an action to set aside a deed for fraud, where the plaintiff was represented by an attorney, it is material to aver that the attorney did not know of the falsity of the defendant's representations, and that if he did have such knowledge he was acting in collusion with the grantee and concealed the same from the plain-

tiff. *Edwards v. Richards*, 95 Ga. 655, in which case it was held that the court erred in refusing to allow an amendment in this respect.

2. *Pratt v. Philbrook*, 33 Me. 17.

Averments Showing Plaintiff's Knowledge of His Rights. — A petition which alleges that the defendant took advantage of the necessities of the plaintiff and induced him upon the payment of a certain sum to release a claim against the defendant, and which does not allege that the plaintiff relied upon any fraudulent statement made by the defendant, but shows that the plaintiff was dealing with the defendant with the full knowledge of his rights and all the facts, is without equity. *Davis v. Hagler*, 40 Kan. 187.

3. *Belmont Min., etc., Co. v. Costigan*, 21 Colo. 471, in which case the court said: "In such an action there must be alleged 'the telling of an untruth, knowing it to be an untruth, with intent to induce a man to alter his condition, and his altering his condition in consequence, whereby he sustains damage.'" Citing *Watson v. Poulson*, 15 Jur. 1111, and *Ming v. Woolfolk*, 116 U. S. 599. See also *Bailey v. Fox*, 78 Cal. 389; *Marriner v. Dennison*, 78 Cal. 202; *Morrison v. Lods*, 39 Cal. 381; *Hargroves v. Nix*, 14 Ga. 316; *Crittenden v. Craig*, 2 Bibb (Ky.) 474; *Pratt v. Philbrook*, 33 Me. 17; *Jewett v. Davis*, 10 Allen (Mass.) 68; *Foley v. Holtry*, 43 Neb. 133; *Stetson v. Riggs*, 37 Neb. 797.

Complaint Sufficient After Answer. — It would seem that the failure to allege that the fraud was injurious to the plaintiff will be waived by answering the complaint without raising the ob-

the precise amount of damages sustained need not be alleged as is necessary in an action for deceit.¹

e. BY WHOM FRAUD WAS COMMITTED. — It must be alleged that the fraud was that of the party against whom rescission is asked;² but it need not be alleged in terms that the defendant made the alleged false representations, as it is sufficient to charge that he procured his agent or servant to make them.³

f. MALA FIDES OF SUBSEQUENT HOLDER. — It has been held that where the cancellation of a negotiable instrument procured by fraud is sought, and it appears that the instrument is in the hands of an innocent purchaser, no relief can be had in equity, as the remedy must be sought by an action at law against the parties to the fraud; and that the allegation that the party who procured the instrument fraudulently negotiated it to the present holder is not an averment that the plaintiff has any defense which can be availed of against the holder, and is insufficient to give the bill equity.⁴

9. Averments as to Mistake — *a.* IN GENERAL. — Where the reformation of an instrument is sought on the ground of mistake the bill must allege facts showing that a mistake was committed. And such a mistake must be alleged as calls for the interposition of a court of equity.⁵

Negating Negligence of Plaintiff. — The bill or complaint must allege

jection. *Potter v. Taggart*, 54 Wis. 395.

1. *Wainscott v. Occidental Bldg., etc., Assoc.*, 98 Cal. 253.

2. *Schultz v. McLean*, (Cal. 1890) 25 Pac. Rep. 427, in which case the only fraud or deceit shown by the complaint was the fraud of the plaintiff's agent, and it was held that the complaint was demurrable.

3. *Grundy v. Louisville, etc., R. Co.*, 98 Ky. 117, to which case reference is made for the substance of a petition which was held sufficient on demurrer, the action being against a railroad company to set aside a conveyance of a right of way on the ground that it had been obtained by false representations and by the fraudulent concealment of certain facts.

Participation of All Defendants in Fraud. — Where a bill charges that one of the defendants in the purchase of goods practiced such fraud as will justify a rescission of the contract, and that the claim set up by another defendant to the goods is feigned and fraudulently asserted with the intention of preventing the plaintiff from successfully asserting his rights to the goods, it is unnecessary to allege that such other defendant participated in

the fraud practiced in the purchase of the goods. *Bradberry v. Keas*, 5 J. J. Marsh. (Ky.) 446.

Fraud of Agent — Knowledge of Principal. — Where it is alleged that an instrument was obtained from the plaintiff through the fraudulent representations of the officer of a corporation, and that the corporation, with full knowledge of such fraud and that the instrument was so obtained, took the same payable to itself, such allegations are sufficient to show that the corporation is *in pari delicto*, and that as against the corporation the plaintiff is entitled to rescission. *Taylor v. National Bank*, 6 S. Dak. 511.

4. *Fuller v. Percival*, 126 Mass. 381. But see *contra*, *Louisville, etc., R. Co. v. Ohio Valley Imp., etc., Co.*, 57 Fed. Rep. 42, in which case Lurton, J., said: "It seems to me that where a bill alleges a state of facts showing that negotiable securities have been issued illegally and fraudulently, and have come into the possession of the defendant, that it devolves upon the defendant, in view of such fraud and illegality, to show that he is a purchaser for value."

5. *Witmer Brothers Co. v. Weid*, 108 Cal. 569; *Wheaton v. Wheaton*, 9 Conn.

facts from which it will appear that the mistake in the instrument did not arise from the gross negligence of the plaintiff.¹

Negating Sufficiency of Instrument Notwithstanding Mistake. — In a suit to reform a mortgage which by mistake does not include all the land which the mortgagor agreed to mortgage, it is not necessary to allege that the mortgage, as mistakenly made, is not sufficient security.²

Averments as to Subsequent Agreement of Parties. — A written contract cannot be amended or reformed by incorporating into it a distinct subsequent agreement, and therefore a bill or complaint alleging a subsequent agreement, and asking that the written instrument be so amended and reformed as to carry out the subsequent agreement, is without equity.³

b. DEFINITENESS AND CERTAINTY. — The allegations on the subject of mistake should not be vague and weak;⁴ but must state with definiteness and certainty wherein the contract as it is written fails to express the intention of the parties.⁵ A bill which shows that the contract was drawn precisely as both par-

96; *Casady v. Woodbury County*, 13 Iowa 113; *Coleman v. McKinney*, 3 J. J. Marsh. (Ky.) 246.

Bill to Quiet Title. — Where a bill asks that the complainant's title to certain land be quieted, and the bill is not framed with a view to the correction of mistakes, the court will not grant such relief. *Cates v. Raleigh*, 1 T. B. Mon. (Ky.) 164.

Description of Intended Instrument. — As to the necessity to allege what contract was in fact made and what variance there is between the intended instrument and the one sought to be reformed, see *infra*, VIII. 15. *b.* (3) *The Intended Instrument — Pointing Out Mistake.*

1. *Meier v. Kelly*, 20 Oregon 86. See also *Osborn v. Ketchum*, 25 Oregon 352, and *Lewis v. Lewis*, 5 Oregon 169.

Allegation Touching Improvements. — Where the plaintiff alleges that through mistake a deed made by him conveyed more land than was intended to be conveyed, and that since the execution of the deed he has been in possession of the land embraced in the deed which was not intended to be conveyed, and has made improvements thereon, and reformation and an injunction against an action at law are sought, the allegations concerning the improvements must state the nature of the improvements, and when they were made, and must show that they have not been made since the plaintiff's discovery of the mistake. *Lewis v. Lewis*, 5 Oregon 169.

2. *Stevens v. Holman*, 112 Cal. 345, 53 Am. St. Rep. 216.

3. *Wilson v. Moriarty*, 88 Cal. 207.

4. *Newell v. Stiles*, 21 Ga. 118.

5. *Marshall v. Drawhorn*, 27 Ga. 275, in which case there were two contradictory statements as to the defects in the instrument, and it was held that the defendant was entitled to abide by the statement which was most favorable to him. See also *Norris v. Colorado Turkey Honestone Co.*, 22 Colo. 162; *Meier v. Kelly*, 20 Oregon 86; and *Hagenah v. Geffert*, 73 Wis. 636.

What Correction Is Necessary. — The party alleging the mistake must show exactly in what it consists and the correction that should be made. * *Bishop v. Clay F. & M. Ins. Co.*, 49 Conn. 167.

Averment of Ignorance of Contents of Instrument. — In an action for the reformation of a written contract, an allegation that the plaintiff had no actual knowledge of the contents of the instrument, without any allegations of fraud and mistake, is immaterial. *McCormick v. Orient Ins. Co.*, 86 Cal. 260.

Objections Waived. — The objection that allegations as to the mistake under which the parties labored in executing an agreement were not sufficiently specific is waived by not presenting such objections to the court and by allowing evidence to be introduced under such allegations. *Montgomery County v. American Emigrant Co.*, 47 Iowa 91.

ties intended that it should be drawn is without equity.¹

c. **NECESSITY TO ALLEGE FACTS.** — In a suit for reformation the bill or complaint must allege facts which show that a mistake was committed, and averments of legal conclusions are not sufficient;² but if the bill or complaint alleges all the facts necessary to entitle the plaintiff to the relief sought, or those not directly alleged are necessarily inferable from those averred, the pleading is sufficient to withstand a general demurrer.³

1. *Betts v. Gunn*, 31 Ala. 219, in which case the court said: "The complaint is, not that a mistake was committed in the drawing of the instrument, but that the defendant has not performed a part of the antecedent verbal agreement, which was designedly left out of the written contract, and trusted to the defendant's honor. It is desired to add to the contract a stipulation which, according to the complainant's bill, was intentionally left out, under the influence of a confidence in defendant which subsequent events prove to have been misplaced."

Attempt to Set Up Parol Agreement. — A bill which shows that the deed was drawn and executed according to the intention of the parties, and which seeks not to raise an equity by operation of law, but to set up a conventional trust on the foundation of a special parol agreement, contrary to the provisions of the statutes of frauds, is without equity. *McElderry v. Shipley*, 2 Md. 25.

2. *Hyland v. Hyland*, 19 Oregon 51.

3. *Seegelken v. Corey*, 93 Cal. 92.

Averment of Mistake in Express Words. — In *Murdoch v. Leonard*, 15 Wash. 142, the court in holding that the complaint was sufficient said: "It is true that the authorities hold that 'in this class of cases the facts must be distinctly and positively averred,' but we think that while the complaint does not in express words allege 'mutual mistake,' it does distinctly set up facts from which that conclusion is inevitable."

Deed Absolute — Averment of Intention to Make Mortgage. — In *Gumpel v. Castagnetto*, 97 Cal. 15, it was held that the following averments were sufficient to support a decree adjudging that a conveyance was made to the defendants as security for certain money, and that the defendants reconvey the same upon the payment of such money: "That this plaintiff never intended to make or execute a convey-

ance absolute to defendant's, or to either of them, but was led to believe by them that such paper, so purporting to be a deed as aforesaid, was simply a mortgage to secure the said payment of said four hundred dollars to defendants as aforesaid."

Forms. — In the following cases will be found set forth, either in full or in substance, bills or complaints which were held sufficient:

Arkansas. — *Griffith v. Sebastian County*, 49 Ark. 24.

California. — *Breen v. Donnelly*, 74 Cal. 301.

Connecticut. — *Palmer v. Hartford F. Ins. Co.*, 54 Conn. 488, which was a suit for the reformation of a policy of fire insurance.

Florida. — *Greeley v. De Cottes*, 24 Fla. 475.

Kansas. — *Stephenson v. Elliott*, 53 Kan. 550.

Maine. — *Tucker v. Madden*, 44 Me. 206.

Maryland. — *Delaware State F. & M. Ins. Co. v. Gillett*, 54 Md. 219, wherein will be found the substance of a bill to reform a mistake in a policy of fire insurance, which bill was held sufficient on demurrer.

South Dakota. — *MacVeagh v. Burns*, 2 S. Dak. 83.

Wisconsin. — *Grossbach v. Brown*, 72 Wis. 458, wherein is set forth the substance of a complaint in an action to reform a deed, which complaint was held sufficient.

Substance of Necessary Allegations. — In *Gassert v. Black*, 11 Mont. 185, the court, in holding that sufficient was alleged to entitle the party to a reformation, said: "In order that a written instrument may be reformed in equity for mistake, it must appear that the parties agreed upon a certain contract; that they executed a contract, the one sought to be reformed; that the contract executed was not the one agreed upon; that the variance between the contract agreed upon and the one exe-

d. MATERIALITY OF MISTAKE. — Where reformation is sought on the ground of mistake, the bill or complaint must allege facts showing that the mistake was material, and that it was such that reformation is necessary to prevent injustice.¹

Averment of Omission by Inadvertence. — A bill for the reformation of an instrument which shows merely that something was omitted by inadvertence, which ought to have been inserted in the instrument as a matter of propriety and which was not a matter of specific agreement between the parties, is without equity.²

e. MUTUALITY OF MISTAKE. — Since, as a general rule, equity will not reform a mistake unless the mistake was a mutual one, the bill or complaint must allege facts showing that there was a mutual mistake.³

cuted occurred by mistake; in what the mistake consisted; and that the mistake was mutual." *Citing Gillespie v. Moon*, 2 Johns. Ch. (N. Y.) 585; *Barton v. Sackett*, (Supm. Ct.) 3 How. Pr. (N. Y.) 358; and *Wemple v. Stewart*, 22 Barb. (N. Y.) 154.

1. *Lewis v. Lewis*, 5 Oregon 169.

Clerical Errors. — It is not sufficient to allege that one word was left out of the instrument by mistake, where, without such word, the intention of the parties is sufficiently apparent to be recognized in any court. *Atlanta, etc., R. Co. v. Speer*, 32 Ga. 550.

2. *Thompsonville Scale Mfg. Co. v. Osgood*, 26 Conn. 16, in which case the court said: "Equity will neither make nor ameliorate agreements, nor supply new terms to contracts not wisely and thoughtfully made. If, therefore, the present bill was brought to procure the insertion, in the instrument set forth, of a clause about which the parties had no understanding whatever, the respondent might justly reply, that the contract embraced no more and no less than was agreed upon; that, if silent on the point in controversy, it could not affect the petitioners; if it spoke, it bound them."

3. *Evarts v. Steger*, 5 Oregon 147, in which case the court, in holding the complaint insufficient because there was no sufficient averment to show that the defendant was mistaken as to any of the terms of the contract, said: "To entitle a party to relief in a court of equity against a mistake, it must appear that such mistake was mutual; that it was the mistake of both parties to the contract. And as we have before indicated, there is nothing in this complaint, or at least no sufficient averment, to show that respondents

were mistaken as to any of the terms of the contract by them executed." See also *Newell v. Stiles*, 21 Ga. 118, wherein it was decided that in determining whether the ground of mistake supplies any equity to the bill the first inquiry is whether it alleges that all the parties made a mistake; *Arter v. Cairo Democrat Co.*, 72 Ill. 434; *Meier v. Kelly*, 20 Oregon 86. And see generally as to the doctrine that a court of equity will not reform a mistake in an instrument unless it is the mutual mistake of both parties, *infra*, III. 2. *e.* (2) (*b*) *Mutuality of Mistake.*

Sufficient Allegation of Mutual Mistake.

— In *Newton v. Hull*, 90 Cal. 487, the complaint alleged that the agreement was to sell an undivided two-fifths of the land described in the written memorandum sought to be reformed; that the plaintiff owned only two-fifths thereof; "that the parties to said memorandum of agreement intended to insert therein a description of the undivided two-fifths of the premises, but that by mistake in drawing said memorandum of agreement the description of said lot or parcel of land was therein set forth incorrectly, in the following particulars;" and then proceeded to state definitely the mistake and how it happened to be made. It was held that this was sufficient, in the absence of a demurrer, the court saying: "To say that by mistake a description different from that intended by the parties to the agreement was inserted therein, is to say, substantially, that the mistake was a mutual mistake of the parties to the agreement."

Mistake as to Land Embraced in Deed.

— In *Barfield v. Price*, 40 Cal. 535, which was an action to reform a misdescription in a deed, the court said:

f. **MISTAKE OF LAW.** — Since mistake or ignorance of the law forms no ground of relief from contracts fairly entered into with knowledge of the facts under the circumstances raising no presumption of fraud, imposition, or undue advantage taken, a bill for the reformation of an instrument must as a general rule allege facts showing that the instrument was entered into by mistake of fact as distinguished from a mistake of law.¹

10. Averments as to Accident. — Where accident is relied upon as a ground for relief, it must be alleged in the bill.²

11. Averment of Duress and Undue Influence — Necessity to Allege Grounds for Relief. — The court will not rescind or cancel a contract on the theory that it was obtained by duress or undue influence unless such ground is alleged; ³ and a complaint which avers that

"In the next place the complaint is deficient in not showing that the defendants did not understand the agreement to sell in accordance with the deed. There may have been no mistake on their part, except in failing to understand that the plaintiff supposed she was selling. If plaintiff supposed she was selling a different tract of land, but the defendants thought they were purchasing the tract actually conveyed, there was a mutual mistake as to the subject-matter of the contract. In that case the minds of the parties never met, and there was really no contract of sale at all."

Defendant's Knowledge of Plaintiff's Mistake. — In an action to reform a deed made by the plaintiff to the defendants, allegations that the defendant at the time he accepted the deed supposed that it contained only the undivided one-half of the property, and that the defendant knew at the time of such acceptance that the plaintiff also supposed that the deed described and conveyed only the undivided one-half of said property, are sufficient to support findings that the mistake was that of the plaintiff, and that the defendant knew of such mistake at the time. *Holt v. Holt*, 120 Cal. 67.

In California a complaint framed under Civ. Code Cal., § 3399, which shows that either a "mutual mistake" was committed or a "mistake of one party which the other at the time knew or suspected," is sufficient to entitle the plaintiff to relief. *Cleghorn v. Zumwalt*, 83 Cal. 155.

1. Necessity to Allege Mistake of Fact. — In *Kyes v. Merrill Furniture Co.*, 92 Wis. 32, which was an action by a judgment creditor of an insolvent corpora-

tion in the name of its assignee to set aside certain notes and mortgages and a conveyance of the mortgaged premises made by the assignee which conveyance was made by the assignee under the mistaken belief that the mortgages and the notes secured thereby were valid securities, the court said: "In such a case it should, doubtless, be made to appear by the complaint that the settlement or conveyance was induced by a mistake of fact, as distinguished from a mistake of law; for equity does not relieve against mistakes merely of law. Every party must act upon his own opinion of the law, at his peril. The complaint in fact avers that 'such conveyance was made upon the mistaken belief on the part of this plaintiff (the assignee) that said notes and mortgages were valid securities.' Whether they were valid securities is a question of law arising, indeed, upon the facts, but still a question of law. There is no averment that the assignee was ignorant or mistaken as to the facts upon which this question arose. So the complaint fails to state a cause of action in favor of the assignee." See also *Montgomery County v. American Emigrant Co.*, 47 Iowa 91. See further as to the general rule that equity will not relieve against a mistake of law, and the qualifications of such rule, *supra*, III. 1. *f.* (2) *Mistake of Law*; and III. 2. *e.* (2) *c.* *Mistake of Law*.

2. *Segur v. Tingley*, 11 Conn. 134, in which case it was said: "It is not claimed that there is any accident which is a ground for interposition. The plaintiff must, then, rely either upon fraud or mistake."

3. *Drown v. Ingels*, 3 Wash. 424.

a contract was procured by such means, without stating facts or circumstances which will enable the court to ascertain the circumstances under which the contract was entered into is insufficient as against a special demurrer.¹

Sufficient Allegations. — It is not necessary to state in the bill or complaint all the facts going to establish the fact of undue influence, as such facts are, for the most part, evidentiary. The necessary allegations are the relations of the parties, the age and feebleness of intellect of the grantor, the importunities of the grantee, the inadequacy or want of consideration, and other circumstances surrounding the transaction, and the nature of the consideration itself.²

12. Averment of Mental Incapacity — *a.* IN SUITS FOR RESCISSION. — Where rescission or cancellation is sought on the ground that the plaintiff at the time he made the contract was insane, or was mentally incapable of making a contract, such ground must be definitely alleged, otherwise no relief will be granted on such theory.³

1. *Pedrorena v. Hotchkiss*, 95 Cal. 636.

Deprivation of the Advice of Friends. — Where a woman seeks to set aside an antenuptial contract made by her it is not sufficient to allege that she was deprived of the advice of her friends as to the propriety of making it, but she must allege that she desired the advice of her friends and that her purpose would have been changed by their advice. *Forwood v. Forwood*, 86 Ky. 114.

Allegations in Aid of Averments of Fraud. — Where the complaint alleges fraudulent representations, which alone are not sufficient to justify the rescission of a contract, it will be aided by the allegation of circumstances which show great oppression and undue influence well calculated to overcome the judgment and will of the plaintiff. *Hick v. Thomas*, 90 Cal. 289.

2. *Ashmead v. Reynolds*, 134 Ind. 139.

Forms. — In the following cases in which the rescission and cancellation of contracts were sought on the ground of undue influence, and the bills or complaints were held sufficient, will be found useful forms: *Wilson v. Moriarty*, 77 Cal. 596, in which case the complaint asked rescission on the ground that the plaintiff was of weak understanding and illiterate, and had been fraudulently importuned and induced to make the contract; *Walker v. Hunter*, 27 Ga. 336, in which case can-

cellation was sought on the ground that the instrument had been procured without consideration and by undue influence; *Hill v. Lewis*, 45 Kan. 162, in which case the allegations of duress are set forth in full; *Muller v. Buyck*, 12 Mont. 354, in which case will be found the material allegations of the complaint; *Kennedy v. Currie*, 3 Wash. 442.

Sufficient Averments of Undue Influence. — In *Alaniz v. Casenave*, 91 Cal. 41, the court said in holding the complaint sufficient: "A general fiduciary relation between the parties is averred; and that plaintiff reposed in the principal defendant unlimited confidence, and was entirely under his control, being herself ignorant and unacquainted with business; that he proposed the conveyances to enable him more conveniently to manage her business, and promised to hold and manage it for her, and to reconvey upon request. If the rule laid down in *Brison v. Brison*, 75 Cal. 525, 7 Am. St. Rep. 189, is to be upheld, these facts, with the others, constitute a cause of action."

3. *More v. Calkins*, 85 Cal. 177.

Sufficiency of Averment of Fraud. — Evidence of the grantor's mental capacity should not be considered when his mental capacity is not at issue, and relief is asked solely on the ground of fraud. *Hines v. Horner*, 86 Iowa 594.

Unnecessary to Allege Actual Insanity. — Where it is sought to have an instru-

b. IN SUITS FOR REFORMATION. — In a suit to reform an instrument the theory of the bill is that a valid contract was made, but that through mistake or fraud it was not correctly reduced to writing, and therefore an allegation that the plaintiff was weak-minded or insane is not essential.¹

13. Averment of Failure or Want of Consideration — *a.* IN SUITS FOR RESCISSION. — Where the rescission or cancellation of a contract is sought on the ground that there was a failure or want of consideration it usually happens that want of consideration is alleged in connection with other grounds which appeal to a court of equity, such as fraud, undue influence, or mental incapacity, and it would seem that a bill or complaint which plainly and concisely alleges the facts *seriatim* is all that is necessary.²

ment set aside on the ground that it was made without consideration and that the maker was unfit mentally for the transaction of business, allegations that just before the execution of the instrument the plaintiff's husband had been killed while she was pregnant with a child, and that his death caused great prostration of mind and body and unfitted her for the transaction of business, coupled with averments that she was unduly influenced to make the instrument by her brothers and brothers-in-law and their representations that the execution of the instrument was the wish of her late husband, are sufficient, although insanity or even temporary aberration of mind is not alleged. *Moore v. Moore*, 56 Cal. 89, in which case the court cited *Kempson v. Ashbee*, L. R. 10 Ch. 15, and *Allore v. Jewell*, 94 U. S. 506.

Facts Showing Imposition upon Plaintiff. — In an action to cancel a deed it is not necessary to allege in the complaint that the plaintiff was at the time of the execution of the deed of unsound mind, or in such a state of mental imbecility as to render him entirely incapable of making a deed. It is sufficient to allege facts which show that from his sickness and infirmity he was at the time in a condition of mental weakness, and that there was either gross inadequacy of consideration, or that by improper practices, undue influence, misrepresentation, or concealment, he was induced to execute a deed which in the free exercise of his deliberate judgment he would not have executed. *Yount v. Yount*, 144 Ind. 133.

Continued Unsoundness of Mind. — Where in an action by the heirs of a grantor to set aside his deed it is

alleged that the grantor was eighty-two years of age, enfeebled by age and physical and mental decrepitude, and that his death occurred in about a month after the execution of the deed, it is unnecessary to allege facts showing that the grantor "continued to be of unsound mind until his death, or that he disaffirmed the deed after he became of sound mind." *Raymond v. Wathen*, 142 Ind. 367, in which case it was declared that there is a presumption as to the continuance of insanity such as was alleged in the complaint, but that there is no such presumption in cases of occasional or intermittent insanity; citing *Physio-Medical College v. Wilkinson*, 108 Ind. 314, and *distinguishing Louisville, etc., R. Co. v. Herr*, 135 Ind. 591, and *Hardenbrook v. Sherwood*, 72 Ind. 403.

1. *Wilson v. Moriarty*, 88 Cal. 207.

Averment of Weak Understanding. — It is not sufficient for the plaintiff to allege that, at the time of the making of the instrument sought to be canceled, he was of weak understanding, there being no claim that he was *non compos*. *Clough v. Adams*, 71 Iowa 17.

Allegations in Aid of Averment of Fraud. — Although an allegation that the plaintiff, at the time of the making of the instrument sought to be canceled, was of weak understanding, there being no claim that he was *non compos*, is not sufficient, yet it is a material allegation when it is also alleged that the plaintiff was by false and fraudulent representations unduly influenced to make the instrument. *Clough v. Adams*, 71 Iowa 17.

2. In *Muzzy v. Tompkinson*, 2 Wash. 616, in which case the court said: "The facts are pleaded: (1) the confidential relation; (2) that there

Necessity for Express Averments as to Failure of Consideration. — It is immaterial that it is not expressly alleged that the contract sought to be rescinded was made without consideration, where such is the clear and necessary conclusion from the facts which are averred.¹

b. IN SUITS FOR REFORMATION. — In a suit to reform an instrument an averment that there was inadequacy of consideration for the contract is not essential.²

14. Grounds for Injunction — In General. — Pending a suit for the rescission, cancellation, or reformation of a contract the court may grant a temporary injunction restraining the defendant from exercising rights under the contract in fraud of the plaintiff,³ and not infrequently injunctive relief is awarded in the final decree.⁴

Bill Not Multifarious. — A bill asking the rescission of a contract on the ground of fraud and also an injunction against an action at law upon the contract is not multifarious.⁵

was no consideration; (3) that there was misrepresentation. This is what the code requires, and it was proper to state the facts *seriatim*, as they occurred. In a case of this kind there can be but one cause of action, embracing all the ultimate facts connected with the transaction, and upon them the court of equity grants or refuses relief."

Inconsistent and Illogical Averments. — A complaint which avers that a conveyance was made without consideration, but shows that there was sufficient consideration for the conveyance, which however wholly failed, is inconsistent and illogical. *Pedrorena v. Hotchkiss*, 95 Cal. 636.

Materiality of Averments as to Consideration. — Where fraud and undue influence are alleged, an allegation that the consideration was grossly inadequate is material. *Hick v. Thomas*, 90 Cal. 289.

1. *Alaniz v. Casenave*, 91 Cal. 41.

Insufficiency of Allegations as to Want of Consideration. — In *Schultz v. McLean*, (Cal. 1890) 25 Pac. Rep. 427, it was held that it was insufficient to allege that the contract was executed without consideration, or that there was an inadequacy of consideration, as want or insufficiency of consideration will not establish fraud *per se*. Citing *Goad v. Moulton*, 67 Cal. 536; *Welton v. Palmer*, 39 Cal. 456; *Thornton v. Hook*, 36 Cal. 229; *Horn v. Volcano Water Co.*, 13 Cal. 62; and *Gillan v. Metcalf*, 7 Cal. 138.

2. *Wilson v. Moriarty*, 88 Cal. 207.

3. *Parker v. Cochran*, 97 Ga. 249, holding that in a bill to rescind a con-

tract on the ground of fraud the plaintiff may ask for an injunction against an action at law upon the contract; *Baltimore Sugar Refining Co. v. Campbell, etc., Co.*, 83 Md. 36; *Smith v. Everett*, 126 Mass. 304, holding that where the plaintiff has been induced by fraud to form a partnership with the defendant equity may in a suit to cancel the articles of partnership enjoin the defendant from using the plaintiff's name as a partner; *Wilcox v. Lucas*, 121 Mass. 21. See also *Foster v. Winchester*, 92 Ala. 497, to the effect that in a suit to reform a misdescription in a deed, the court may grant an injunction temporarily until the misdescription of the land has been corrected, if the proof authorizes it.

Injunction Against Action in Court of Inadequate Jurisdiction. — In *National Bank v. Carlton*, 96 Ga. 469, it was held that where the defendant in an action pending in the city court of Athens was entitled to affirmative equitable relief, viz., the cancellation of a deed, etc., which she could not obtain in that court because it had not the power and jurisdiction to grant relief of this kind, she could maintain an equitable proceeding in the superior court to restrain the further progress of the action pending in the city court, in order that the entire controversy might be finally adjudicated in the superior court. Cited with approval in *English v. Thorn*, 96 Ga. 557.

4. See *infra*, XV. 4. *Injunction*.

5. *Parker v. Cochran*, 97 Ga. 249. And see generally the cases cited in the preceding note.

Requisite Averments. — Where an injunction is sought in a suit for the rescission, cancellation, or reformation of an instrument, the bill or complaint must allege facts showing the necessity for an injunction, and no injunction will be awarded if the plaintiff does not allege special circumstances warranting it, or if his allegations show that it is sought for the protection of purely legal rights.¹

15. Description of Contract — *a.* IN SUITS FOR RESCISSION. — In a suit for the rescission or cancellation of a contract the bill or complaint must contain a direct and positive allegation that the plaintiff executed the contract;² and the contract should be correctly described.³

b. IN SUITS FOR REFORMATION — (1) *In General.* — Where

1. *Hartley v. Matthews*, 96 Ala. 224, in which case the court said: "While an injunction against an action at law is sometimes retained in aid of the main purpose of the bill and in order to settle the whole controversy in one suit, notwithstanding there may be a valid defense at law to the suit enjoined, it is not matter of absolute right that it should be so retained, and under the facts disclosed in the bill we cannot hold that the court erred in decreeing a dissolution of the injunction." *Citing Wingo v. Hardy*, 94 Ala. 184. See also *Moore v. Tate*, 102 Ala. 320, and *Hardy v. Newton First Nat. Bank*, 46 Kan. 88.

2. *Maggini v. Pezzoni*, 76 Cal. 631, in which case the complaint, in an action by the administratrix of a decedent, alleged that at a time when the decedent was of unsound mind and incapable of making any contract or transacting any business, the defendant, by taking an unfair advantage of the decedent's weakness of mind and incapacity to transact business, induced and procured him to give an apparent consent to the execution and delivery of a deed; that the deed was given without consideration, and that it was recorded. It was held that the complaint was open to the objection that it did not contain a sufficient averment that the decedent executed the deed, but that the defect did not affect the substantial rights of the parties, and, as no objection was taken by demurrer, the complaint should be considered sufficient on appeal.

3. *Waterman v. Higgins*, 28 Fla. 660.

Contract Presumed to Be in Writing. — In a suit for the cancellation of a con-

tract which the plaintiff alleges to have been made in consideration of an alleged promise by the defendant, if the promise was verbal and consequently within the influence of the statute of frauds, that fact must be made to appear by plea or answer; and on demurrer, and on motion to dismiss the bill for want of equity, the contract alleged in the bill will be taken to be in writing. *Piedmont Land Imp. Co. v. Piedmont Foundry, etc., Co.*, 96 Ala. 389, in which case the court cited *Trammell v. Craddock*, 93 Ala. 450, and *Manning v. Pippen*, 86 Ala. 357.

Averment that Contract Has Been Wholly Executed. — Where the bill seeks the cancellation of a contract for fraud, it is immaterial that it alleges that the contract has been wholly executed, and shows that the complainant has made an absolute conveyance to the defendant, and that the latter has fully paid the agreed consideration. *Baker v. Maxwell*, 99 Ala. 558.

Harmless Error in Describing Instrument. — Where the bill contains a clerical error in describing the instrument sought to be canceled, the error is cured by a copy of the instrument attached to the bill as a part thereof. *Piedmont Land Imp. Co. v. Piedmont Foundry, etc., Co.*, 96 Ala. 389, in which case the court cited *Harland v. Person*, 93 Ala. 273.

Averment of Performance by Plaintiff — Executory Contract. — A mere allegation of nonperformance by one party to an executory contract, without any allegation of performance by the other, discloses no ground for the interference of a court of equity. *Missouri River, etc., R. Co. v. Miami County*, 12 Kan. 482.

the reformation of a written contract is sought the bill must distinctly allege that the parties in fact made an agreement prior to the execution of the written contract.¹

(2) *Consideration for Contract.* — Since equity will not reform a merely voluntary deed or contract, the bill or complaint must show that the contract sought to be reformed was executed for a valuable consideration.²

(3) *The Intended Instrument — Pointing Out Mistake.* — A bill or complaint in a suit to reform a written instrument must clearly and distinctly state what was the contract or agreement between the parties, and show what part of the contract was omitted to be reduced to writing, or what portion of the contract as it was expressed in writing was not embraced in the original contract. The plaintiff's allegations must show in terms what the tenor of the instrument ought to be to express the contract, which by mistake there was a failure to execute. It is not sufficient to allege that it was the intention of the parties to make an instrument that would accomplish a certain object, and ask the court to make a writing that will accomplish that object.³

1. *Bishop v. Clay F. & M. Ins. Co.*, 49 Conn. 167.

Parol Agreement — Statute of Frauds. — In *Todd v. Munson*, 53 Conn. 579, in which case the reformation of a deed was sought, it was alleged that a conveyance of real estate was made to the defendant without consideration, and upon the parol condition and understanding that the grantee should hold an undivided half of the land upon certain trusts, and it was held that the complaint was not demurrable on the ground that the agreement of the grantee was alleged to be by parol, as the grantee having received the benefit of the grant could be compelled to perform the agreement on his part. *Following Crocker v. Higgins*, 7 Conn. 342, and *explaining and limiting Powers v. Mulvey*, 51 Conn. 432.

2. *Conaway v. Gore*, 24 Kan. 389, in which case, however, it was held that the insufficiency of the petition in this respect may be waived by failing to file a demurrer to it, and by answering and going to trial.

Sufficiency of Past Consideration. — In *Comstock v. Coon*, 135 Ind. 640, it was held that it is sufficient to allege that there was a past consideration in support of the promise, the court saying: "In a case like the present, where the promisor was under a previous obligation to pay the debt, both legal and moral, his promise to do so, by causing the land to be conveyed from himself

to his wife, through the intervention of a third person, in payment of such debt, had for its support a good and sufficient consideration."

Reformation of Voluntary Contracts. — Upon the question whether or not a court of equity will reform voluntary contracts, see *infra*.

3. *Thompsonville Scale Mfg. Co. v. Osgood*, 26 Conn. 16, in which case it was said: "When a court is requested so to remodel a contract in writing that it may express the true understanding of the parties, it is necessary that both the defective instrument and the real agreement should be embodied in the petition. Otherwise the bill would lack substantial requisites. Without referring to the right of a respondent to be fairly apprised of the precise nature of a petitioner's claim, we cannot suppose that a court can intelligently reform a contract without something more than general and vague statements concerning the intent of parties." See also *Citizens' Nat. Bank v. Judy*, 146 Ind. 322, in which case the court cited 20 Am. and Eng. Encyc. of Law (1st ed.), p. 720. See further the following cases in which the rules stated in the text find support:

Alabama. — *Ohlander v. Dexter*, 97 Ala. 476.

Connecticut. — *Thompsonville Scale Mfg. Co. v. Osgood*, 26 Conn. 16.

Georgia. — *Wall v. Arrington*, 13

Setting Out Legal Effect of Contract. — The bill or complaint should set out the transaction as it occurred and not the legal effect thereof;¹ however, allegations which specifically set out the intended contract, and the mistake in reducing it to writing, are sufficient.²

16. Averments as to Damages. — Where the Recovery of Damages Is Sought in a suit in which fraud is alleged, the amount of damages caused by the fraudulent representations must be alleged, otherwise there can be no decree or judgment for damages.³

Where Rescission Only Is Sought on the ground of fraud, the fraud is the essential thing, and while the fraud must be coupled with loss, injury, or damage, the precise amount of such damage need not be alleged, as it is of secondary importance.⁴

17. Denying or Excusing Laches — *a.* IN GENERAL. — In a suit for the rescission, cancellation, or reformation of a contract the bill or complaint must make it appear that the complainant is

Ga. 88; *Ligon v. Rogers*, 12 Ga. 281.

Kentucky. — *Lear v. Prather*, 89 Ky. 501.

Maryland. — *Wesley v. Thomas*, 6 Har. & J. (Md.) 24.

Oregon. — *Osborn v. Ketchum*, 25 Oregon 352. In *Foster v. Schmeer*, 15 Oregon 363, the court, in holding that the plaintiff's allegations were insufficient, said: "He would ordinarily have to set out the terms of the contract as the parties made it; what they each undertook and agreed to do; and show why its terms happened to be left out when it was attempted to be reduced to writing, or how terms not agreed upon came to be inserted." See also *Meier v. Kelly*, 20 Oregon 86; *Hyland v. Hyland*, 19 Oregon 51; *Stephens v. Murton*, 6 Oregon 193; *Ramsey v. Loomis*, 6 Oregon 367; and *Lewis v. Lewis*, 5 Oregon 169.

United States. — In *U. S. v. Munroe*, 5 Mason (U. S.) 572, Story, J., said that if the bill seeks to correct an asserted mistake in the language of the instrument, differing from the intention of the parties, "and reform the instrument and obtain the consequent relief, it is not sufficient to allege generally that the intention was different; but there must be an express averment that the instrument, as existing, differs from the intention of the parties — stating the particulars; and the bill must conclude with a prayer for the correction of the mistake, and a decree according to the reformed instrument."

Accidental Omission of Words and

Phrases. — The bill or complaint must allege facts showing distinctly that the instrument as signed was not in terms the instrument which the parties intended to sign, and it is insufficient to allege merely that certain words or phrases were accidentally omitted. *Evarts v. Steger*, 5 Oregon 147.

1. *Hyland v. Hyland*, 19 Oregon 51, in which case Thayer, C. J., said: "The complaint in this case should have stated what the parties mutually agreed to do in regard to the exchange of their lands, and not the result of what they did do." Compare *Stephens v. Murton*, 6 Oregon 193, in which case the court said that where one alleges a mistake in a written instrument, the mistake being in the wrong use of certain words or the omission to use them, the words should be set out either in tenor or substance. Citing *Lamoureux v. Atlantic Mut. Ins. Co.*, 3 Duer (N. Y.) 680.

2. *Walls v. State*, 140 Ind. 16; *Rousseau v. Lambert*, (Ky. 1888) 7 S. W. Rep. 923.

3. *Bohall v. Diller*, 41 Cal. 533, in which case the court said: "It is not alleged in the complaint that the plaintiff has sustained damages, and therefore he is not entitled to a judgment for damages." See also to the same effect *Herman v. Gray*, 79 Wis. 182.

4. *Wainscott v. Occidental Bldg., etc., Assoc.*, 98 Cal. 253.

Injury Resulting from Fraud. — As to the necessity of alleging not only the fraud of the defendant, but also that injury resulted to the plaintiff from

pursuing his remedy in good time after the discovery of the injury, and if his allegations disclose that his claim is a stale one, or that after the discovery of his right to relief he has been guilty of long acquiescence and unnecessary and unexplained delay for an unreasonable length of time before asking relief, the bill or complaint is demurrable.¹

What Is Reasonable Diligence is not and cannot be defined by any general rule. No precise or definite limit of time can be stated within which the interposition of the court must be sought. What is reasonable time must, in a great measure, depend upon the exercise of the sound discretion of the court, under the circumstances of each particular case.²

the fraud, see *supra*, VIII. 8. *d. Materiality of and Reliance upon Misrepresentations.*

1. *Alabama.* — *Howle v. North Birmingham Land Co.*, 95 Ala. 389; *Goree v. Clements*, 94 Ala. 337; *Scruggs v. Decatur Mineral, etc., Co.*, 86 Ala. 173; *Askew v. Hooper*, 28 Ala. 634; *Kern v. Burnham*, 28 Ala. 428; *Smith v. Robertson*, 23 Ala. 312; *Johnson v. Johnson*, 5 Ala. 90.

Colorado. — *Sears v. Hicklin*, 13 Colo. 143.

Connecticut. — *Barnes v. Starr*, 64 Conn. 136.

District of Columbia. — *Smoot v. Coffin*, 4 Mackey (D. C.) 407.

Florida. — *Stephens v. Orman*, 10 Fla. 9.

Georgia. — *MacIntyre v. Cotton States L. Ins. Co.*, 82 Ga. 478; *Nunn v. Burger*, 76 Ga. 705; *Jones v. Georgia R. Co.*, 62 Ga. 718; *Lamb v. Harris*, 8 Ga. 546.

Illinois. — *Brown v. Brown*, 154 Ill. 35; *Day v. Ft. Scott Invest., etc., Co.*, 153 Ill. 293, 53 Ill. App. 165; *Greenwood v. Fenn*, 136 Ill. 146; *Perry v. Pearson*, 135 Ill. 218; *Speck v. Pullman Palace-Car Co.*, 121 Ill. 33; *Hall v. Fullerton*, 69 Ill. 448; *Cunningham v. Fithian*, 7 Ill. 650.

Indiana. — *Valentine v. Wysor*, 123 Ind. 47; *Galling v. Newell*, 9 Ind. 572; *Brackenridge v. Dawson*, 7 Ind. 383; *Cain v. Guthrie*, 8 Blackf. (Ind.) 409.

Kentucky. — *Lacey v. McMillen*, 9 B. Mon. (Ky.) 523; *Bryant v. Hill*, 9 Dana (Ky.) 67.

Maryland. — *Hewitt's Appeal*, 55 Md. 509.

Michigan. — *Haff v. Haff*, 54 Mich. 511; *De Armand v. Phillips, Walk.* (Mich.) 186; *Carroll v. Rice, Walk.* (Mich.) 373.

Mississippi. — *Foxworth v. Bullock*,

44 Miss. 457, wherein it was declared that laches will weaken the bill.

North Carolina. — *Moore v. Reed*, 1 Ired. Eq. (N. Car.) 419, 2 Ired. Eq. (N. Car.) 580.

Tennessee. — *Moore v. Holt*, 3 Tenn. Ch. 248; *McDonald v. Allen*, 8 Baxt. (Tenn.) 446, in which latter case the bill was dismissed for unreasonable delay in filing it.

Texas. — *Haskins v. Wallet*, 63 Tex. 213, in which case there was an unexplained delay of fourteen years, and it was held that the delay was fatal.

Virginia. — *Robertson v. Tapscott*, 81 Va. 533; *Pollard v. Rogers*, 4 Call (Va.) 239.

Washington. — *Sackman v. Campbell*, 15 Wash. 57.

West Virginia. — *Wilson v. Harper*, 25 W. Va. 179; *McConaughy v. Camden*, 18 W. Va. 140.

United States. — *Richardson v. Walton*, 49 Fed. Rep. 888; *St. Louis, etc., R. Co. v. Terre Haute, etc., R. Co.*, 33 Fed. Rep. 440; *Schneider v. Foote*, 27 Fed. Rep. 581; *Grymes v. Sanders*, 93 U. S. 55; *Salinas v. Stillman*, 30 U. S. App. 40.

Renunciation of Contract. — In *Grymes v. Sanders*, 93 U. S. 55, it was said: "When a party desires to rescind upon the ground of mistake or fraud, he must, upon the discovery of the facts, at once announce his purpose and adhere to it. If he be silent, and continue to treat the property as his own, he will be held to have waived the objection, and will be conclusively bound by the contract, as if the mistake or fraud had not occurred. He is not permitted to play fast and loose. Delay and vacillation are fatal to the right which had before subsisted." *Cited with approval in Disbrow v. Secor*, 58 Conn. 35.

2. *Sears v. Hicklin*, 13 Colo. 143, in

Application of Statute of Limitations. — The court is not governed by statutory provisions, though the statute of limitations may be referred to as fixing a reasonable time. Even where the demand is not barred by statute a court of equity may refuse to interfere after a considerable lapse of time from considerations of public policy and from the difficulty of doing entire justice.¹

Objection at the Hearing. — It has been declared that "the objection that the claim is a stale one may be taken at the hearing, and when such a case is disclosed the court may of its own motion deny relief to parties who have slept upon their rights."²

b. IN SUITS FOR RESCISSION OR CANCELLATION. — In a suit for the rescission or cancellation of a contract on the ground of fraud, undue influence, or other grounds, if the bill or complaint shows that the plaintiff has been guilty of long delay in bringing the suit it is necessary to allege facts which will account for the delay.³

which case the court cited *Hawley v. Cramer*, 4 Cow. (N. Y.) 717, and *Hallett v. Collins*, 10 How. (U. S.) 174.

Time of Discovery of Grounds for Relief. — As a general rule, laches is not imputable to the plaintiff because of delay of which he has been guilty before the discovery of the mistake or fraud which he alleges as a ground for relief. *Sears v. Hicklin*, 13 Colo. 143; *Edwards v. Richards*, 95 Ga. 655; *Carbine v. McCoy*, 85 Ga. 185; *Foley v. Holtry*, 43 Neb. 133.

Question for the Jury. — In *Andrews v. Hensler*, 6 Wall. (U. S.) 254, Field, J., said: "The purchaser must use reasonable diligence to apprise his vendor of the defects alleged, and to make the tender; and what is reasonable diligence is a question of fact, to be decided by the jury according to the special circumstances of each case."

1. *Davis v. Tarwater*, 15 Ark. 286, in which case the court cited *Piatt v. Vattier*, 1 McLean (U. S.) 164, 9 Pet. (U. S.) 415, and *McKnight v. Taylor*, 1 How. (U. S.) 168. See also *Myrick v. Jacks*, 39 Ark. 293.

Action Within Time Limited by Statute. — An action to rescind a contract may be brought at any time within the statutory limitation, by one who offered to rescind in the manner provided by statute, and with reasonable promptness after the discovery of facts which entitled him to a rescission. *Hilton v. Advance Thresher Co.*, 8 S. Dak. 412.

2. *Davis v. Tarwater*, 15 Ark. 286, citing *Adams v. Taylor*, 14 Ark. 62.

Objection by Demurrer. — Where the complaint, in an action for rescission,

shows on its face that the action was not instituted within the time limited by statute, the objection may be raised by demurrer. *Walker v. Pogue*, 2 Colo. App. 149, in which case the court cited *Carpentier v. Oakland*, 30 Cal. 439; *Sublette v. Tinney*, 9 Cal. 424; *Bohm v. Bohm*, 9 Colo. 100; *Bradbury v. Davis*, 5 Colo. 265, and *Pipe v. Smith*, 5 Colo. 146.

3. *Goree v. Clements*, 94 Ala. 337; *Betts v. Gunn*, 31 Ala. 219; *Davis v. Tarwater*, 15 Ark. 286; *Adams v. Taylor*, 14 Ark. 62; *Burkle v. Levy*, 70 Cal. 250; *Barfield v. Price*, 40 Cal. 535; *Fratt v. Fiske*, 17 Cal. 380; *Balue v. Taylor*, 136 Ind. 368.

Sufficient Averment of Assertion of Right to Rescind. — An allegation of the complaint that the plaintiff asserted his right and election to rescind as soon as he discovered the fraud and was advised of his right to rescind, shows a full discharge of his duty. *Taylor v. National Bank*, 6 S. Dak. 511.

Lapse of Five Years After Discovery of Fraud. — In *Davis v. Tarwater*, 15 Ark. 286, the bill was not exhibited until more than ten years had elapsed from the date of the contract, and until, according to its averments, five years had elapsed from the discovery of the fraud, and it was held, in the absence of averments excusing or explaining the delay, that the bill was without equity. Citing *Adams v. Taylor*, 14 Ark. 62.

Discovery of Fraud Within Six Months. — In *Hart v. Kimball*, 72 Cal. 283, the court held, in overruling the demurrer

Acts Done by Plaintiff After Discovering Grounds for Relief. — A bill for rescission is without equity where it discloses that the plaintiff after discovering his right to rescind has waited an unreasonable length of time, and has done acts under the authority of the rights conferred upon him by the contract which indicate that he is satisfied with the contract;¹ but the bill is not demurrable because it alleges that the plaintiff has dealt with the property received by him from the defendant and has transferred the same to others, if it does not show that at the time the plaintiff did these acts he had knowledge of his right to rescind.²

Date of Discovery of Fraud. — Where a deed has been fraudulently procured by false representations, and a suit to cancel the same is seasonably brought, the plaintiff need not allege with exactness the precise date when the fraud was discovered, or do more than allege that he had knowledge of the fraud only a short time prior to the institution of the suit, as the time when the plaintiff learned of the fraud becomes material only when the defendant by answer pleads the fact constituting the estoppel.³

to the complaint in an action to rescind a contract by which the plaintiff purchased a lot of furniture and took a lease of a boarding house from the defendant, upon fraudulent representations as to the amount of business that the boarding house was doing, that six months was a reasonable time within which to ascertain the falsity of the defendant's representations and to offer to rescind the contract. *Citing* Marston v. Simpson, 54 Cal. 189.

1. Betts v. Gunn, 31 Ala. 219.

Effect of Bringing Action at Law. — In Balue v. Taylor, 136 Ind. 368, the court said: "A party to a contract may waive his right to rescind, after it has accrued, by instituting an action to recover damages for the breach of the other." *Quoting* 21 Am. and Eng. Encyc. of Law (1st ed.), p. 79.

Allowing Defendant to Erect Improvements. — Where the plaintiff alleges the date on which he ascertained that the defendant's representations were false, and there has been no such delay in bringing the action as would of itself bar the plaintiff from relief, the fact that the plaintiff, with knowledge of the facts, had permitted the defendant to incur large expense in improving the property of which the plaintiff has been defrauded is a matter of defense, and is not a fact which the plaintiff is called upon to anticipate and negative in his petition. *Foley v. Holtry*, 43 Neb. 133.

2. *Baker v. Maxwell*, 99 Ala. 558.

3. *Foley v. Holtry*, 43 Neb. 133, in which case the plaintiff averred in his petition that he had reason to believe that the defendant's representations were false on April 30, 1890. The defendant, by answer, pleaded that the plaintiff was estopped to maintain the action, because he had with knowledge of the facts permitted the defendant to incur large expense in improving the property of which plaintiff had been defrauded. It was held that the plaintiff's averment as to the date on which he ascertained knowledge of the fraud was unnecessary and immaterial, and consequently it did not estop him from afterwards asserting in his reply a contrary state of facts and alleging that he had no knowledge of the facts constituting his cause of action until after the improvements had been made and immediately prior to the commencement of the action. See also *Edwards v. Richards*, 95 Ga. 655.

Averments Held Sufficient. — In *Moore v. Moore*, 56 Cal. 89, which was an action to rescind certain deeds on the ground that they were procured without consideration and by undue influence and imposition, the plaintiff alleged that she "did not know, understand, comprehend, learn, or discover the contents of said instruments, or the purpose, effect, or meaning thereof, or any of them, at any time prior to the — day of October, 1877," which was

c. IN SUITS FOR REFORMATION. — It is a well-settled rule that a party who discovers a mistake in a deed or other instrument must use due diligence in seeking equitable aid, and a bill or complaint which shows that the plaintiff after the discovery of the mistake has confirmed the contract, or has been guilty of unreasonable delay, is without equity.¹

Absence from State and Failure to Discover Mistake. — The plaintiff may allege, for the purpose of showing that his action to reform the instrument is not barred by his laches, that shortly after the execution of the instrument he left the state, and that he was absent for several years, and that he did not discover the mistake until his return.²

18. Offer to Do Equity — a. GENERAL RULE AS TO NECESSITY OF OFFER TO RESTORE — (1) *In Suits for Rescission and Cancellation.* — In suits for the rescission and cancellation of contracts the court applies the familiar maxim of equity of almost universal application, that he who seeks equity must do equity.³ The plaintiff will not be permitted to repudiate his contract and still retain the benefits which he has derived from it; and his desire and willingness to restore what he has received must

within three years next preceding the commencement of the action, and it was held under Code Civ. Proc. Cal., § 452, providing that in the construction of a pleading its allegations must be liberally construed with a view to substantial justice, that it was sufficiently averred that the plaintiff did not discover the facts constituting the fraud or mistake of which she complained until three years next preceding the commencement of the action.

1. *Essex v. Day*, 52 Conn. 483; *Beard v. Hubble*, 9 Gill (Md.) 420; *McNaughten v. Partridge*, 11 Ohio 223. See also *Carbine v. McCoy*, 85 Ga. 185.

Rule for Protection of Third Persons. — The requirement that a party seeking reformation shall use diligence in seeking equitable relief is for the purpose mainly of protecting third persons against loss by reason of the unasserted right. *Essex v. Day*, 52 Conn. 483, *per Loomis, J.*

Averment Showing Laches. — In *Beard v. Hubble*, 9 Gill (Md.) 420, which was a suit to enjoin a judgment which had been recovered on a note, on the ground that the note was founded in mistake, it was held that an allegation in the bill that when the complainant signed the note he was "not satisfied that he owed the money to said Brewer, but he has always entertained misgivings in relation to it," showed that the

complainant had been guilty of great laches.

Suit in Aid of Action at Law. — Where an action at law is brought upon a written instrument within the time limited by the statute, and the defendant interposes a defense based on a mistake in the contract, a suit in equity for the reformation of such mistake, and an injunction against the interposition of such defense, may be brought, even though at the time of the institution of such suit for reformation an action on the contract would have been barred. *Woodbury Sav. Bank, etc., Assoc. v. Charter Oak F. & M. Ins. Co.*, 31 Conn. 517. Compare *McNaughten v. Partridge*, 11 Ohio 223.

2. *Carbine v. McCoy*, 85 Ga. 185, in which case the action was brought within a little more than two years from the time the plaintiff first discovered the mistake.

Effect of Bringing Action at Law. — When a bill shows that the plaintiff, after discovering the mistake, confirmed the contract and proceeded on it at law, the bill is without equity. *McNaughten v. Partridge*, 11 Ohio 223.

3. *George v. New England Mortg. Security Co.*, 109 Ala. 548, in which case the court cited 6 Am. and Eng. Encyc. of Law (1st ed.) 707. See also *Travelers Ins. Co. v. Redfield*, 6 Colo. App. 190.

appear in the bill or complaint, otherwise he will have no standing in a court of equity.¹

Reason of Rule.—The purpose of the rule requiring an offer in the bill to do equity by placing the defendant as nearly as possible *in statu quo* has been stated to be to test the good faith of the complainant, to require that he purge himself as far as possi-

1. *Alabama*.—Betts v. Gunn, 31 Ala. 219, in which case it was held that a bill for rescission which contained no offer on the part of the plaintiff to place the defendant *in statu quo* was without equity; Hartley v. Matthews, 96 Ala. 224; Thompson v. Sheppard, 85 Ala. 611; Adams v. Sayre, 76 Ala. 509; Parks v. Brooks, 16 Ala. 529; Duncan v. Jeter, 5 Ala. 604, 39 Am. Dec. 342; Fitzpatrick v. Featherstone, 3 Ala. 40.

Arkansas.—Griffith v. Maxfield, 63 Ark. 548; Myrick v. Jacks, 39 Ark. 293; Bozeman v. Browning, 31 Ark. 364; Johnson v. Walker, 25 Ark. 196; Davis v. Tarwater, 15 Ark. 286; Smade v. Mann, (Ark. 1890) 14 S. W. Rep. 1095.

California.—Kelley v. Owens, 120 Cal. 502; Buena Vista Fruit, etc., Co. v. Tuohy, 107 Cal. 243; Wainscott v. Occidental Bldg., etc., Assoc., 98 Cal. 253; Creswell v. Welchman, 95 Cal. 359; More v. Calkins, 85 Cal. 177; Loiza v. Superior Ct., 85 Cal. 31, 20 Am. St. Rep. 197; Wainwright v. Weske, 82 Cal. 193; Hart v. Kimball, 72 Cal. 283; Red Jacket Tribe No. 28 v. Gibson, 70 Cal. 128; Collins v. Townsend, 58 Cal. 608; Hammond v. Wallace, 85 Cal. 531; Herman v. Haffenegger, 54 Cal. 161; Bohall v. Diller, 41 Cal. 533; Purdy v. Bullard, 41 Cal. 444; Morrison v. Lods, 39 Cal. 385; Gifford v. Carvill, 29 Cal. 592; Patten v. Green, 13 Cal. 325; Norton v. Jackson, 5 Cal. 262; Barry v. St. Joseph's Hospital, (Cal. 1897) 48 Pac. Rep. 68.

Colorado.—Pershing v. Wolfe, 6 Colo. App. 410; Smith v. Ramer, 6 Colo. App. 177; Walker v. Pogue, 2 Colo. App. 149; Jaeger v. Whitsett, 3 Colo. 105.

Connecticut.—Sherwood v. Salmon, 5 Day (Conn.) 439.

Georgia.—Bowden v. Achor, 95 Ga. 243; Strodger v. Southern Granite Co., 94 Ga. 626; Dotterer v. Freeman, 88 Ga. 479; Lane v. Latimer, 41 Ga. 171; Miller v. Cotten, 5 Ga. 341.

Illinois.—Rigdon v. Walcott, 141 Ill. 649, 43 Ill. App. 352; Burnham v. Kidwell, 113 Ill. 425; Wickiser v. Cook, 85 Ill. 68; Whitlock v. Denlinger, 59

Ill. 96; Duncan v. Humphries, 58 Ill. App. 440.

Indiana.—Balue v. Taylor, 136 Ind. 368, in which case the court said: "Where a party to a contract seeks to avoid it for fraud, or asks to rescind it on the ground of fraud, he must tender back to the other party whatever of value he received for the property which he seeks to recover by the rescission; Cree v. Sherfy, 138 Ind. 354; Hormann v. Hartmetz, 128 Ind. 353; Boyer v. Berryman, 123 Ind. 451; Watson Coal, etc., Co. v. Casteel, 68 Ind. 476; Haase v. Mitchell, 58 Ind. 213; Hanna v. Shields, 34 Ind. 84; Patten v. Stewart, 24 Ind. 332; Parks v. Evansville, etc., Straight Line R. Co., 23 Ind. 567; Teter v. Hinders, 19 Ind. 93; Shaw v. Barnhart, 17 Ind. 183; Shepherd v. Fisher, 17 Ind. 229; Gatling v. Newell, 9 Ind. 572; Norris v. Scott, 6 Ind. App. 18; Srader v. Srader, 151 Ind. 339; Osborn v. Dodd, 8 Blackf. (Ind.) 467.

Iowa.—Armstrong v. Pierson, 5 Iowa 317; Rynear v. Neilin, 3 Greene (Iowa) 310.

Kansas.—Patterson v. Galusha, 53 Kan. 367; Constant v. Lehman, 52 Kan. 227; State v. Williams, 39 Kan. 517; Gribben v. Maxwell, 34 Kan. 8; Jeffers v. Forbes, 28 Kan. 174.

Kentucky.—Hardwick v. Forbes, 1 Bibb (Ky.) 212; Stewart v. Dougherty, 3 Dana (Ky.) 480; Hoggins v. Becraft, 1 Dana (Ky.) 28; Tibbs v. Timberlake, 4 Litt (Ky.) 12; Davis v. James, 4 J. J. Marsh. (Ky.) 8; Buford v. Brown, 6 B. Mon. (Ky.) 553; Stone v. Ramsey, 4 T. B. Mon. (Ky.) 236; Abel v. Cave, 3 B. Mon. (Ky.) 159; Sneed v. Waring, 2 B. Mon. (Ky.) 522; Gray v. Shaw, (Ky. 1895) 30 S. W. Rep. 402.

Louisiana.—Bryant v. Stothart, 46 La. Ann. 485; Ackerman v. McShane, 43 La. Ann. 507; West Carroll v. Gad-dis, 34 La. Ann. 928; Blake v. Nelson, 29 La. Ann. 245; Stewart v. Presley, 22 La. Ann. 514; Latham v. Hicky, 21 La. Ann. 425; Lee v. Taylor, 21 La. Ann. 514; Matta v. Henderson, 14 La. Ann. 478; McDonald v. Vaughan, 14 La. Ann. 727; Tippet v. Jett, 3 Rob. (La.)

ble of the guilt of complicity in the unlawful transaction by declaring his purpose and readiness to do equity by restoring as far as is in his power the other party to his original status.¹

Not a Matter of Defense. — It is for the plaintiff to show clearly that he can restore to the defendant all that he has received under the contract, and that the parties can be placed *in statu quo*, and it is not for the defendant to show that it cannot be done.²

Same Rule as to Real and Personal Property. — The rule is the same in respect to both real and personal estate. The plaintiff must make his election, either to rescind the contract by restoring all that he has obtained by it, when he may recover of the defrauding party what he has paid upon it, or to retain the real estate and sue for damages sustained by reason of the alleged fraud. But he cannot affirm so much of the contract as may be advantageous to him, and rescind as to the residue.³

313; *Walden v. City Bank*, 2 Rob. (La.) 165.

Maine. — *Chase v. Hinckley*, 74 Me. 181; *Harding v. Jewell*, 73 Me. 426; *Herrin v. Libbey*, 36 Me. 357.

Massachusetts. — *Craemer v. Wood*, 102 Mass. 441.

Michigan. — *Bedier v. Reaume*, 95 Mich. 518; *Merrill v. Wilson*, 66 Mich. 232.

Mississippi. — *Nolan v. Snodgrass*, 70 Miss. 794; *Pounds v. Clarke*, 70 Miss. 263; *Watts v. Bonner*, 66 Miss. 629; *Hanson v. Field*, 41 Miss. 712; *Shipp v. Wheelless*, 33 Miss. 646.

Missouri. — *Thompson v. Cohen*, 127 Mo. 241.

Montana. — *Waite v. Vinson*, 14 Mont. 405.

Nebraska. — *Miller v. Gunderson*, 46 Neb. 715.

New Hampshire. — *Sanborn v. Batchelder*, 51 N. H. 426; *Riddle v. Gage*, 37 N. H. 519.

New York. — *Gillet v. Moody*, 5 Barb. (N. Y.) 185; *Bruen v. Hone*, 2 Barb. (N. Y.) 586; *M'Donald v. Neilson*, 2 Cow. (N. Y.) 139, 14 Am. Dec. 431; *Masson v. Bovet*, 1 Den. (N. Y.) 74; *Weill v. Malone*, 91 Hun (N. Y.) 261; *Wilson v. Lawrence*, 8 Hun (N. Y.) 593; *More v. Smedburgh*, 8 Paige (N. Y.) 600; *Shields v. Pettee*, 2 Sandf. (N. Y.) 262; *Fisher v. Conant*, 3 E. D. Smith (N. Y.) 199; *Burton v. Stewart*, 3 Wend. (N. Y.) 239, 20 Am. Dec. 692; *Venice v. Woodruff*, 62 N. Y. 462, 20 Am. Rep. 495; *Alexander v. Donohoe*, 143 N. Y. 203.

Oklahoma. — *Day v. Mooney*, 3 Okla. 608.

Pennsylvania. — *Bird's Appeal*, 91 Pa. St. 68.

South Dakota. — *Lovell v. McCaughey*, 8 S. Dak. 471.

Tennessee. — *Wiley v. Heidell*, 12 Heisk. (Tenn.) 98; *Coppedge v. Threadgill*, 3 Sneed (Tenn.) 577; *Cox v. Building, etc., Assoc.*, 101 Tenn. 490.

Texas. — *Stewart v. Houston, etc., R. Co.*, 62 Tex. 246; *Coddington v. Wells*, 59 Tex. 49; *Teague v. Williams*, 6 Tex. Civ. App. 468.

West Virginia. — *Christian v. Vance*, 41 W. Va. 754.

Wisconsin. — *Welsh v. Blackburn*, 92 Wis. 562; *Daly v. Brennan*, 87 Wis. 36; *Becker v. Trickel*, 80 Wis. 484; *Paetz v. Stoppleman*, 75 Wis. 510; *Hoffman v. King*, 70 Wis. 381; *Van Trott v. Wiese*, 36 Wis. 439; *Grant v. Law*, 29 Wis. 99; *Barber v. Kilbourn*, 16 Wis. 485.

United States. — *Reeves v. Corning*, 51 Fed. Rep. 774; *Courtright v. Burnes*, 48 Fed. Rep. 501; *Stuart v. Hayden*, 36 U. S. App. 462; *Schneider v. Foote*, 27 Fed. Rep. 581.

England. — *Hunt v. Silk*, 5 East 449. 1. *New England Mortg. Security Co. v. Powell*, 97 Ala. 483. See also *Buena Vista Fruit, etc., Co. v. Tuohy*, 107 Cal. 243, in which case, there being no sufficient offer to restore what had been received of the defendant, the court said of the complaint: "Practically it is an attempt to rescind so much of the contract as militates against the interest of the plaintiff, while claiming the benefit of that portion of it in its favor."

2. *Davis v. Tarwater*, 15 Ark. 286.

3. *Grant v. Law*, 29 Wis. 99, in which case the court cited *Weeks v. Robie*, 42 N. H. 316; *Barton v. Beer*, 35 Barb. (N. Y.) 78; *Masson v. Bovet*, 1 Den.

Instrument Violating Provisions of Statute. — It is a principle recognized generally in equity jurisprudence, that where a party applies to a court of equity to cancel a contract or agreement entered into by him, on the ground of illegality in violating the provisions of some statute prohibiting the making of such contract or agreement, the court will require him, as a condition to granting the relief, to do equity by restoring or repaying whatever he may have received under the contract or agreement sought to be canceled; and he must expressly offer in his bill so to do.¹

Poverty of Plaintiff. — There is a possible exception to the rule that the plaintiff must allege that he has returned, or in his bill must offer to return, the consideration received by him, where the plaintiff by reason of his poverty is unable to restore; but such inability must, it would seem, be alleged in the bill.²

(N. Y.) 69; *Pearsoll v. Chapin*, 44 Pa. St. 9; *Costigan v. Hawkins*, 22 Wis. 74; *Akerly v. Vilas*, 21 Wis. 88; *Hollenback v. Shoyer*, 16 Wis. 499; *Weed v. Page*, 7 Wis. 503, and *Miner v. Medbury*, 6 Wis. 295.

Inability to Return Chattels. — Where the plaintiff asks the rescission of a sale of chattels to him on the ground of fraud, if the chattels cannot be returned as a whole by the plaintiff — that is, if a material part cannot be restored, or they have been so damaged as to render them practically valueless, the decree should direct the payment to the defendant of the value of the property at the time of the sale. *Smade v. Mann*, (Ark. 1890) 14 S. W. Rep. 1095.

Rule Applicable in Action by State. — In *State v. Williams*, 39 Kan. 517, which was an action by the state of Kansas for the rescission of a contract on the ground of fraud, the court in holding that the petition was insufficient said: "It is not alleged that the plaintiff has returned, or offered to return, the amount received upon the contract sought to be annulled. The state cannot retain the benefits of a business transaction like this one, and at the same time repudiate it as null and void. A party seeking to set aside a contract must pay or tender back all that has been received as consideration on such contract. Failing to restore the consideration paid is an additional reason why the plaintiff's action must fail." *Citing Jeffers v. Forbes*, 28 Kan. 174, and *State v. Dennis*, 39 Kan. 509.

Suit for Cancellation of Mortgage. — A mortgage will not be canceled upon

the application of the mortgagor, no creditor being interested, without a tender or requirement that the mortgagee be reimbursed for such expenditures as he has made, and indemnified as to such liabilities as in good faith he has incurred, on the faith of such mortgage. *Miller v. Gunderson*, 48 Neb. 715.

Where a Vendor Is Unable to Make Title, and the purchaser asks rescission of the contract, he must offer to restore to the vendor all that he has received. *Brown v. Witter*, 10 Ohio 142.

Bringing Money and Securities into Court. — The plaintiff in a suit to rescind a contract must allege that he has made a tender, etc., and where he received money or securities for money and has not tendered the same he must bring them into court. *Edwards v. Morris*, 1 Ohio 524.

California Statute. — Civ. Code Cal., §§ 689, 691, provide that the party desiring to rescind must act promptly, and must restore or offer to restore to the other party everything of value received from him under the contract. *Barry v. St. Joseph's Hospital*, (Cal. 1897) 48 Pac. Rep. 68. See also *More v. Calkins*, 85 Cal. 177; *Kelley v. Owens*, 120 Cal. 502; and *Buena Vista Fruit, etc., Co. v. Tuohy*, 107 Cal. 243. • 1. *New England Mortg. Security Co. v. Powell*, 97 Ala. 483, in which case the court cited *American Freehold Land Mortg. Co. v. Sewell*, 92 Ala. 163.

2. *Bowden v. Achor*, 95 Ga. 243; *Strodder v. Southern Granite Co.*, 94 Ga. 626, in which cases, however, there is no more than an intimation that the poverty of the plaintiff may, where he seeks rescission on the ground of fraud,

Where Plaintiff Has Parted with Property Received. — Where the contract the rescission or cancellation of which is sought is not severable the plaintiff must repudiate the entire transaction; and whether the contract relates to personal or real property, if the plaintiff has conveyed to a third person all of the property received by him, or an important part of it, and is therefore unable to make restitution to the defendant, and the bill discloses these facts, the bill is without equity, as the plaintiff's only remedy is an action for damages, either for fraud and deceit or for a breach of covenant.¹

In Answer or Cross-Complaint. — In an action at law in which the plaintiff claims under a contract, if the defendant files an answer or cross-complaint asking a rescission of the contract the defendant must offer to restore to the plaintiff all that he has received under the contract, precisely as if he were the plaintiff in a bill for rescission.²

relieve him from restoring or offering to restore.

Bill by a Widow for Cancellation of Ante-Nuptial Contract — Renouncing Benefits of Will. — A bill filed by a widow, before the expiration of the time for filing a waiver of the provisions of her deceased husband's will, to set aside for fraud an ante-nuptial contract, need not allege that the plaintiff waives the provision of the will. *Nathan v. Nathan*, 166 Mass. 294.

1. *Betts v. Gunn*, 31 Ala. 219; *Bailey v. Fox*, 78 Cal. 389; *Herman v. Haffenegger*, 54 Cal. 161; *Patterson v. Galusha*, 53 Kan. 367; *Jeffers v. Forbes*, 28 Kan. 174; *Neal v. Reynolds*, 38 Kan. 432; *Edwards v. Hanna*, 5 J. J. Marsh. (Ky.) 18; *Cobb v. Hatfield*, 46 N. Y. 533; *Curtiss v. Howell*, 39 N. Y. 215.

Rescission in Toto. — In *Fisher v. Conant*, 3 E. D. Smith (N. Y.) 199, the court quoted the language of Beardsley, J., in *Masson v. Bovet*, 1 Den. (N. Y.) 69, as follows: "The party who would disaffirm a fraudulent contract must return whatever he has received upon it. He cannot hold on to such part of the contract as may be desirable on his part and avoid the residue, but must rescind *in toto*, if at all. To retain the whole or a part of what was received upon the contract is incompatible with its rescission, and hence the necessity of restoring what has been received upon it." See also *Van Trott v. Wiese*, 36 Wis. 439, wherein the foregoing language was quoted with approval.

Tender of Portion of Goods and Proceeds

of Remainder. — In *California*, upon a rescission of a contract of sale at the suit of the buyer, the defendant, before paying back the purchase money and delivering up the notes, is entitled to receive the identical thing sold, and a tender of goods which the buyer has not disposed of, and of the amount realized from the sale of those disposed of by him, is not sufficient. *Bailey v. Fox*, 78 Cal. 389, in which case the court cited *Herman v. Haffenegger*, 54 Cal. 161, and *Cobb v. Hatfield*, 46 N. Y. 533.

2. Cross-Complaint Alleging Failure of Title — Offer to Restore. — In *Godding v. Decker*, 3 Colo. App. 198, which was an action on a note given for the purchase price of land, the defendant filed a cross-complaint alleging failure of title, and asking a rescission of the contract, and the court held that the answer was insufficient because it contained no allegation that he had surrendered or had offered to surrender possession, or that he had reconveyed or offered to reconvey any title which he had, or that he had released or offered to release *Godding* from his contract. *Citing Garrett v. Lynch*, 44 Ala. 324; *Martin v. Chambers*, 84 Ill. 579; *Dennis v. Jones*, 44 N. J. Eq. 513; and *Knuckolls v. Lea*, 10 Humph. (Tenn.) 577.

Answer in Ejectment Asking Rescission. — Where in ejectment by a vendor to recover land in the possession of the vendee under a contract of sale which the vendor has declared forfeited the vendee files an answer asking a rescission of the contract, the vendee must

(2) *In Suits for Reformation.* — In a bill to correct a mistake in a written contract the plaintiff must offer to do equity as the circumstances of the case may require.¹

b. WHEN OFFER TO RESTORE UNNECESSARY. — There are exceptional cases where restoration or an offer to restore before suit brought is not necessary, as, for instance, where the thing received by the plaintiff is of no value whatever to either of the parties; or where the plaintiff has merely received the individual promissory note of the defendant; or where the contract is absolutely void; or where it clearly appears that the defendant could not possibly have been injuriously affected by a failure to restore; or where without any fault of plaintiff there have been peculiar complications which make it impossible for plaintiff to offer full restoration, although the circumstances are such that a court of chancery may by a final decree fully adjust the equities between the parties.²

Where Defendant Is Entitled to Nothing upon Accounting. — In a suit to set aside a contract for fraud the plaintiff is relieved from making any offer to restore what he has received under the contract, where he alleges that the defendant is indebted to him in a greater sum than that paid by the defendant, and asks an investigation and settlement of the accounts existing between the plaintiff and the defendant.³

allege that he has tendered to the vendor the amount due the latter under the contract. *Reddish v. Smith*, 10 Wash. 178.

1. *Boyce v. Watson*, 20 Ga. 517.

2. *Kelley v. Owens*, 120 Cal. 502, in which case will be found the precise language of the text.

Property Received Worthless. — In support of the proposition that where it is alleged that the property received by the plaintiff was utterly worthless, no offer to restore is necessary, see *McKee v. Eaton*, 26 Kan. 226, which case, however, is not precisely in point.

Where Plaintiff Has Received Nothing. — Where the bill seeks the rescission of a sale of chattels, and the seller has not received any part of the purchase money, no offer by him to do equity is necessary. *Bradberry v. Keas*, 5 J. J. Marsh. (Ky.) 446.

Where a bill asks the reconveyance of a parcel of land on the ground of fraud and mistake, and by the payment made to him upon the delivery of the deed the plaintiff took nothing from the defendant that he was not entitled to, no offer to restore is necessary. *Montgomery v. Pickering*, 116 Mass. 227.

Repudiation of Contract by Defendant.

— In *Pedrorena v. Hotchkiss*, 95 Cal. 636, it was held that as, according to the allegations of the complaint, the defendant had done nothing in the way of performance and had parted with nothing, but had wholly repudiated the contract, nothing was required of the plaintiff in the way of placing the defendant *in statu quo*.

Deed Procured Without Any Consideration. — Where the complaint alleges that the defendant procured the execution of a deed without any consideration whatever except a provision therein that the defendant was to support and maintain the plaintiff during his life, it is not necessary to allege that the plaintiff restored or offered to restore any consideration, because a judgment setting aside the deed will set aside the contract of support contained therein, and will place the parties *in statu quo*. *Yount v. Yount*, 144 Ind. 133. See also *Wilson v. Moriarty*, 77 Cal. 596, in which case it was held that no offer to refund was necessary, because the defendant had already been fully reimbursed by what he had received under the contract.

3. *Watts v. White*, 13 Cal. 321.

Setting Off Rents and Profits Against Part Payment. — As a general proposition.

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c. **ALLEGING EXCUSES FOR FAILURE TO RESTORE.** — Where the plaintiff in an action for the rescission or cancellation of a contract does not offer to restore all that he has received from the defendant he must allege facts which are sufficient to excuse him from such duty.¹

Denial by Defendant of Plaintiff's Right to Rescind. — It would seem that the plaintiff in an action for rescission, instead of alleging an offer to make restoration to the defendant, or his readiness to make such restoration, may allege that he elected to rescind the contract and that the defendant denied his right to do so.²

d. **TERMS OF THE OFFER.** — The offer must not be equivocal, but there must be a direct and unconditional offer to repay such money, or to restore such property, as the defendant will be entitled to upon the rescission of the contract.³ However, an offer which substantially declares the plaintiff's purpose and readiness to do equity, and which merely asserts the condition that the court shall decide that the duty rests on the plaintiff, is sufficient.⁴

tion, a vendor cannot rescind a contract without offering to refund so much of the purchase money as he has received; but where the vendee has had the use, rents, and profits of the property to a much larger amount than he has paid, the amount paid by the vendee should be considered as so much paid for the rents and profits, and if any balance still remains due to the vendor the court may render a decree for such balance. *Higby v. Whitaker*, 8 Ohio 198.

1. *Smith v. Robertson*, 23 Ala. 312; *Johnson v. Walker*, 25 Ark. 196; *Bellows v. Cheek*, 20 Ark. 424; *Seaborn v. Sutherland*, 17 Ark. 606; *Davis v. Tarwater*, 15 Ark. 286; *More v. Smedburgh*, 8 Paige (N. Y.) 600; *Thredgill v. Pintard*, 12 How. (U. S.) 28. See also *Kelley v. Owens*, 120 Cal. 502.

2. *Herman v. Gray*, 79 Wis. 182.

Readiness and Willingness to Make Restoration. — Where it is alleged in the complaint that the plaintiff offered to make restoration, and that the defendant then and there refused to accept what was offered, and insisted upon the validity of the contract, it should be alleged also that the plaintiff was then and there ready and willing to make such restoration, but the omission of such allegation will not make the complaint the subject of a demurrer *ore tenus* on the trial. *Potter v. Taggart*, 54 Wis. 395.

3. *New England Mortg. Security Co. v. Powell*, 97 Ala. 483.

Allegation of Abandonment by Plaintiff.

— In *Davis v. Tarwater*, 15 Ark. 286, the plaintiff alleged that immediately after he found that the land was encumbered and that he had been deceived and imposed upon, he abandoned and yielded the possession of said land, without stating when or to whom, and it was held that this was insufficient.

Averment of Diligence in Ascertaining Fraud and Making Tender. — An allegation that the complainant tendered back what he had received as soon as he had ascertained or had become fully satisfied that he had been cheated is not sufficient, but it must be averred that he made the offer as soon as by reasonable and ordinary vigilance in the use of the means in his possession the alleged fraud could be ascertained. *Buford v. Brown*, 6 B. Mon. (Ky.) 553, which was a suit by a buyer of chattels for the rescission of the contract of sale.

4. *New England Mortg. Security Co. v. Powell*, 97 Ala. 483, in which case, which was a bill to cancel a mortgage that was illegal under the statute, the plaintiff having alleged that he was not indebted under the law to the defendant, it was considered sufficient to make the following offer: "If complainant is mistaken in this he is ready and hereby offers to pay to the said New England Mortgage Security Company whatever sum or amount this court may adjudge that he is due and owing to it on account of the matters con-

e. AVERMENT OF TENDER BEFORE FILING BILL—View that Offer in Bill Is Sufficient.—Upon the question whether the bill or complaint in a suit for rescission should aver that before the institution of the suit the plaintiff rescinded the contract by notifying the defendant of his renunciation, and tendering back what he had received, or offering to restore the defendant to his original status, the cases are in conflict. According to the weight of authority, however, an offer made in the bill or complaint is suffi-

tained in this bill of complaint." See also *Day v. Mooney*, 3 Okla. 608, which was a suit to rescind a contract for the exchange of real estate. It was held that an offer to return all that was received by the plaintiff pursuant to the exchange was sufficient.

Forms of Offer to Do Equity.—Where the petition specifies that "the plaintiff is in the attitude to restore all of said property," and in terms tenders the same to the defendant, no more is necessary. *McCorkell v. Karhoff*, 90 Iowa 545, in which case the court cited *Taylor v. Ormsby*, 66 Iowa 112, and *Binford v. Boardman*, 44 Iowa 53.

Offer to Restore Land and Account for Rents.—In *Leyden v. Hickman*, 75 Ga. 684, a purchaser of land who sought the rescission of a contract prayed that the grantor be decreed to pay him the several sums paid out for the repairs of the premises and the purchase money paid for the premises, and offered to account for and pay the rents and to give up the land, and it was held that this was a sufficient offer to do equity.

Insufficient Offer.—In a bill to cancel a mortgage given to a foreign corporation on the ground that the mortgage is invalid because the corporation has failed to comply with constitutional and statutory provisions relating to the rights of foreign corporations to do business within the state, the following allegation is insufficient: "Complainant avers that if, upon the final hearing of this cause, the court should ascertain that said mortgage is void, and should order a reference to the register to ascertain and report the amount due from complainant to respondent, he is ready and willing and able to pay the same." *Ross v. New England Mortg. Security Co.*, 101 Ala. 362, in which case the court cited *New England Mortg. Security Co. v. Powell*, 97 Ala. 483, and *American Freehold Land Mortg. Co. v. Sewell*, 92 Ala. 170.

Offer to Make Release in Writing.—

Where the plaintiff seeks the rescission of a contract under which he has received from the defendant a lease of land for five years and certain chattels, it is sufficient to allege that the plaintiff has put the defendant in possession of all the personal property and of the land leased, and has verbally offered to rescind the whole contract and to place the defendant *in statu quo*, and the plaintiff need not offer to make the release in writing. *Hart v. Kimball*, 72 Cal. 283.

Offer in Language of Statute—California.—In *Hick v. Thomas*, 90 Cal. 289, in which case a demurrer to the complaint was overruled, the court said: "The offer to restore is averred in the language of the statute. If that requires a specific tender, the allegation would imply one, and would be sufficient, at least in the absence of a special demurrer, which is sometimes in the nature of a motion to require a pleader to make his averment more definite, as the practice is in some states where code pleading prevails." See also *Hammond v. Wallace*, 85 Cal. 522, in which case the offer was considered insufficient; *Collins v. Townsend*, 58 Cal. 608; *Herman v. Haffenegger*, 54 Cal. 161; *Bohall v. Diller*, 41 Cal. 533; *Gifford v. Carvill*, 29 Cal. 589.

Sufficiency of Formal Offer.—"In order to rescind a contract by a purchaser, when a ground for rescission exists, it is not necessary to make any formal tender of the property held by the purchaser; it is sufficient to offer to make return of the same." *Potter v. Taggart*, 54 Wis. 395, in which case the court cited *Cunningham v. Brown*, 44 Wis. 72; *McWilliams v. Brookens*, 39 Wis. 334; *Van Trott v. Wiese*, 36 Wis. 439; *Corbitt v. Stonemetz*, 15 Wis. 170; *Racine County Bank v. Keep*, 13 Wis. 209; *Wright v. Young*, 6 Wis. 127; and *Mann v. Stowell*, 3 Pin. (Wis.) 220.

Offer to Reconvey Free from Subsequent Incumbrances.—In an action to rescind a deed conveying land to the plaintiff,

cient;¹ and it has been forcibly declared that if such were not the rule, fraud might, in its manifold resources, frequently contrive so to shape the conditions and circumstances that the defrauded party could not make an offer to restore, prior to invoking the power of the court for relief; and relief would then be denied by reason of the rule.²

View that Previous Offer to Return Must Have Been Made. — In some cases it has been held that in a suit in equity for rescission it must be alleged that the plaintiff before the institution of the suit returned, or offered to return, what the defendant had parted with;³ but it has been pointed out that these were cases in which the defrauded party was so situated in respect to the subject matter that he could return to the guilty party that which the latter had parted with, and where nothing more was necessary to effect a rescission, and that in such cases the true distinction has been lost sight of.⁴ And it would seem that the courts in hold-

if the plaintiff, after the making of the instrument, has allowed the land to be sold for taxes and has encumbered it with a mortgage, a petition which offers to reconvey the land to the defendant free and clear of all incumbrances is sufficient. *Clapp v. Greenlee*, 100 Iowa 585, in which case the court declares that there is a distinction between suits in equity and actions at law, and that in a suit in equity such offer is sufficient, although it might not be sufficient in an action at law.

1. *Hopkins v. Snedaker*, 71 Ill. 449; *Shuee v. Shuee*, 100 Ind. 477; *Thomas v. Bealls*, 154 Mass. 51; *Whelan v. Reilly*, 61 Mo. 565; *Maloy v. Berkin*, 11 Mont. 138, to which case particular reference is made as containing an exhaustive review of the authorities *pro* and *con*, and a statement of the reasons upon which the view of the majority of the courts is based; *Kirby v. Harrison*, 2 Ohio St. 326, 59 Am. Dec. 677; *Ellison v. Beannabia*, 4 Okla. 347.

2. *Per Harwood, J.*, in *Maloy v. Berkin*, 11 Mont. 138.

3. *Hammond v. Wallace*, 85 Cal. 531, 20 Am. St. Rep. 239, in which case the only averment was that the plaintiff was "willing and able to return to the defendant all the moneys which she paid to him on the purchase of the property, and all the moneys which she has lawfully and legitimately paid out or expended on account of the purchase of said property, and now offers to do so," and this was held insufficient. See also *Kelley v. Owens*, 120 Cal. 502; *Collins v. Townsend*, 58 Cal. 608; *Herman v. Haffenegger*, 54 Cal. 161; *Bohall v.*

Diller, 41 Cal. 533; *Dotterer v. Freeman*, 88 Ga. 479, in which last case it was held that an offer to do equity is no substitute for an allegation that the plaintiff has made a tender which ought to have been made before the bill was filed; and *Taylor v. Fulks*, (Ky. 1895) 29 S. W. Rep. 349.

4. *Maloy v. Berkin*, 11 Mont. 138, in which case the court, in holding that no previous restoration or tender was necessary, criticised *Herman v. Haffenegger*, 54 Cal. 161, and declared that that case was decided on the authority of *Gifford v. Carvill*, 29 Cal. 589, which was not a suit in equity for rescission or cancellation, but an action at law in all its attributes.

Distinction Between Suits for Rescission and Rescission by Act of a Party. — In *Kirby v. Harrison*, 2 Ohio St. 326, 59 Am. Dec. 677, which was an action for rescission, *Thurman, J.*, said: "It is said, however, that Kirby did no positive act manifesting an intention to rescind before filing his bill; and it is argued that this is an insurmountable objection to a decree of rescission. In support of this proposition *Higby v. Whittaker*, 8 Ohio 201, is cited. In that case the court did say, and very properly, in reference to the facts of the case, that 'the law requires some positive act by the party who would rescind, which shall manifest such intention, and put the opposite party on his guard, and it then gives a reasonable time to comply; but it requires eagerness, promptitude, ability, and a disposition to perform by him who would resist a rescission of his contract.'

ing that a previous restoration, or offer to restore, must be alleged, have made a misapplication of the doctrine that a party filing a suit for rescission must not have been guilty of laches in filing the bill and repudiating the contract.¹

f. OFFER TO ACCOUNT FOR RENTS AND PROFITS. — Where a grantee seeks the rescission of a contract for the sale of land, and the grantor has remitted to the grantee all control over the land, the grantee must offer to account for the value of the rents and profits of the land, or he must allege that the use of the land was of no value to him, and would not have been of any value to the grantor.²

g. TENDER OF DEED — (1) *Offer to Return Original Deed.* — In a suit for the rescission or cancellation of a deed an offer to return the deed is not sufficient as an offer to restore the property embraced in the deed, as the return of a deed does not reinvest the grantor with title.³

(2) *Tender of Deed to Be Signed by Defendant.* — Where the plaintiff asks the rescission of a contract for the sale of land, and the recovery back of land conveyed to the defendants, it is suffi-

The court, when this was said, were speaking of a rescission by the act of the party, and not by a decree. The case was not one of a bill to rescind. * * * But here Kirby asks such a decree, and if it were admitted that he did no positive act, before filing the bill, manifesting an intention to rescind, it cannot be denied that the filing of the bill itself manifests his intention clearly enough."

1. *Sears v. Hicklin*, 13 Colo. 143; *Buford v. Brown*, 6 B. Mon. (Ky.) 553; *Taylor v. Fulks*, (Ky. 1895) 29 S. W. Rep. 349. See also *Disbrow v. Secor*, 58 Conn. 35, and *Parmlee v. Adolph*, 28 Ohio St. 10.

Objection Not Available Except by Special Demurrer. — In *Newman v. Smith*, 77 Cal. 22, the court said: "The objection that the precise time at which the plaintiff offered to return the payment which had been made to her is not alleged, if valid, should have been taken by special demurrer."

In *Missouri* it must be alleged that prior to or at the time of the commencement of the action the plaintiff made an offer to refund the money he had received for his deed. *Thompson v. Cohen*, 127 Mo. 241.

Filing Bill Considered as Offer to Restore. — In *Bradberry v. Keas*, 5 J. J. Marsh. (Ky.) 446, it was declared that where a seller of goods, who has received the buyer's promissory note for

the price, asks a rescission of the sale on the ground of fraud, and prays that the contract may be rescinded, the bill itself is a sufficient offer to restore the note and deliver it up for cancellation.

2. *Fratt v. Fiske*, 17 Cal. 380.

Receipt of Rents and Profits Not Disclosed. — The bill or complaint need not make an offer to restore the rents and profits where the pleading does not disclose that the plaintiff has received any rents and profits, or has used the land. *Griffith v. Maxfield*, 63 Ark. 548.

3. *Ahrens v. Adler*, 33 Cal. 608, in which case the court said: "The clause of the complaint struck out under the leave to amend did not aver in direct terms that the sale had been rescinded, nor did the facts detailed in the clause amount to a rescission, or to an offer to rescind in legal effect. An offer 'to return the deed' given by the defendant to the plaintiff would not, if it had been accepted, have invested the defendant with the title to the mines." See also, to the same effect, *Jeffers v. Forbes*, 28 Kan. 174, in which case the court cited *Bainter v. Fults*, 15 Kan. 323; *Tisdale v. Buckmore*, 33 Me. 461; *Bisbee v. Ham*, 47 Me. 543; *Evans v. Gale*, 17 N. H. 573; *Nichols v. Michael*, 23 N. Y. 264; *Cobb v. Hatfield*, 46 N. Y. 533; *M'Donald v. Neilson*, 2 Cow. (N. Y.) 139; and *Ford v. Harrington*, 16 N. Y. 285.

cient to allege that a demand was made upon the defendant to restore the land, and that he refused to do so, and it need not be alleged that a deed was tendered to the defendant to be signed by him.¹

h. **OBJECTIONS WAIVED.** — An objection that the plaintiff, in an action to cancel a deed on the ground that it was procured by fraud, does not offer to do equity, must be raised by the pleadings or otherwise urged in the trial court, or else it will not be considered on appeal.²

19. Averments as to Possession and Title of Plaintiff — **Possession of Plaintiff.** — A suit in equity to cancel a deed procured by fraud is not technically a suit to quiet title or to remove a cloud, and consequently the plaintiff need not allege that he is in possession;³ and the same is true of an action to reform a deed.⁴

Title of Plaintiff. — In a suit for the reformation of a deed to which the plaintiff is not a party he must allege facts showing that he has such an interest in the property as will entitle him to relief.⁵

20. Alleging Demand and Disaffirmance Before Filing Bill. — In a suit for the reformation of an instrument it would seem that ordinarily the bill or complaint must allege that prior to the institution of the action the plaintiff made a demand upon the

1. *Peck v. Vinson*, 124 Ind. 121, in which case rescission was sought on the ground that the grantor of the defendant Peck was insane at the time of making the deed. The court said: "Having taken a conveyance from a person whom he knew to be of unsound mind, it was his duty to restore the title to her upon demand, and it is alleged that when demand was made on said Peck to do so, he refused and claimed the land as his own. Under the facts as alleged it would have been of no avail if the guardian had tendered to Peck a deed to sign reconveying the land."

2. *Ormsby v. Budd*, 72 Iowa 80; *Taylor v. Fulks*, (Ky. 1895) 29 S. W. Rep. 349.

Objection Raised Originally on Appeal. — In *Taylor v. Fulks*, (Ky. 1895) 29 S. W. Rep. 349, the court said: "This matter of a tender within a reasonable time being a mixed question of law and fact, and always dependent on the particular circumstances of each case, we think a defendant who seeks to rely on the want of same as a defense should tender the issue either by demurrer or by answer; that he cannot, after trial had, and a judgment against him on the issues made, going to the real

merits of the case, be now heard in this court, for the first time, by brief, to raise such an issue."

3. *Jackson v. Tatebo*, 3 Wash. 456, holding that even though the plaintiff alleges that the instrument is a cloud on his title the suit is not one to quiet title within the rule requiring the plaintiff to allege and prove possession. See also generally article **QUIETING TITLE — REMOVAL OF CLOUD**, vol. 17, p. 274.

4. *Rousseau v. Lambert*, (Ky. 1888) 7 S. W. Rep. 923.

5. *Moore v. Tate*, 102 Ala. 320.

Necessity to Annex Abstract of Title — Georgia Statute. — Where a grantee of a cotenant has by fraud procured a deed to a parcel of land in excess of the grantor's interest, and obtained possession thereof and ousted the other cotenant, an action by such ousted cotenant for the reformation of the deed and that the plaintiff be decreed the owner of a one-half interest in the land is not an action for the recovery of land within Code Ga., § 3401, requiring the plaintiff in a statutory action for the recovery of land to annex to his petition an abstract of the title relied upon. *Prater v. Bennett*, 98 Ga. 413.

defendant to correct the alleged mistake, and that the defendant refused to make the correction;¹ but under some circumstances no such demand and refusal are prerequisite to the institution of the suit, and the plaintiff may be permitted to allege facts excusing his failure to demand a rectification of the instrument.²

In Suits for the Rescission and Cancellation of Contracts it is necessary to allege, under some circumstances, that the plaintiff, before the institution of the suit, by some positive act or notice to the defendant, disaffirmed the contract;³ but it would seem that ordinarily, according to the weight of authority, no such allegation is necessary, and the plaintiff need do no more than refrain from alleging facts showing that he has ratified the contract, or

1. *Axtel v. Chase*, 77 Ind. 74, which case was distinguished in *Walls v. State*, 140 Ind. 16. See also *Weathers v. Hill*, 92 Ala. 492, and *Haussman v. Burnham*, 59 Conn. 117. But see *contra*, *Watson v. Wells*, 5 Conn. 468, *per* Hosmer, C. J.

2. **Facts Showing Excuse for Failure to Make Demand.**—A bill for the reformation of a deed containing a defective description of the property, which alleges that the defendant has commenced to trespass upon the land in dispute, and is actively setting up a claim thereto, shows a state of facts sufficient to relieve the complainant from alleging that he requested a correction of the mistake before filing the bill. *Weathers v. Hill*, 92 Ala. 492, in which case the court cited *Robbins v. Battle House Co.*, 74 Ala. 499.

Recognition by Defendant of Plaintiff's Rights.—Where the plaintiff has conveyed land with the understanding that the same shall, upon request, be reconveyed to him, and the same is afterwards reconveyed, but a mistake is made in the deed of reconveyance, it is necessary ordinarily, in a bill for the reformation of the deed of reconveyance, to allege that the plaintiff requested a reconveyance; but such allegation is unnecessary where facts are alleged showing that his right to a reconveyance was fully recognized and that an attempt to reconvey was made. *Haussman v. Burnham*, 59 Conn. 117.

Where Reformation Is Incidental to Other Relief.—Where a mortgage debt is due and unpaid, and the plaintiff asks for judgment of foreclosure and sale of the land, and a prayer for reformation is incidental to the main action, the complaint is not defective because it shows no demand made

upon the defendant for reformation of the mortgage prior to the commencement of the action. *Walls v. State*, 140 Ind. 16, in which case the court cited *Axtel v. Chase*, 83 Ind. 546, wherein it was said: "The appellants were brought into court for the purpose of compelling them to pay their debt, and, being in court because of this failure, they are asked, incidentally, to correct the mortgage. No demand upon them to correct the mortgage was necessary."

3. *Hammond v. Wallace*, 85 Cal. 522.

Rescission Sought for Nonperformance of Contract by Defendant.—In *Winfield v. Winfield Water Co.*, 51 Kan. 70, a city sought the rescission of a contract with a water company for supplying the city and its inhabitants with water, on the ground that the defendant had violated the provisions of the contract with reference to the quality of the water, and in other respects, and it was held that, as the petition showed that the city had for a long period of time accepted the water and acquiesced in the company's acts, the petition was demurrable because it did not allege that the city had, by some regular action of the city authorities, directly challenged the attention of the company to its failure to perform the contract, and notified the company that its performance of the contract was unsatisfactory.

Disaffirmance of Insane Person's Deed.—In *Indiana* it has been held that in an action by the heirs of a grantor to rescind his deed on the ground that he was insane when he made it, it is necessary to allege that the grantor, or the plaintiffs as his heirs, disaffirmed the deed prior to the commencement of the action. *Raymond v. Wathen*, 142 Ind. 367.

that he has been guilty of laches.¹

21. The Prayer — Necessity for Prayer. — In suits for the rescission, cancellation, or reformation of contracts, as in other suits, no relief will be granted other than such as is demanded.²

Failure to Ask Damages. — No recovery of damages can be had unless the pleader demands judgment therefor.³

Prayer for Rescission in Toto. — Since the general rule is that a contract cannot be rescinded in part, where the contract is not severable and there are grounds for its rescission, the plaintiff must not pray for the rescission of a part of the contract, but must ask that the entire contract be rescinded.⁴

Right to Vary Prayer. — The plaintiff has the right to vary the prayer for relief to meet every shape in which he may apprehend relief may be granted to him.⁵

Consistency with Case Made by Bill. — As in other suits, the prayer must be consistent with the case set forth in the bill or complaint.⁶

1. See *supra*, VIII. 18. *c. Averment of Tender Before Filing Bill.*

Breach of Contract for Support of Grantor. — Where a deed is made pursuant to an agreement whereby the grantee shall support the grantor, and the complaint alleges an entire nonperformance by the grantee, it is not necessary to aver in the complaint a demand for the maintenance, as the spirit of the contract is that the grantee shall furnish it when needed unasked. *Bogie v. Bogie*, 41 Wis. 209.

2. *Jaeger v. Whitsett*, 3 Colo. 105, in which case the court said: "The charge that appellees agreed to convey with warranty, and by false representations induced appellant to accept a deed without such covenant, may, if true, be a ground for reforming the instrument, but such relief is not demanded."

Relief under General Prayer. — As to the relief which the court may decree under a general prayer, see *infra*, XV. 5. *Relief under General Prayer.*

Forms of Prayers — In Suit for Reformation. — In *Eureka v. Gates*, 120 Cal. 54, will be found the form of a prayer in a cross-complaint asking the rectification of a misdescription in a deed.

In Suit for Rescission. — In *Lawrence v. Gayetty*, 78 Cal. 128, which was an action to set aside a deed on the ground of fraud, the prayer of the complaint, which was held sufficient on demurrer, was that the court "order, adjudge, and decree that the defendants, and each of them, reconvey to this plaintiff whatever of the estate in said property

is in him vested, and that the legal title of all of the said defendants be restored and reinvested in the plaintiff," and for general relief.

Objection by Special Demurrer. — The objection that some of the relief prayed for is inappropriate must be taken by special demurrer. *Reese v. Reese*, 89 Ga. 645.

3. *Herman v. Gray*, 79 Wis. 182.

4. *Purdy v. Bullard*, 41 Cal. 444; *Daly v. Brennan*, 87 Wis. 36.

5. *Betts v. Gunn*, 31 Ala. 219, in which case the primary object of the bill was the rescission of a contract on the ground of fraud, and it contained the general prayer and the following special prayers: that the instrument which evidences the complainant's liability to the defendant may be canceled; that the defendant may account for all payments and advances made by the complainant, over and above the amount he ought to have paid by his purchase; that the said instrument may be reformed, if not canceled; and that the defendant may account for the property conveyed, of which the complainant was unable to obtain possession. The court cited in support of the right to vary the prayer, *Driver v. Fortner*, 5 Port. (Ala.) 9; *May v. Lewis*, 22 Ala. 646; *Strange v. Watson*, 11 Ala. 324; *Kelly v. Payne*, 18 Ala. 371; *Godwin v. McGehee*, 19 Ala. 475.

6. *Crow v. Owensboro, etc.*, R. Co., 82 Ky. 134, in which case the prayer was as follows: "Wherefore the plaintiff prays that the court adjudge said lands have reverted to the plaintiffs —

Amendment of Prayer. — In a suit to cancel an instrument, if the pleader states a good cause of action the prayer may be amended.¹

22. Amendments. — The court should allow the bill or complaint in a suit for the rescission, cancellation, or reformation of a contract to be amended in conformity to the ordinary rules as to amendments, and where a failure in the proof is rather in the nature of a variance the court may in its discretion allow an amendment.²

that said deed be declared void — that plaintiff have possession thereof, and for judgment for his costs, and all proper and general relief." It was objected by the court that the petition set forth an action for the partial rescission of the contract, while the prayer was for a complete rescission.

1. Willard *v.* Ford, 16 Neb. 543, which was an action to cancel a deed on the ground of fraud.

As to Amendments Generally, see *infra*, VIII. 22. *Amendments.*

2. Belmont Min., etc., Co. *v.* Costigan, 21 Colo. 465, wherein it was held that the granting or refusing of an amendment is within the legal discretion of the trial court; Lemon *v.* Phoenix Mut. L. Ins. Co., 38 Conn. 294; Peck *v.* Hoyt, 39 Conn. 9; Jones *v.* Munroe, 32 Ga. 181; Cross *v.* Bean, 81 Me. 525, which was the bill for the reformation of a deed.

Amendment to Conform to Proof. — In the following cases it was held that the court may in its discretion allow an amendment so as to make the bill or complaint conform to the proof; Jackson *v.* Jackson, 94 Cal. 446; Ward *v.* Waterman, 85 Cal. 488; Adair *v.* McDonald, 42 Ga. 506; Carter *v.* West, 93 Ky. 211, in which case an amendment was permitted so as to make the petition allege that the relation of attorney and client existed between the parties to the deed.

To Conform to Proof of Mental Incapacity. — Where the plaintiff alleges in his original petition, in an action to rescind a deed, that he was induced to make the deed by certain false and fraudulent representations, the court may, in its discretion on the trial, permit the plaintiff to amend by alleging that he was of weak intellect and was wanting in capacity to engage in important business transactions, and also that he was in financial distress. Clough *v.* Adams, 71 Iowa 17.

To Conform to Proof as to Person Who

Made Mistake. — Where the plaintiff alleges that a mistake was made by the person who wrote the contract, and the evidence shows that it was the mutual mistake of the parties, the court may allow the complaint to be amended to correspond with the evidence. Cordes *v.* Coates, 78 Wis. 641.

To Conform to Proof of Disaffirmance. — In an action by the heirs of a grantor to rescind his deed on the ground of his insanity, the complaint may be amended by inserting the necessary averment that the grantor, or the plaintiffs as his heirs, disaffirmed the deed prior to the commencement of the action. Raymond *v.* Wathen, 142 Ind. 367, in which case such amendment was allowed after a motion for a new trial had been overruled, and pending a motion in arrest of judgment, so as to make the complaint conform to the proof. The court said: "The amendment did not substantially change the claim or issue in the case. It resulted in adding only to the complaint a material averment to conform it to the evidence. The record does not disclose that the appellants were in any way deceived by the amendment, or prejudiced in their rights thereby. No proof was made or offered by them tending to show that they were in any manner misled or prejudiced by this action of the court. Under such circumstances it is settled that the complaining party cannot be successfully heard in this court relative to the ruling in permitting the amendment." Citing Stanton *v.* Kenrick, 135 Ind. 382; Child *v.* Swain, 69 Ind. 230, and overruling Heddens *v.* Younglove, 46 Ind. 212.

Reply Treated as Amendment to Petition. — In Ruffner *v.* Ridley, 81 Ky. 165, it was held that the court did not err in rescinding a contract on a ground which was first set up in the reply, whereas it should have been by amended petition, because both the

A Bill for the Foreclosure of a Mortgage may be amended so as to ask the reformation of the mortgage and its foreclosure as reformed.¹

Where Original Action Is One at Law. — In a state in which by the provisions of the code the forms of action have been abolished and law and equity have been blended, in an action at law on a contract, or for fraud in the procurement of a contract, if the defendant by his answer relies upon a defense which makes a resort by the plaintiff to equity necessary, the plaintiff may in the discretion of the court, and upon proper terms, be permitted to amend so as to ask the rescission or reformation of the contract as equity may require.²

IX. CROSS-BILL, CROSS-COMPLAINT, OR ANSWER ASKING RELIEF — In General. — The rescission, cancellation, or reformation of a contract may be decreed as well where the grounds for such relief are

court and the parties treated the reply as an amendment to the petition.

1. *Winchell v. Coney*, 54 Conn. 24, in which case the court said: "The facts essential to a reformation of the deed do not, in this case, constitute a separate and distinct cause of action. That matter is incidental to the main object of the suit—a foreclosure. Therefore the objection to the amendment on that ground cannot prevail."

Leave to File Supplemental Complaint. — Where, pending a suit by the grantee in a deed for its reformation, the plaintiff dies, leave should be given to file a supplemental complaint showing the interest of the heirs of the plaintiff in the subject-matter, making them parties, and containing such additional averments as may be pertinent and proper. *Haussman v. Burnham*, 59 Conn. 117.

2. **Action on Insurance Policy — Amendment Asking Reformation.** — Where the plaintiff brings an action at law on an insurance policy, and the defendant sets up the defense that the plaintiff is not the proper party plaintiff, because prior to the loss he had alienated the property and had no interest therein at the time of the loss, the plaintiff may file a substituted petition showing that he had certain interests in the property interested, and that he is entitled to have the policy of insurance so reformed as to make it a contract interesting him to the extent of his interest. *Esch v. Home Ins. Co.*, 78 Iowa 334, in which case it was held that the filing of such substituted petition did not contravene the rule that where a party has two inconsistent remedies, he is called

upon to elect which he will pursue, and having made his election he cannot pursue the other remedy. *Following Barnes v. Hekla F. Ins. Co.*, 75 Iowa 11, in which case the plaintiff having commenced an action at law on the policy, and the defendant having pleaded that the policy contained a provision against additional insurance and that the plaintiff had procured additional insurance, it was held that the plaintiff might amend, alleging that at the time the contract of interest was entered into it was agreed that the plaintiff had the right to take out additional insurance, and that such agreement was omitted from the policy by mistake or through the fault of the defendant, and asking a reformation of the policy.

Action for Damages for Fraud — Amendment Asking Rescission. — Where the plaintiff, having exchanged land upon false representations as to the value of the land received by him, upon discovering the falsity of the representations commences an action to recover damages for alleged fraud, and afterwards discovers that the defendant claims that he did not at any time have any knowledge of the real character of the land, he may upon the payment of costs file an amended and substituted petition in equity asking a rescission of the contract of exchange. *Smith v. Bricker*, 86 Iowa 285, in which case it was held that the filing of the substituted petition amounted to a dismissal of the action at law, and that there was no such election of remedies as precluded the plaintiff from seeking equitable relief. See also *Holmes v. Clark*, 10 Iowa 423.

set up in a cross-bill, cross-complaint, or answer, as where the relief is directly sought by a bill in equity, with the qualifications, however, that the relief sought by the defendant must be germane to the case made by the plaintiff in his bill or complaint, and that such equitable relief can be decreed in favor of the defendant only where the parties to the action are such as would be required to a bill in equity asking the same relief.¹

In the Code States in which the distinctions between actions at law and suits in equity have been abolished, it is a very common practice for the defendant in an action at law based on a contract to file an answer or equitable counterclaim asking the rescission, cancellation, or reformation of the contract. Such applications for equitable relief when meritorious are universally entertained, but the general rule deducible from the cases is that where the defendant asks such equitable relief he must allege such facts as should be averred in an original bill asking the same relief.² It

1. *Leitensdorfer v. Delphy*, 15 Mo. 160, 55 Am. Dec. 140, in which case is asserted the jurisdiction of equity to reform an instrument when a mistake therein is set up in the answer by way of defense. See also *Avery v. Chapel*, 6 Conn. 270, wherein Daggett, J., declared that the defendant may, in his answer, set up a mistake in a deed or contract by way of defense to rebut an equity.

Necessary Parties.—Since an answer setting up an equitable defense and asking the rescission or reformation of an instrument is in the nature of a bill in equity, it can only be interposed where the parties to the action are such as would be required to a bill in equity asking the same relief. *Lestrade v. Barth*, 19 Cal. 660, in which case the defendant in an action of ejectment asked the reformation of a deed.

In Suits for Specific Performance.—In *Gillespie v. Moon*, 2 Johns. Ch. (N. Y.) 585, Chancellor Kent said: "On bills for a specific performance of an agreement in writing, the defendant has frequently been admitted to show, by parol proof, a mistake in such agreement, and by that means to destroy the equity of the bill. The relief on such bills is said to rest in discretion, and if the defendant can show surprise or mistake, it makes the special performance of such an agreement unjust."

Insufficiency of Original Bill.—Applying the familiar rule of equity pleading, when the original bill is without equity there is nothing on which to

found a cross-bill. *Dill v. Shahan*, 25 Ala. 694, 60 Am. Dec. 540.

Cross-bill Repugnant to Answer.—Where the original bill seeks the rescission of a contract for the sale of land and of a deed of trust made to secure the purchase money, and the defendant in his answer admits all the allegations of the bill and avers his readiness to contribute to the expense of the suit, a cross-bill in which he sets up the same trust deed as a valid security, and alleges that as surety for the complainant he has paid part of the purchase money, and asks that the trust deed be foreclosed for his benefit, is inconsistent with the answer. *Dill v. Shahan*, 25 Ala. 694, 60 Am. Dec. 540.

2. Defendant May Ask Reformation.—In an action on a written contract the defendant may in his answer, or by an equitable counterclaim, ask the reformation of the contract. *Eva v. McMahon*, 77 Cal. 467; *Lion v. McClory*, 106 Cal. 623; *Van Dusen v. Parley*, 40 Iowa 70, in which case it was declared that it is not incumbent upon the defendant to institute in the first place an action for the reformation of the instrument; *Casgrain v. Milwaukee County*, 81 Wis. 113.

In Ejectment.—The defendant in an action of ejectment may ask that the deed under which the plaintiff claims be reformed. *Eureka v. Gates*, 120 Cal. 54. See also *Meeker v. Dalton*, 75 Cal. 154, and *Hoppough v. Struble*, 60 N. Y. 430.

Defendant May Ask Rescission.—In support of the general proposition that the defendant may as an equitable

has been held that where the defendant in an action at law upon a contract seeks relief against a mistake he must interpose an

defense ask the rescission of a contract, see *Friday v. Parkhurst*, 13 Wash. 439; *Daly v. Brennan*, 87 Wis. 36, and *Scott v. Menasha*, 84 Wis. 73.

Right to Make New Parties.—Where the defendant in ejectment files a cross-complaint asking for the reformation of a deed from the defendant under which the plaintiff claims title, the defendant may ask that such new parties may be made defendants as are necessary for the determination of the issues raised by the cross-complaint. *Eureka v. Gates*, 120 Cal. 54, in which case the court cited *Winter v. McMillan*, 87 Cal. 256, 22 Am. St. Rep. 243.

Attachment of Mortgaged Property—Interplea Asking Reformation.—In *Kansas* it has been held, under Comp. Laws 1879, c. 80, § 45a, providing that any person claiming property, money, etc., attached may interplead in the cause, that where an action is brought on a note, and real estate of the defendant is attached, one to whom the defendant has given a mortgage may file an interplea and ask that a mistake in the mortgage be corrected so as to make the mortgage include the land attached. *Bodwell v. Heaton*, 40 Kan. 36.

Essential Averments of Bill in Equity Necessary.—In *Lestrade v. Barth*, 19 Cal. 660, in which case the defendant in an action of ejectment interposed an equitable defense and asked that a misdescription in certain conveyances might be reformed, the court said: "As we have had frequent occasion to observe, the defendant in such cases becomes an actor with respect to the matter presented by him, and his answer must contain all the essential averments of a bill in equity. The defense to an action of ejectment must meet the present claim of the plaintiff to the possession; and in order that an equitable defense may avail, the equity presented must be of such a character that it may be ripened, by the decree of the court, into a legal right to the premises, or such as will estop the plaintiff from the prosecution of the action."

Action to Foreclose Mortgage—Rescission for Fraud.—In *Lion v. McClory*, 106 Cal. 623, which was an action to foreclose a mortgage, the defendant in a cross-complaint set up that he had been induced to purchase the premises by certain false and fraudulent repre-

sentations concerning the same made by the plaintiff, and prayed that the sale be rescinded, and that the mortgage, as well as a certain cash payment, be delivered up and restored to said defendant. The court, however, found the facts for the plaintiff, and rendered a judgment accordingly.

Bill for Reformation—Cross-bill Asking Reformation of Another Deed.—Where a bill is filed to correct a mistake in a deed, and the defendant answers and admits the mistake and files a cross-bill asking the court to make the plaintiff's relief conditional upon the correction of another alleged error in the original deed to the plaintiff, such cross-bill is without equity and is demurrable. *Slater v. Cobb*, 153 Mass. 22. In this case the deed was given to settle the boundaries between the plaintiff and the defendant, and was intended to correct an earlier mistake in the original conveyance to the plaintiff by the defendant's predecessor in title. The defendant's cross-bill asked the correction of another alleged error in the original deed to the plaintiff, consisting in the omission of a restriction against building on the boundary line.

Action on Coupons—Rescission of Coupons and Bonds.—In an action on coupons which have been detached from municipal bonds, the defendant may answer by way of counterclaim and allege that the coupons and the bonds from which they had been detached are void, that the plaintiff is the owner of the bonds from which the coupons were detached, and that both the bonds and coupons are void, and ask that the same be canceled. *Scott v. Menasha*, 84 Wis. 73, in which case the decision was based on Rev. Stat. Wis., § 2656, subd. 1, providing that the defendant may set up a cause of action arising out of the contract set forth in the complaint as the foundation of the plaintiff's claim, which, if established, will defeat or in some way qualify the judgment to which the plaintiff is otherwise entitled. The court said: "The bond and coupons are simultaneously executed, the coupon being simply an incident to the bond, and are based upon the same consideration, and are the result of the same negotiations. It seems to us that this cause of action fulfils both clauses of

equitable counterclaim; ¹ and that the counterclaim, in order to entitle the defendant to equitable relief on the ground of fraud, must ask a rescission of the contract *in toto*, and must not be simply a counterclaim at law for damages. ²

X. DEMURRER TO BILL OR COMPLAINT.—In a suit for the rescission, cancellation, or reformation of a contract, the demurrer performs the same office as in other suits. In the notes will be found cases in which the court applied general rules as to the necessity and effect of a demurrer. ³

the section under consideration. It arises out of the contract which is the foundation of the plaintiff's claim, and it is connected with the subject of the action."

In an Action to Recover the Price of Goods Sold, the defendant may plead thereto, as a defense or counterclaim, that he purchased the goods on the faith of fraudulent representations made by the vendor as to quality, condition, etc. *Van Trott v. Wiese*, 36 Wis. 439, in which case the court cited *Craemer v. Wood*, 102 Mass. 441, and *Barber v. Kilbourn*, 16 Wis. 485.

1. *Casgrain v. Milwaukee County*, 81 Wis. 113, in which case the court said: "It cannot be by mere defense in an action at law."

2. *Daly v. Brennan*, 87 Wis. 36.

Prayer for Money Judgment—Allegations as to Rescission of Contract.—In *Herman v. Gray*, 79 Wis. 182, the court, in holding that the averments of the answer were "not sufficiently pleaded as a recoupment of damages or counterclaim," said: "The demand in such answer for judgment against plaintiff for the sums paid by defendant on account of his purchase of the property is entirely unsupported by any of the averments in the pleading. To entitle him to such relief, the defendant must aver facts showing a rescission of the contract of purchase, or which entitle him to have such rescission adjudged, and there must be a demand of judgment therefor. Until the contract is rescinded in some manner defendant cannot maintain an action to recover such payments. No such facts are averred."

Suit to Set Aside Fraudulent Conveyance—Cross-bill by Grantee for Reformation.—In *Ellinger v. Crowl*, 17 Md. 361, which was a suit by creditors to set aside as fraudulent a deed from a debtor to his wife, the wife answered and filed a bill praying that the deed might be so reformed as to recite the true consid-

eration, or that a new one might be given her under the direction of the court.

3. Effect of Failure to Demur.—In a suit for reformation, if no demurrer is interposed to the complaint and no question as to its sufficiency is raised in the trial court objections thereto will not receive favorable consideration on appeal. *Haynes v. Whitsett*, 18 Oregon 454.

Objections to Superfluous Allegations.—Objections that some of the facts alleged are superfluous or afford no cause for relief cannot be taken by general demurrer. *Reese v. Reese*, 89 Ga. 645.

Allegations of Irrelevant Matter will not render the bill or complaint demurrable. *Newman v. Smith*, 77 Cal. 22, which was a suit to set aside a written contract on the ground of fraud.

Repugnancy in Bill.—In *New England Mortg. Security Co. v. Powell*, 97 Ala. 483, the court, in overruling a demurrer to a bill which sought the cancellation of a mortgage, said: "The repugnancy complained of is that the bill avers that the transactions are void under the laws of New York and at the same time offers to submit to the jurisdiction of the court and avers facts that show the mortgage is legal, and offers to pay whatever sum the court decrees to be due. The demurrer is to the whole bill. We may concede the correctness of the proposition it maintains, and eliminate from the bill the eleventh paragraph which sets up the facts designed to show that the note and mortgage are Alabama transactions and void for violations of our constitution. To sustain the demurrer as it is assigned, however, would put the entire bill out of court, which in view of what we have said would be improper. The real repugnancy is not presented so we can act upon it."

Admissions by Demurrer.—A demur-

XI. THE ANSWER OR PLEA — 1. In General. — In a suit for the rescission, cancellation, or reformation of a contract the same general rules as to the necessity for, the requisite allegations and denials of, and the effect of, an answer or plea, are applied as in other suits in equity, as is shown by the cases cited in the notes.¹

2. Requisites of Answer or Plea — Denials Must Be Responsive. — The answer should not be vague and evasive,² and the denials of the answer should be direct, full, and specific, and should contain complete responses to the interrogatories of the bill.³

rer to a bill to rescind a contract for fraud is governed by the ordinary rule and is taken to admit all material facts well pleaded, but not to admit conclusions of law or inferences of facts, and, as in other cases, the bill will be construed most strongly against the pleader. *Birmingham Warehouse, etc., Co. v. Elyton Land Co.*, 93 Ala. 549; *Dickerson v. Winslow*, 97 Ala. 491; *Gassert v. Black*, 11 Mont. 185.

Demurrer in Suit for Reformation. — On demurrer to a complaint or cross-complaint asking the reformation of a contract, the court does not inquire whether the matter set up therein would be sufficient as a legal defense in an action on the instrument, but will consider merely whether sufficient is alleged to appeal to a court of equity. *Gassert v. Black*, 11 Mont. 185.

1. Self-Crimination. — In an action to vacate a forged instrument the defendant will not be compelled to make an answer which will criminate himself. *Singery v. Atty.-Gen.*, 2 Har. & J. (Md.) 487.

Use of Answer of One Defendant Against Another. — As in other suits an answer of one defendant cannot be used as evidence against another. *Robinson v. Sampson*, 23 Me. 388. See also in general article ANSWERS IN EQUITY PLEADING, vol. 1, p. 863.

2. Freed v. Brown, 41 Ark. 495, in which case the reformation of a deed was sought; *Bryan v. Masterson*, 4 J. J. Marsh. (Ky.) 225, in which case it was declared that where relief is sought against a mistake and the answer is evasive, it may be construed as a virtual admission of the allegations of the bill.

Compelling Production of Deed. — In Georgia it has been held that where the plaintiff in an action to cancel a deed annexes to his bill a copy of the deed and calls on the defendant to answer as to the copy, and the defendant files a

cross-bill and annexes a copy of the same deed thereto, the court should, on the hearing of the cause, compel the defendant to produce the deed to be read in evidence. *Warner v. Graves*, 25 Ga. 369, in which case the court said: "The mode of proceeding is different in this state from the practice in England. Here, a special jury discharges most of the duties of the master as well as those of the chancellor. A party there may compel the production of books and papers, etc., before the master for examination, but there is somewhat more ceremony there than here in obtaining an order for that purpose. *Bennett's Ch. Pr.* 78. But a motion like that made in this case would be granted without notice. *Bettison v. Farrington*, 3 P. Wms. 363. The defendants, if taken by surprise, might have asked for time, and upon a proper showing that the papers could not then be produced, time would doubtless have been given; and, in that event, the case must have lain over." See also article DISCOVERY, PRODUCTION, AND INSPECTION, vol. 6, p. 728.

3. Allen v. Elder, 76 Ga. 674; *Triplett v. Gill*, 7 J. J. Marsh. (Ky.) 432; *Crane v. Prather*, 4 J. J. Marsh. (Ky.) 75.

Insufficient Denials. — In *Allen v. Elder*, 76 Ga. 674, the plaintiff alleged that it was intended to execute a good and sufficient mortgage, but that it was defectively executed, in that it had no scroll attached to the signature of the mortgagors, and that they failed to make a good mortgage in consequence of a mutual mistake of the law upon the subject. The defendant denied that its insufficiency was the result of a mutual mistake of the law, and answered that it was the result of mutual ignorance of the law. There was no denial of the intention charged in the bill to make a good and sufficient mortgage. The court said: "This disingenuous and insufficient answer, with

Denial of Facts Alleged Conjunctively. — Where the plaintiff in stating his grounds for relief alleges facts conjunctively, an answer denying such facts as conjunctively stated by the plaintiff is bad.¹

An Answer Is Sufficient if it fully denies in direct and positive terms any of the equity-giving allegations of the bill.²

Defense that Conveyance Was in Fraud of Creditors. — Where the bill does not disclose that the deed sought to be rescinded was given to defraud creditors the court will not inquire into the intent of the complainant where fraudulent intent is not set up by the defendant.³

Sufficiency of Plea. — The court, in a suit to correct a misdescription in a deed, applies the general rule that in considering the sufficiency of the plea, every fact stated in the bill, and not denied by the averments in the plea and by the answer in support of the plea, must be taken as true.⁴

3. Defense of Innocent Purchaser. — In a suit for the reformation of a deed a purchaser who derives his title from the original grantee in such deed, if he wishes to make the defense that he is an innocent purchaser without notice, must in his plea or answer

what appeared on the face of the instrument, admitted enough, under the rules of equity, to have entitled the complainant to the decree she prayed."

Denial of Value. — Where the plaintiff alleges that land was, on a certain day, worth a stated amount, an answer denying that the land was worth such stated amount is not a denial of the allegation in the complaint, but is an admission that the land was on the day mentioned worth any sum less than the amount stated, and raises no issue in relation to the value of the premises. *Scovill v. Barney*, 4 Oregon 288, in which case the court cited *Leffingwell v. Griffing*, 31 Cal. 232; *Lynd v. Pickett*, 7 Minn. 184; *Baker v. Bailey*, 16 Barb. (N. Y.) 54; *Davison v. Powell*, (Supm. Ct. Gen. T.) 16 How. Pr. (N. Y.) 467; *Salinger v. Lusk*, (Supm. Ct. Spec. T.) 7 How. Pr. (N. Y.) 430; and *Schaetzel v. Germantown Farmers' Mut. Ins. Co.*, 22 Wis. 412.

1. *Scovill v. Barney*, 4 Oregon 288, in which a material allegation of the complaint was that the plaintiff was "mentally infirm and not of sound mind, and so insane as to be wholly incapable of attending to business." The denial was that "the plaintiff was mentally infirm, and not of sound mind, and so insane as to be wholly incapable of attending to business." The court said: "This mode of answering is in violation of the common-law rules of pleading, and also of the

rule established by the code, which provides that the answer shall contain a specific denial of each allegation of the complaint controverted, or a denial thereof according to the defendant's information and belief."

2. *Abel v. Cave*, 3 B. Mon. (Ky.) 159, holding that where the plaintiff alleges an offer to rescind, the defendant in his answer may deny such allegations and put the plaintiff upon proof of it. See also *Reynolds v. Excelsior Coal Co.*, 100 Ala. 296, to the effect that an answer denying positively the allegations of fraud made against the defendant and giving an account of the execution of the deed which, if true, is consistent with honesty and fair dealing, is sufficient.

Answer Alleging Defendant's Ability to Perform Contract. — In an action to rescind a contract for the sale of land and to enjoin the transfer and collection of certain promissory notes given under it, on the ground that the contract and notes were procured by false and fraudulent representations as to the ownership of the land, it is a good defense that the plaintiff is in undisturbed possession of the land and that the defendants are ready, able, and willing to carry out the contract. *Simmons v. Hill*, 77 Iowa 378.

3. *Booth v. Booth*, 3 Litt. (Ky.) 57.

4. *Foster v. Winchester*, 92 Ala. 497, in which case the court cited 1 Dan. Ch. Pl. & Pr. (5th ed.), §§ 694, 695.

deny all knowledge of the mistake, not only at the time of his purchase but also at the time he paid the purchase money.¹

4. Effect of Denial — *a.* PAROL EVIDENCE OF MISTAKE IN INSTRUMENT. — In a suit for the reformation of a mistake in a deed or written contract the fact that the defendant in his answer positively denies the mistake does not prevent the introduction of parol evidence to show the mistake.²

b. BURDEN OF PROOF. — In a suit for the rescission, cancellation, or reformation of a contract the court will apply the usual rule of pleading that where the answer fully meets the allegations of the bill the answer will be taken as true unless the plaintiff overcomes the answer by sufficient proof; and according to the ancient rule of equity which still prevails in some states, where the answer is under oath it must be overcome by the testimony of two witnesses or the testimony of one witness with strong corroborating circumstances.³

1. *Allen v. McGaughey*, 31 Ark. 252, in which case, however, it was held that such defense cannot be interposed by a purchaser at an execution sale. See also *Byers v. Fowler*, 12 Ark. 286, and *Miller v. Fraley*, 21 Ark. 22.

Averments of Bona Fide Purchaser. — In *Hyland v. Hyland*, 19 Oregon 51, which was a suit for the reformation of a mistake, the court said, quoting the language of Baldwin, J., in *Boone v. Chiles*, 10 Pet. (U. S.) 211, that a defendant who interposes a plea, or answers that he is a purchaser in good faith without notice, must allege "the deed of purchase, the date, parties, and contents briefly, that the vendor was seized in fee, and in possession; the consideration must be stated with a distinct averment that it was *bona fide* and truly paid, independently of the recital in the deed. Notice must be denied previous to, and down to, the time of paying the money, and the delivery of the deed; and if notice is specially charged, the denial must be of all the circumstances referred to, from which notice can be inferred; and the answer or plea shows how the grantor acquired title."

Right to Specific Performance. — In an action to cancel a deed the defendant may plead and prove facts entitling him to specific performance of an oral contract to convey the land described in the deed, and the defendant need not plead the facts as a counterclaim and pray for affirmative relief, but he may plead them simply as a defense, though the former course is the better one. *Frede v. Pflugradt*, 85 Wis. 119.

Bill by a Purchaser — Claim by Defendants for Rents and Profits. — Where a purchaser asks the rescission of a contract, and he has been in the possession of the land described in such contract, and the rents and profits exceed the amount paid by the purchaser, no decree will be rendered against the purchaser for the balance unless the defendant claims it in his answer. *Higby v. Whittaker*, 8 Ohio 198.

2. *Gillespie v. Moon*, 2 Johns. Ch. (N. Y.) 585, in which case Chancellor Kent said: "It has been said that there was no instance of a mistake corrected in favor of a plaintiff against the answer of the defendant denying the fact of mistake. But I do not understand any of the *dicta* on this point to mean that the answer, denying the mistake, shuts out the parol proof, and renders relief unattainable, however strong that proof may be. The observations of Lord Eldon, in the case of *Townshend v. Stangroom* [6 Ves. Jr. 328], certainly imply no more than that the answer is entitled to weight, in opposition to the parol proof; but it certainly can be overcome by such proof. In that very case the answer denied the mistake, yet parol proof was held admissible."

3. See generally article ANSWERS IN EQUITY PLEADING, vol. 1, p. 863. See also for applications of the general rule to suits for rescission, cancellation, or reformation, the following cases: *Righter v. Roller*, 31 Ark. 170; *Johnson v. Walker*, 25 Ark. 196, which was a suit to rescind a contract on the ground of fraud; *Franklin v. Jones*, 22 Fla. 526,

c. DISSOLUTION OF INJUNCTION. — As in other suits in which an injunction is sought, the general rule is, that where the answer is full, and its denials of the facts constituting the equity of the bill are positive and complete and under oath, the injunction should be dissolved.¹

5. Admissions in Answer. — As in other suits, all allegations in the bill of material facts the truth or falsity of which must be known to the defendant will be taken as true on the hearing if the defendant answers without denying them.²

XII. TRIAL BY JURY — 1. **Right to Jury Trial** — In General. — A suit for the rescission, cancellation, or reformation of a contract being equitable in its nature is one proper to be tried by the court rather than a jury, but the court may, in its discretion, submit questions of fact to the jury.³

Joinder of Equitable and Legal Causes of Action. — Where, in one complaint, the plaintiff asks the reformation of a contract, and also

which was a suit for reformation; *Triplett v. Gill*, 7 J. J. Marsh. (Ky.) 432; *Cross v. Bean*, 81 Me. 525, which was a bill for reformation of a deed; *Showman v. Miller*, 6 Md. 479; *Wood v. Patterson*, 4 Md. Ch. 335; *Hall v. Claggett*, 2 Md. Ch. 151.

Denial of Mistake in Instrument. — Where reformation of an instrument is sought on the ground of mistake, and the mistake is denied in the answer, the mistake should be established clearly and satisfactorily by the strongest possible proof. *Triplett v. Gill*, 7 J. J. Marsh. (Ky.) 432; *Hall v. Claggett*, 2 Md. Ch. 151; *Watkins v. Stockett*, 6 Har. & J. (Md.) 435.

Denial of Fraud. — The court in an action to rescind a contract on the ground of fraud will apply the general rule that when a general replication is put in to an answer in chancery, all of the allegations of the answer that are responsive to the bill are taken as true, unless disproved or overturned by two witnesses, or by one with pregnant circumstances. *Hill v. Bush*, 19 Ark. 522, in which case the court cited *Spence v. Dodd*, 19 Ark. 166; *Shields v. Trammell*, 19 Ark. 62; and *Wheat v. Moss*, 16 Ark. 243. See also *Righter v. Roller*, 31 Ark. 170.

Rule as to Two Witnesses — Abolition by Code. — Civ. Code Ky., § 142, providing that the verification of the pleadings "shall not make other or greater proof necessary on the side of the adverse party," changed the rule requiring two witnesses or one witness with strong corroborating circumstances to overcome an answer in

chancery under oath. *Worley v. Tuggle*, 4 Bush (Ky.) 168, in which case reformation of a deed was decreed although the answer was under oath and the draftsman who drew the deed was the only witness.

1. *Hartley v. Matthews*, 96 Ala. 224; *New England Mortg. Security Co. v. Powell*, 97 Ala. 483, in which latter case the court cited *Weems v. Weems*, 73 Ala. 462; *Collier v. Falk*, 61 Ala. 105; and *Jones v. Ewing*, 56 Ala. 360.

And see for a more complete statement of the rule and of the exceptions thereto, article INJUNCTIONS, vol. 10, p. 869.

2. *Clough v. Adams*, 71 Iowa 17; *Booth v. Booth*, 3 Litt. (Ky.) 57. And see generally articles ANSWERS IN EQUITY PLEADING, vol. 1, p. 863, and ANSWERS IN CODE PLEADING, vol. 1, p. 777.

3. *MacLellan v. Seim*, 57 Kan. 471, which was an action to cancel a forged deed. The court said: "The cause was equitable in character, and might have been tried by the court alone, notwithstanding a demand for a jury by either party; as neither could demand it as a matter of right. It is usually the better practice for the court to try such issues alone; but the court may in its discretion order any issue or issues of fact to be tried by a jury, and error will not lie unless for an abuse of such discretion." Citing *Drinkwater v. Sauble*, 46 Kan. 170; *Yeaman v. James*, 27 Kan. 195; *Hunt v. Spencer*, 20 Kan. 126; and *Hixon v. George*, 18 Kan. 253. See also *Hill v. Miller*, 50 Kan. 659.

damages for the breach of the contract, it would seem that the equitable cause of action should be tried by the court, and the legal cause of action by the court and jury.¹

Verdict of Jury Advisory Merely. — An action to rescind a contract being equitable in its nature, the verdict of the jury is simply advisory, and the court may, in its discretion, modify the findings, or set the same entirely aside, and substitute its own conclusions upon the facts as well as the law.²

2. Instructions — In General. — A suit for the rescission, cancellation, or reformation of a contract being equitable in its nature, the giving or refusing to give instructions is within the discretion of the court, and its action in this regard is not subject to review on appeal.³ The instructions must be pertinent to the

1. *Cameron v. White*, 74 Wis. 425, which case, however, was decided under Rev. Stat. Wis., § 2843. In this case the court said: "In the regular order of proceeding in an action of this kind the equitable issue for the reformation of the contract should be first tried by the court, and afterwards the legal issues as to the breach and damages. * * * The fact that the court submitted all the issues to a jury in the first instance, and took their verdict upon such issues, was not error, as the court, after taking the verdict of the jury upon the issue upon the reformation of the contract, made and filed findings of fact and conclusions of law which sustain the judgment reforming the contract." *Citing Hammel v. Queen Ins. Co.*, 50 Wis. 240; *Gunn v. Madigan*, 28 Wis. 158; and *Harrison v. Juneau Bank*, 17 Wis. 340.

Order of Trying Issues — Where Defendant in Ejectment Asks Reformation.

— In *Lestrade v. Barth*, 19 Cal. 660, which was an action of ejectment, the defendant interposed an equitable defense and asked the reformation of certain deeds. It was held that the equitable defense "should be first passed upon by the court, as according to the determination of the claim of the defendant to the relief he seeks will the necessity of proceeding with the action at law depend;" the court saying: "The parties are entitled to a trial by jury upon the legal issues; but the court, sitting to administer equitable relief either by way of defense to an action of ejectment or affirmatively, sits as a chancellor, and, in the exercise of equitable powers, may or may not order an issue or issues to a jury in its discre-

tion; but in a great majority of cases the judge can as well pass upon the facts as a jury, and may do so with a great deal less delay and expense." *Citing Arguello v. Edinger*, 10 Cal. 160; *Estrada v. Murphy*, 19 Cal. 248; and *Weber v. Marshall*, 19 Cal. 447.

Where Defendant in Action on Insurance Policy Asks Reformation. — In *Colville v. Chubb*, (Supm. Ct. Gen. T.) 20 Civ. Pro. (N. Y.) 352, which was an action on an insurance policy, the defendant answered by way of counterclaim, alleging a mistake in the terms of the policy, and praying that the policy might be reformed so as to make the same express truly the contract. The court said: "It is undoubtedly true that the plaintiff cannot be deprived of the right to a trial by jury upon the cause of action set out in this complaint, but it is equally true that it would be idle to try his cause of action until the equitable cause of action set up in the answer has been disposed of." *Citing Born v. Schrenk*, eisen, 110 N. Y. 55.

2. *Kellogg v. Kellogg*, 21 Colo. 181.

In *Indiana* an action for the cancellation of a deed is of equitable cognizance and not triable by a jury, but the court may in its discretion call a jury to hear issues of fact and return findings thereon for the information of the court. *Thrash v. Starbuck*, 145 Ind. 673.

3. *Kellogg v. Kellogg*, 21 Colo. 181, in which case the court cited *Porter v. Grady*, 21 Colo. 74. See also *Hill v. Miller*, 50 Kan. 659, which was a suit to cancel a deed. And see article INSTRUCTIONS.

Submitting Question as to Title. — In an action to cancel a deed, if the plead-

issues made by the pleadings,¹ and they must be authorized by the evidence.²

Instruction as to Mental Incapacity. — Where the object of the suit is to set aside a deed on the ground of the grantor's insanity, the court may give the jury an instruction informing them what degree of mental incapacity is requisite to authorize the vacation of the deed.³

Undue Influence. — Where it is sought to set aside a deed procured by undue influence the court should instruct the jury as to

ings make the title to the land described in the deed the gist of the action, depending upon a question of fact, the court should submit such questions of fact to the jury. *Silberg v. Pearson*, 75 Tex. 287.

As to Plaintiff's Financial Condition. — Where the allegations of fraud and undue influence on the part of the defendant are based in part upon the circumstance that the plaintiff at the time of making the instrument sought to be canceled was financially embarrassed, an instruction that the jury may consider evidence as to the embarrassed financial condition of the plaintiff for the sole purpose of "illustrating and throwing light upon the plaintiff's mental condition" at the time of the making of the alleged fraudulent contract, is correct. *Tucker v. Roach*, 139 Ind. 275.

1. *Fitschen v. Thomas*, 9 Mont. 52, in which case reformation was sought by the defendants in their answer to an action for specific performance, and the court said: "Under the issues, the defendants could not show that there was no agreement entered into; for they were limited to proving that all parties had understood and agreed upon a contract different from that contained in the written agreement, to wit, the contract as set forth in their answer. If this had been a suit by the defendants to avoid the contract on the ground of mistake as to the subject-matter thereof, then the instructions asked would have been proper."

2. *Poss v. Huff*, 98 Ga. 377.

Question as to Plaintiff's Diligence. — As a general rule, where time becomes an essential of a right to recover, involving the question of diligence, it is the duty of the court to instruct the jury specifically on that question. *Parmlee v. Adolph*, 28 Ohio St. 10.

3. **Requisite Degree of Insanity.** — In *Raymond v. Wathen*, 142 Ind. 367, the court instructed the jury "that if it

was proved by a preponderance of the evidence that the grantor at the time he executed the deed did not possess that degree of mental capacity which would enable him to understand and act with discretion in the ordinary affairs of life, then the deed should be set aside." It was held that this instruction substantially stated "a correct exposition of the law relative to the degree of insanity sufficient to set aside the deed in controversy." Citing *Darnell v. Rowland*, 30 Ind. 342, and *Somers v. Pumphrey*, 24 Ind. 231.

Partial Imbecility. — In *Bowden v. Achor*, 95 Ga. 243, the court said: "The court instructed the jury that if the plaintiff was partially imbecile in mind, and if 'this partial imbecility consisted in her mental inability to understand the value of her property; to be in such a state of mind as that she would do what any friend would request her to do in respect to the disposition of her property; that she did not understand her rights; that she was mentally unable to protect herself in her negotiations with others in respect to her property; that she did not understand the value of money, and that she did not know one coin from another, or one bill of currency from another;' and if they believed from the evidence this was her mental condition, and were thereby convinced she did not have sufficient mental capacity to make a contract, she would not be bound by certain deeds she had executed, and they would not stand in the way of a recovery by her. We see no error in this charge, as against the defendant."

Instruction as to Testamentary Capacity. — Where the court holds as a matter of law that the instrument is a deed and not a will the court is not bound to give in charge to the jury anything whatever as to the law of testamentary capacity. *Owen v. Smith*, 91 Ga. 564.

how they should apply the law to the evidence in support of the alleged undue influence.¹

Instructions as to Mistake. — Where relief is sought on the ground of mistake the court must correctly inform the jury as to what constitutes such a mistake as is the basis for relief in equity.²

3. Interrogatories to Jury. — It is improper practice for the court to ask the jury to find specially whether or not the contract should be rescinded.³

XIII. REFERENCE TO MASTER OR REFEREE. — In a suit for the rescission, cancellation, or reformation of a contract the court may order a reference to a master, as in other suits in equity. Thus, if the parties cannot agree upon the amounts to be allowed for rents and profits, etc., the court will order a reference to a master to state the accounts between the parties. Such references are governed by ordinary rules.⁴

XIV. ALLEGATIONS AND PROOF — VARIANCE — In General. — As in other suits, there must be a substantial correspondence between the allegations of the bill or complaint and the evidence.⁵ Thus it has been held that if a case of actual fraud is

1. *Raymond v. Wathen*, 142 Ind. 367.

2. **Instructions as to Mistake.** — An instruction that a mistake to be the subject of correction must be a mistake in which all the parties to the contract participated, is too absolute. *Wyche v. Greene*, 26 Ga. 415, in which case the court said: "If one of the parties to a contract is mistaken in a matter, and the others know that he is, and do not apprise him of it, yet the mistake, though not one on their part, is the subject of correction. The case becomes one in which there is a mistake in one of the parties to the contract, and a fraud in the others. Such a case is even more readily the subject of relief at his instance than is a case in which there is nothing but a mistake, although that be a mistake extending to all the parties."

Reasonable Doubt as to Mistake. — In *Muller v. Rhuman*, 62 Ga. 332, in which case reformation of a deed was sought on the ground that it had been made by mistake, the court said: "The charge of the court that the jury must believe from the evidence beyond a reasonable doubt that the alleged mistake in the deed was committed, is to be understood as applicable to the admission of parol evidence to show a mistake in a written contract, and to that extent it was not error."

3. *Bell v. Hutchings*, 86 Ga. 562, in which case it was held that whether

the contract should be rescinded or not is a question for the court to decide upon the facts found by the jury, and that it is better to allow the jury to find as to special questions of fact without knowledge on their part as to the legal bearing of their findings. And see generally article SPECIAL FINDINGS.

4. *Harding v. Jewell*, 73 Me. 426. See also *Ladd v. Chaires*, 5 Fla. 395. See further article REFERENCE, vol. 17, p. 978.

Report — Findings as to Fraud. — In *Lavette v. Sage*, 29 Conn 577, in which case there was a reference to a committee, it was held that there was no force in the objection that the committee did not themselves expressly find fraud, but only certain facts from which fraud might be inferred; the court saying: "A court of equity has no occasion to find fraud, in so many words, as an inference of law, beyond what it does by announcing what the law is upon the facts established or admitted."

Reference to Referee to Take Account. — In *Paetz v. Stoppleman*, 75 Wis. 510, which was an action to rescind a contract and dissolve a partnership entered into pursuant thereto, on the ground of fraud, the court rescinded the contract and adjudged that an accounting be had and that a referee be appointed to take testimony and state an account.

5. *Cole v. Bean*, 1 Ariz. 364, which

alleged in the bill relief cannot be had upon proof of constructive fraud only.¹

When Fraud Need Not Be Proved Though Alleged. — Where the gravamen of the complaint is that a deed was procured without consideration, and the complaint also alleges that there was a confidential relation existing between the parties, and that the defendant was guilty of fraud, proof of want of consideration and of the relation existing between the parties as alleged will entitle the plaintiff to relief, although he fails to sustain his alle-

was a suit to cancel a deed for fraud and mental incapacity. See also *Goree v. Clements*, 94 Ala. 337, which was an action for cancellation on the ground of fraud. It was there held that the plaintiff cannot recover on a case inconsistent with the allegations of his bill, though admitted in the answer or established by the proof. See likewise *Reynolds v. Excelsior Coal Co.*, 100 Ala. 296; *Simms v. Greer*, 83 Ala. 263; *Winter v. Merrick*, 69 Ala. 86, and *Munchus v. Harris*, 69 Ala. 506.

As to the Necessity to Allege the Precise Grounds upon which the plaintiff seeks the rescission, cancellation, or reformation of a contract, see *supra*, VIII. 5. *Grounds for Equitable Relief.*

Deed Delivered in Escrow — Allegation of Forgery. — In *MacLellan v. Seim*, 57 Kan. 471, it was held that under a general allegation of forgery the plaintiff might show that he executed the deed in blank, and that while it was held in escrow the defendant, without authority, wrote his name as grantee in the deed and caused the same to be recorded.

Necessity to Prove Gist of Bill. — In *Tilden v. Streeter*, 45 Mich. 533, the court said: "The complainant is confined to the ground of action on which he has founded his case. He is not permitted to say now that he misstated the transaction and that he admits that he meant to convey the land fully and absolutely, but that the vice he wishes to complain of is that the defendant induced him thereto by undue influence. This would be in direct contradiction of the positive allegations of the bill and contrary to the scheme and equity of the case. The very gist of the bill is that the transaction was in truth not a sale nor an absolute conveyance, but an arrangement having no other end than the obtaining by complainant of one hundred dollars by way of loan and the giving of security therefor."

1. *Reynolds v. Excelsior Coal Co.*, 100 Ala. 296, in which case the court cited *Adams v. Thornton*, 78 Ala. 490.

Averment of Fraud — Proof of Representations Made under Mistake. — Where it is alleged as a ground for rescission that the representations made by the defendant were false and fraudulent and known to be untrue, and the evidence shows that the representations were false, but that they were made under mistake, and that the defendant did not know that they were false, a decree of rescission may be rendered on the theory that there was a mutual mistake. *Hood v. Smith*, 79 Iowa 621, in which case the court followed *Swezey v. Collins*, 36 Iowa 589, and cited *Mohler v. Carder*, 73 Iowa 582; *Seeberger v. Hobert*, 55 Iowa 756, and *Wilcox v. Iowa Wesleyan University*, 32 Iowa 367.

Proof of Mutual Mistake. — It has been held, however, that where the bill seeks the rescission of a contract for the sale of land on the ground of material misrepresentations by the vendor pending the negotiations, and it is alleged that such misrepresentations were made either fraudulently or through honest mistake on his part, and the evidence shows only a mutual mistake of both parties, the variance is fatal. *Porter v. Collins*, 90 Ala. 510, which case was cited with approval in *Reynolds v. Excelsior Coal Co.*, 100 Ala. 296.

Objections Waived. — Where it is alleged that the mistake because of which the reformation of a contract is sought was made by the person who wrote the contract, and the evidence shows that the mistake was a mutual mistake of the parties, unless objection to the admission of the evidence is made on the ground of variance the objection will be deemed to have been waived and cannot be taken for the first time on appeal. *Cordes v. Coates*, 78 Wis. 641.

gations of fraudulent representations.¹

XV. FINDINGS OF COURT AND DECREE — 1. In General. — In a suit for the rescission, cancellation, or reformation of a contract, both the findings of the court² and the decree must be in consonance with the case made by the bill, and no relief must be granted except upon the grounds which are alleged by the plaintiff,³ and no decree should be rendered except such as is prayed.⁴

As Respects the Parties. — The court should not adjudicate upon the rights and liabilities of one who is not made a party.⁵

Dismissal Without Prejudice. — Where it appears that although the plaintiff is not entitled to relief in equity he may have a right of action at law for damages, the court should not dismiss the bill absolutely, but should dismiss it without prejudice to the plaintiff's remedy at law.⁶

2. In Suits for Rescission and Cancellation — a. FINDINGS — General Requisites of Findings. — In a suit for the rescission or cancellation of a contract the sufficiency of the findings of the court is tested by general rules. Thus, they must be consistent with each other,⁷ they must be definite,⁸ they must not be incompatible with the pleadings,⁹ and they must comply with statutory

1. *Muzzy v. Tompkinson*, 2 Wash. 616.

2. *Burton v. Morrow*, 133 Ind. 221, holding that a finding outside the issues is a nullity and can give no support to a conclusion of law thereon.

3. *Travelers Ins. Co. v. Redfield*, 6 Colo. App. 190; *People v. Tynon*, 2 Colo. App. 131; *Hines v. Horner*, 86 Iowa 594; *Harding v. Des Moines Nat. Bank*, 81 Iowa 499; *Cates v. Raleigh*, 1 T. B. Mon. (Ky.) 164.

Decree for Specific Performance — In Favor of Plaintiff. — Where the bill contains sufficient averments to entitle the plaintiff to specific performance, upon the establishment of the case which it states, the court is authorized to grant relief of that kind, although the main purpose of the action is to obtain a decree canceling the contract. *Travelers Ins. Co. v. Redfield*, 6 Colo. App. 190.

In Favor of Defendant. — In an action to cancel a contract by which the plaintiff has agreed to convey land, where the defendant under the pleadings and evidence is entitled to specific performance, a decree for the specific performance of the contract upon his doing equity within a time named may be rendered. *Pryor v. Hunter*, 31 Neb. 678.

4. *Wooden v. Haviland*, 18 Conn. 101, which was a suit for reformation.

5. *Freeman's Bank v. Vose*, 23 Me. 98.

After the Death of a Party if his representatives are not brought in no decree ought to be passed which shall affect the rights of his representatives. *Ashmead v. Colby*, 26 Conn. 287, which was a suit for the rescission of a contract on the ground of fraud.

Must Dispose of Cause as to All Parties. — No final judgment should be entered without disposing of the case as to all the defendants served. *Godding v. Decker*, 3 Colo. App. 198, in which case a party defendant served with process did not appear.

6. *McCulloch v. Scott*, 13 B. Mon. (Ky.) 172, 56 Am. Dec. 561.

Variance Between Allegations and Proof. — Where the bill is insufficient to authorize the relief which according to the evidence the plaintiff is entitled to, the chancellor will sign a decree dismissing the bill without prejudice. *McElderry v. Shipley*, 2 Md. 25.

7. *Cole v. Bean*, 1 Ariz. 364, which was a suit to cancel a deed for fraud and mental incapacity.

8. *Duff v. Duff*, 71 Cal. 513.

9. *Cole v. Bean*, 1 Ariz. 364, which was a suit to cancel a deed for fraud and mental incapacity.

provisions, if any.¹

Findings as to Fraud. — Where the court finds facts which show that the instrument was obtained under circumstances which in conscience and good faith require it to be set aside, it need not expressly find fraud as an inference of law, as the decree itself is a sufficient finding and application of the law.²

Failure to Find All Facts Alleged. — Where it is alleged that the grantor in a deed was of unsound mind and incapable of making a deed, and that the grantee took an unfair advantage of him, a finding that the grantor was of unsound mind and that he made the instrument without consideration is sufficient to support a judgment canceling the instrument, and it is immaterial that the court further finds that the defendant took no unfair advantage of the grantor, and exercised no undue influence over him.³

1. Compliance with Statute. — Where the rescission of a contract is sought, general findings and conclusions that the contract is a valid and binding one are not a sufficient compliance with Rev. Stat. Wis., § 2863, requiring that the decision of the judge shall contain "the facts found by him." *Spence v. Geilfuss*, 89 Wis. 499.

2. *Lavette v. Sage*, 29 Conn. 577.

Finding that Representations Were False. — A finding which does not specifically state that the representations were false, but which finds facts which are inconsistent with and contradictory of the representations made, is sufficient. *Hick v. Thomas*, 90 Cal. 289.

That Plaintiff Believed Defendant's Representations. — Where it is found by the court that the defendant's misrepresentations were accompanied by threats and duress, a finding that the plaintiff believed the misrepresentations is unnecessary, but a general finding that the contract was procured by fraud implies that the plaintiff believed the representations. *Hick v. Thomas*, 90 Cal. 289.

General Finding of Fraud — Harmless Error. — A general finding that the instrument was procured by the defendant "by duress, menace, undue influence, and fraud," is not as specific as it should be, but a judgment based thereon will not be disturbed where it does not appear that the defendant has been injured by the failure to find more specifically. *Hick v. Thomas*, 90 Cal. 289.

Use of Technical Word "Damage." — Where the court finds, in an action to

rescind a contract on the ground of fraud, that the plaintiff was injured by the false and fraudulent representations of the defendant, it is immaterial that the technical word "damage" is not used. *Wainscott v. Occidental Bldg., etc., Assoc.*, 98 Cal. 253.

Finding as to Inadequacy of Consideration. — A finding that the contract was executed for a grossly inadequate consideration is a sufficient finding that the plaintiff was injured. *Hick v. Thomas*, 90 Cal. 289.

3. *Maggini v. Pezzoni*, 76 Cal. 631.

Immaterial Failure to Find. — The failure of the court to make a finding as to one of the averments of the complaint, whether the omission is from inadvertence or from a belief of the court that the averment was immaterial, is not error where a finding as to such averment would have made no difference in the result. *Lion v. McClory*, 106 Cal. 623.

Finding as to Neglect of Plaintiff. — In *Goodrich v. Lathrop*, 94 Cal. 56, which was an action to rescind a contract on the ground that it was executed through a mistake of fact, it was held that a finding by the court that "these mistakes were caused by the neglect of a legal duty on the part of plaintiff" was a finding of a conclusion of law, and was insufficient as the basis for a judgment for the defendant.

Objections on Appeal Not Raised Below. — In *Cordes v. Coates*, 78 Wis. 641, it was said: "It is said that there is a variance between the complaint and the findings of fact, in that it is alleged in the complaint that the mistake was that of the person who wrote the deed,

b. GENERAL REQUISITES OF DECREE — Decree Must Be Warranted by Pleadings. — In granting relief to the plaintiff no decree should be rendered except such as is warranted by the allegations of the bill.¹

Consistency of Decree with Findings. — The decree of the court must be consistent with the findings of fact.²

c. GIVING COMPLETE RELIEF TO PLAINTIFF AND DEFENDANT — (1) In General. — A court of equity, in decreeing the rescission or cancellation of a contract, applies the familiar rule that when a court of equity obtains jurisdiction, it will proceed to administer full equity, and adjust the rights of all the parties, and give complete relief.³

while the finding is that it was the mutual mistake of the parties. This variance is now of no importance. The testimony supports the finding, and there was no objection to its admission on the ground of variance. Had such objection been made at the trial, the court would have ordered the complaint amended to correspond with the proofs. The objection not having been so made, the variance must be disregarded."

1. *Cole v. Bean*, 1 Ariz. 364, which was a suit to cancel a deed for fraud and mental incapacity; *Coleman v. McKinney*, 3 J. J. Marsh. (Ky.) 246, in which case the court declared that proof without allegation is as ineffectual as an allegation without proof; *Ruffner v. Ridley*, 81 Ky. 165, in which case it was held that the court, in rescinding a contract relating to land, did not err in not canceling a contract between the parties concerning personal property, because the plaintiff's bill did not ask for such relief.

Cancellation on Bill for Reformation. — Where a bill is filed to have a deed absolute declared a mortgage, and the complainant fails to make out his case as made by the bill, and the bill contains no averments of inadequacy of consideration or other grounds authorizing a cancellation of the deed, a decree annulling the deed is erroneous. *Peagler v. Stabler*, 91 Ala. 308, in which case it was held that the bill should have been dismissed.

2. *Lawrence v. Gayetty*, 78 Cal. 128, in which case it was held that where fraud in the execution of the instrument is the only theory upon which the plaintiff is entitled to its cancellation, a finding that there was no false representation or fraud in fact, will ren-

der it improper to enter a judgment canceling the instrument. See also *Hines v. Horner*, 86 Iowa 594.

Form of Decree. — See *Galloway v. Merchants Bank*, 42 Neb. 259, for the form of a decree canceling and annulling a deed for fraud.

3. *Paetz v. Stoppleman*, 75 Wis. 510, in which case the rescission of a contract was asked on the ground of fraud, and it appearing that a partnership was consequent and became necessary upon the tenancy in common and joint use of the property by the plaintiff and the defendant, the court not only rescinded the contract but dissolved the partnership and ordered a reference to a referee to state an account. See also in support of the text for further applications of the rule, *Lyon v. Dees*, 101 Ala. 700; *Donald v. Beals*, 57 Cal. 399; *Edwards v. Hanna*, 5 J. J. Marsh. (Ky.) 18; *Holland v. Anderson*, 38 Mo. 58; *Paetz v. Stoppleman*, 75 Wis. 510; and *Burhop v. Milwaukee*, 18 Wis. 431. 20 Wis. 338.

Allowance for Improvements. — As a general proposition, when a court of equity sets aside an agreement it will be on refunding what has been *bona fide* paid, making allowances for improvements. *Griffith v. Frederick County Bank*, 6 Gill & J. (Md.) 424.

Rescission at Suit of Purchaser. — In rescinding a contract for the sale of land at the suit of the purchaser, the court should decree an accounting for improvements, if any. *Per Robertson, C. J.*, in *Williams v. Rogers*, 2 Dana (Ky.) 374.

Rescission at Suit of Vendor. — In *Morgan v. Loomis*, 78 Wis. 594, the court set aside a conveyance of land made in consideration that the grantee should support the grantor, on the ground that there had been a breach of

(2) *Rescission in Toto — Placing Parties in Statu Quo.* — The court in decreeing the rescission or cancellation of a contract must, as a general rule, set aside the contract *in toto* or not at all.¹ In granting such relief the court requires equity at the hands of the complaining party as well as from the defendant, and will not treat the contract as valid in part and invalid in part, but will place the parties *in statu quo* by requiring the plaintiff to restore to the defendant everything of value which the plaintiff has received under the contract.²

the conditions of the deed, and it was held that the defendant was entitled to recover for money expended in making permanent improvements on the land, less a certain amount which represented the value of timber cut and removed therefrom; *citing* *Blake v. Blake*, 56 Wis. 392, and *De Long v. De Long*, 56 Wis. 514.

Value of Improvements as to What Time. — In *Williams v. Rogers*, 2 Dana (Ky.) 374, it was held, in rescinding a contract for the sale of land at the suit of the purchaser because of the failure of title, that, as the purchaser had had the use of his improvements without charge, their real money value at the time of the rendition of the decree was the just measure of his equitable right to compensation for them, and that he should not therefore be allowed their value at the times when they were respectively made.

Decree Against Defendant for Rents and Profits. — On canceling an instrument the court will proceed to afford complete relief, and if the allegations of the bill and prayer, and the evidence warrant it in doing so, it will, upon decreeing the cancellation of the instrument, compel the defendant to account for rents and profits. *Luffboro v. Foster*, 92 Ala. 477.

Reconveyance by Plaintiff Clear of Incumbrances. — The court, in rescinding a deed conveying land to the plaintiff on the ground that there was a mistake as to the subject matter, should, where the plaintiff has encumbered the premises, protect the defendant by requiring the plaintiff to reconvey the premises to the defendant clear of all encumbrances. *Clapp v. Greenlee*, 100 Iowa 586.

Cancellation of Articles of Partnership. — In a suit to cancel articles of partnership procured by fraud, and enjoin the defendant from using the plaintiff's name as a partner, the court having obtained jurisdiction for these purposes

will administer complete relief by ordering the defendant to repay the sums advanced or expended by the plaintiff on account of the partnership. *Smith v. Everett*, 126 Mass. 304.

Conveyance of Encumbered Property — Reimbursement of Defendant for Insurance and Interest. — Where the plaintiff is induced by fraud to convey land subject to a mortgage, he should be required by the decree to reimburse the defendant for money paid by the defendant on account of insurance and interest on the mortgage. *Ormsby v. Budd*, 72 Iowa 80.

1. *Bohall v. Diller*, 41 Cal. 533; *Kelley v. Owens*, 120 Cal. 502; *Neal v. Reynolds*, 38 Kan. 432; *Jeffers v. Forbes*, 28 Kan. 174.

2. In *Walker v. Pogue*, 2 Colo. App. 149, the court said: "In order to rescind, parties must be placed *in statu quo*; without such result there can be no rescission except by mutual consent. This principle is so universal that no authorities are needed in its support." See also the following cases:

Arkansas. — *Davis v. Tarwater*, 15 Ark. 286; *State v. Morgan*, 52 Ark. 150.

California. — *Kelley v. Owens*, 120 Cal. 502; *Red Jacket Tribe No. 28 v. Gibson*, 70 Cal. 128; *Sanchez v. McMahon*, 35 Cal. 218.

Connecticut. — *Peck v. Hoyt*, 39 Conn. 9; *Ashmead v. Colby*, 26 Conn. 287; *Sherwood v. Salmon*, 5 Day (Conn.) 439.

Iowa. — *Clapp v. Greenlee*, 100 Iowa 586; *Ormsby v. Budd*, 72 Iowa 80.

Kansas. — In *Neal v. Reynolds*, 38 Kan. 432, the court said: "In the nature of things, if this contract is to be rescinded, the parties who made it are to be placed with reference to the property in the identical situation in which they were before it was made. The contract must be rescinded *in toto*, if at all." See also *Constant v.*

Inability to Place Parties in Statu Quo — Making Compensation. — It has been held that where fraud is the ground of relief and the court cannot place the parties wholly *in statu quo* it may proceed to do so as nearly as possible by making compensation.¹

Illustrations of Rule Requiring Plaintiff to Do Equity. — A court of equity upon decreeing the rescission or cancellation of a contract, for the purpose of placing the parties *in statu quo*, will provide in its decree that the plaintiff shall refund to the defendant any moneys that the defendant may have paid under the contract,² that he shall, if a purchaser of land, restore the possession to the

Lehman, 52 Kan. 227; Jeffers v. Forbes, 28 Kan. 174.

Kentucky. — Bullitt v. Eastern Kentucky Land Co., 99 Ky. 324; Turner v. Clay, 3 Bibb (Ky.) 52, in which case in a suit for specific performance the court decreed a vacation of the contract because of the defendant's failure or inability to perform; Bradberry v. Keas, 5 J. J. Marsh. (Ky.) 446; Bodley v. McChord, 4 J. J. Marsh. (Ky.) 475; Camplin v. Burton, 2 J. J. Marsh. (Ky.) 216; Williams v. Rogers, 2 Dana (Ky.) 374; Williams v. Wilson, 1 Dana (Ky.) 157.

Maine. — Peterson v. Grover, 20 Me. 363.

Montana. — Maloy v. Berkin, 11 Mont. 138.

New Hampshire. — Weeks v. Robie, 42 N. H. 316.

New York. — Masson v. Bovet, 1 Den. (N. Y.) 69.

North Carolina. — Riggan v. Green, 80 N. Car. 236, 30 Am. Rep. 77.

Ohio. — Riddle v. Roll, 24 Ohio St. 572; Waters v. Lemmon, 4 Ohio 229.

Pennsylvania. — Pearsoll v. Chapin, 44 Pa. St. 9.

Wisconsin. — Welsh v. Blackburn, 92 Wis. 562; Porter v. Beattie, 88 Wis. 22; Paetz v. Stoppelman, 75 Wis. 510; Grant v. Law, 29 Wis. 99; Costigan v. Hawkins, 22 Wis. 74; Akerly v. Vilas, 21 Wis. 88; Hollenback v. Shoyer, 16 Wis. 499; Weed v. Page, 7 Wis. 503; Miner v. Medbury, 6 Wis. 295.

Prayer for Rescission or Specific Performance in Part. — Where a bill alleges the execution of a contract to convey land, and that the defendant has no title to the land and is in doubtful circumstances, and prays a rescission of the contract, or for a specific execution of the contract for as much of the land as the defendant may be able to convey, and it does not appear that the defendant has a perfect title to any part

of the land or any color of title to any moiety of it, the plaintiff cannot complain of a decree rescinding the entire contract. Williams v. Rogers, 2 Dana (Ky.) 374.

1. Myrick v. Jacks, 33 Ark. 425. See also Warfield v. Warfield, 76 Iowa 633, holding that a decree setting aside a deed to land on the ground of plaintiff's insanity should be so framed as to place the parties *in statu quo* as near as may be.

2. Sanchez v. McMahon, 35 Cal. 218.

Vendee's Equitable Lien for Purchase Money. — Where a vendor has failed to

put the vendee in possession, and the vendee has a lien for purchase money paid the vendor, equity will protect such lien, and upon rescinding the contract will not compel the vendee to surrender his equitable title to the land until he has been reimbursed the sum paid the vendor. Bullitt v. Eastern Kentucky Land Co., 99 Ky. 324.

In Cooper v. Merritt, 30 Ark. 686, in which case the plaintiff asked on the ground of fraud the rescission of a contract for the sale of land to the plaintiff to him, the court said: "It seems now to be very well settled that upon a rescission of a contract for the sale of land, the vendee has an equitable lien upon the land for the money advanced upon it." Citing Mackreth v. Symmons, 1 Hare & W. Lead. Cas. 264; Brown v. East, 5 T. B. Mon. (Ky.) 407; and Wickman v. Robinson, 14 Wis. 494.

Purchase Money Received by One Privy to Fraud. — Where a conveyance from the plaintiff to the defendant is not rescinded, but the judgment is that the agreement was void *ab initio* and that no title ever passed from the plaintiff to the defendant because the sale was made under a power of attorney procured through fraud, the defendant is not entitled to a decree against the plaintiff for restitution of a part of the

defendant,¹ that the plaintiff shall restore such chattels as he has received under the contract,² that the plaintiff, if he has received a promissory note, shall deliver it up for cancellation,³ and that the plaintiff shall account for the net income of land of which he has had possession under the contract.⁴

d. MODES OF AFFORDING RELIEF TO THE PLAINTIFF. — The court in a suit for the rescission or cancellation of a contract affords relief to the plaintiff in various ways, according to the circumstances of the particular case; *c. g.*, the court may require

purchase money paid to the attorney who was privy to the fraud. *Sanchez v. McMahon*, 35 Cal. 218.

Payment in "Commonwealth's Paper."

— In *Bodley v. McChord*, 4 J. J. Marsh. (Ky.) 475, in which case the purchase money for land had been paid in commonwealth's paper, it was held that the court in rescinding the contract should not decree a restitution of the commonwealth's paper in kind, but only its value.

1. *Waters v. Lemmon*, 4 Ohio 229, holding that a decree directing the purchase money to be refunded the plaintiff in unconditional possession of the land purchased by him, is erroneous. See also *Williams v. Wilson*, 1 Dana (Ky.) 157.

Provision for Reconveyance from Plaintiff. — The court, upon rescinding a deed for fraud, should insert in the decree a provision for the reconveyance from the plaintiff to the defendant. *Red Jacket Tribe No. 28 v. Gibson*, 70 Cal. 128.

Form of Proper Decree. — In *Sherwood v. Salmon*, 5 Day (Conn.) 439, the court decreed pursuant to the prayer of the bill "that the contract should be rescinded, that the petitioner should reconvey the land, and the respondent refund the purchase money." The court said: "This would place the parties in their former condition, and would do complete justice; for it would not be right that the petitioner should recover the purchase money, and retain the land; and it would be difficult to find a proper measure of damages, if the land be not reconveyed."

Accountability of Plaintiff for Waste. — In rescinding a contract for the sale of land at the suit of the purchaser, the court should require an accounting for waste, if any. *Per Robertson, C. J.*, in *Williams v. Rogers*, 2 Dana (Ky.) 374.

2. **Restoration in Kind.** — In decreeing

the rescission of a contract, the court should give back to the defendant the thing which he gave and not mere money compensation therefor, unless, without the fault of the rescinding party, the thing cannot be restored. *Kelley v. Owens*, 120 Cal. 502.

3. Directing Cancellation of Note.

— In rescinding a contract of sale on the ground of fraud at the suit of the seller, who has received a promissory note for the price of the goods, the court should direct a delivery and cancellation of the note. *Bradberry v. Keas*, 5 J. J. Marsh. (Ky.) 446.

4. *Porter v. Beattie*, 88 Wis. 22, wherein it was held that upon cancelling a contract procured by fraud by which land was sold to the plaintiff, the plaintiff should account for the net income of the land during the time of his possession thereof.

Offsetting Use of Property Against Interest of Purchase Money. — Where, on rescinding a contract for the sale of land, at the suit of the purchaser, a decree is rendered in favor of the plaintiff for the purchase money, he is not entitled to interest where he has had the use of the land which is more than equivalent to the interest. *Bodley v. McChord*, 4 J. J. Marsh. (Ky.) 475.

In *Williams v. Rogers*, 2 Dana (Ky.) 374, it was held that in decreeing a rescission of a contract for the conveyance of land, because of the vendor's inability to convey the legal title, the land should be restored to the vendor without any account for profits, and the price should be refunded to the vendee without interest; although there may be exceptions to this rule. The court declared that the parties by such a decree are reinstated "according to their own estimate of equivalents — the one deeming the use of the price, to him, equal to that of the land, and the other deeming the use of the land, to him, equal to that of the price."

that the contract, if in writing, shall be delivered up and canceled,¹ that the respective parties shall execute to each other such deeds as may be necessary to do equity,² or under some circumstances the court may direct a sale of the land embraced in the contract.³

1. *Bradberry v. Keas*, 5 J. J. Marsh. (Ky.) 446, in which case it was declared that "the decree rescinding the contract will of course direct a delivery and cancellation of it;" *Ellison v. Beannabia*, 4 Okla. 347, in which case the court having found that a deed had been procured by fraud "adjudged the said conveyance to be illegal and void; that the same be cancelled, and the plaintiff have costs."

Judgment Declaring Conveyance Invalid. — In *Gibbons v. Peralta*, 21 Cal. 629, the court said: "He [the plaintiff] objects that the conveyances are not expressly set aside; but the judgment determines their invalidity, and the effect is to remove the cloud resulting from their execution. We are of opinion, therefore, that the objection is not well taken, and that the judgment secures to the parties concerned all the plaintiff asks in respect to the conveyances."

Conveyance in Consideration of Agreement to Support Grantor. — Where land is conveyed upon the consideration that the grantee shall support the grantor, and there is a breach of such conditions, the decree should not be based upon the theory that the land conveyed should be held and the same or its equivalent should from time to time as circumstances require be expended for the support, maintenance, etc., of the grantor, with the right to permanently retain all not so expended, but that in case the grantee at any time finds it for his advantage, interest, or convenience not to further execute such a trust, he shall be at liberty to refuse further performance and reclaim all that he has expended, less rents and profits actually received. The court will set aside the deed and adjudge the title to the land to be in the grantor, subject to the payment at his death, or sooner at his option, of such amount as the grantee is entitled to for improvements. *Morgan v. Loomis*, 78 Wis. 594. Compare *Powers v. Powers*, (Ky. 1897) 39 S. W. Rep. 825.

Decree Quieting Title in Plaintiff. — Where it is alleged by the plaintiff as a ground for rescinding a contract for

the purchase of land that the defendant represented that the land, as described and pointed out to the plaintiff, included a part of an adjoining lot, and that such representations were false and fraudulent, and the evidence fails to establish that the representations were false and fraudulent, the court should not enter a decree rescinding the contract of sale, but should enter a decree quieting the title in the plaintiff. *Coughlin v. Richmond*, 77 Iowa 188.

2. *Jackson v. Jackson*, 94 Cal. 446; *Pierson v. Pierson*, 5 Del. Ch. 11.

Requiring Reconveyance — Prayer of Petition. — In *Riddle v. Roll*, 24 Ohio St. 572, which was an action by heirs to have certain deeds set aside as fraudulent, the court in holding that a decree requiring the reconveyance of the land embraced in the deed was proper, said: "The substance of the prayer of the petition was that the title should be restored to the heirs. The specific prayer was that this should be done by cancellation of the deeds made by the administrator and by Parker. The decree effects the same result by a reconveyance. Besides, the petition contained also a prayer for general relief, under which it is quite plain to us that the court might properly make the decree in question."

3. **Decreeing Sale of Land.** — Where a bill is filed by an insane person praying that a deed made by him while insane to the defendant be vacated and that the land be restored to him or sold, and a sale is directed by the decree, the defendant cannot complain that the averments in the bill are not sufficient to authorize a sale of the land, because if there is any error in this respect the defendant is not injured thereby. *Wampler v. Wolfinger*, 13 Md. 337.

Conveyance in Consideration of Agreement to Support Grantor — Receiver. — In *Kentucky* it has been held that where land is conveyed in consideration of \$100 and the grantee's agreement to contribute to the support of the grantor during the latter's life, and such agreement is not performed, the court should not decree a cancellation of the deed, but should adjudge a sale

Cancellation of Indebtedness Secured by Deed of Trust. — A decree canceling an indebtedness secured by a deed of trust presents a means of making record evidence of the fact of such cancellation, and the legal effect of such cancellation is to release the premises from the incumbrance placed thereon and to release the deed of trust.¹

e. AWARDING DAMAGES TO THE PLAINTIFF — Where Plaintiff Is Not Entitled to Rescission. — Where a bill for rescission on the ground of fraud is insufficient to entitle the plaintiff to such relief the court has no jurisdiction to render a pecuniary judgment for money advanced and paid out for the defendant, or for damages resulting from the defendant's fraudulent representations, or the breach of the defendant's warranty of title, as the plaintiff's remedy is at law.²

In Actions under the Code, however, it has been held that even where the plaintiff does not by his proof make out a cause for equitable relief the court may render a judgment for damages.³

of the land, and out of the proceeds pay the grantor the sum which the grantee should have paid for the grantor's support, or else place the land in the hands of a receiver to be rented out and the proceeds to be applied to the discharge of the grantee's obligation. *Powers v. Powers*, (Ky. 1897) 39 S. W. Rep. 825. Compare *Morgan v. Loomis*, 78 Wis. 594.

1. *Barth v. Deuel*, 11 Colo. 494, in which case the court cited *McNair v. Picotte*, 33 Mo. 57.

2. *Betts v. Gunn*, 31 Ala. 219.

Judgment for Value of Land. — In *Coe v. Turner*, 5 Conn. 86, in which case the plaintiff sought the rescission of a deed which had been deposited in escrow and improperly delivered by the depository in violation of his trust, the court said: "If the remedy requisite was to free the title from a cloud which hung over it, or anything besides which impaired it, this should specifically have been decreed, and no judgment have been rendered for the value of the land."

3. *Lawrence v. Gayetty*, 78 Cal. 128, which was an action to cancel a deed on the ground that it was procured without consideration and by fraudulent promises which the defendant had no intention to perform. The prayer was that the property conveyed be restored to and reinvested in the plaintiff, and for general relief. The court having found that there was no fraud, but that the deed was executed without consideration, it was held that the prayer

was such as to entitle the plaintiff to a judgment for damages although he was not entitled to a rescission.

In Action for Reformation. — In *New York* it has been held that in an action for the reformation of a deed by the correction of a mistake therein, and for the recovery from the defendant of a sum of money, although the plaintiff fails to establish any right to equitable relief he may recover judgment on the cause of action at law. *Fairchild v. Lynch*, 42 N. Y. Super. Ct. 265.

Effect of Transfer to Bona Fide Purchaser. — In *Wisconsin* it has been held that where the cancellation of a note is sought on the ground that it was procured by fraud, if it appears that the note has been transferred to a bona fide purchaser, the defendant will be required to amply protect the plaintiff against any loss from such transfer. *Porter v. Beattie*, 88 Wis. 22.

Inability to Restore Property. — In *Missouri* it would seem that on a bill in equity for rescission and cancellation of a contract in respect of an exchange of lands on the ground of fraud, although the prayer for rescission cannot be granted because the property has been changed in such a manner that it is impossible to restore it, yet the court may award the plaintiff compensation under the prayer for general relief. *Holland v. Anderson*, 38 Mo. 58, in which case *Wagner, J.*, said: "We entertain no doubt about the petition being sufficient under the

3. In Suits for Reformation — *a. FINDINGS.* — In a suit to reform an instrument, findings for the plaintiff which are as full and specific as his allegations as to the mutual mistake of the parties, are sufficient.¹

b. GIVING COMPLETE RELIEF TO PLAINTIFF AND DEFENDANT. — In a suit for the reformation of an instrument the court should by its decree give complete relief to the plaintiff and defendant, and apply the general rule which permits and requires a court of equity when it has jurisdiction for one purpose to extend its jurisdiction to all matters in controversy;² but no relief should be granted except such as is in some way germane to the gravamen of the bill.³

Compensating Defendant for Improvements. — In relieving against a mistake in a deed, if the defendant has expended any money in making improvements upon land to which he has no title under the deed as reformed, compensation may be allowed therefor.⁴

c. PROVISIONS OF DECREE AS TO REFORMATION — (1) *Discretion of Court.* — In a suit for reformation the court has a wide discretion, the object of the court being to give the parties the same beneficial result which would have flowed from the agreement had the mistake never existed.⁵

general relief clause to enable the plaintiff to obtain compensation, providing the evidence made out a case showing he was entitled to such relief. Fraudulent misrepresentation and concealment by a vendor of land, as to the nature, quality, quantity, situation, and title thereof, affecting the whole subject matter of the contract, will entitle the vendee to relief in equity, and he will not be left to his remedy at law; but such misrepresentation by the vendor, to furnish a ground for equitable interference, must be in reference to some material thing unknown to the vendee, either from not having examined, or from want of opportunity to be informed, or from special confidence being reposed in the vendor."

1. *Newton v. Hull*, 90 Cal. 487. See also generally article FINDINGS OF COURT, vol. 8. p. 931.

Findings as to Mutuality of Mistake. — The court need not in terms find that there was a mutual mistake, where it finds facts from which the necessary inference is that there was a mutual mistake. *Drummond v. Krebs*, (Kan. App. 1898) 55 Pac. Rep. 478.

Conclusions of Law as to Kind of Reformation. — In *Walls v. State*, 140 Ind. 16, which was an action for the reformation of a mortgage, it being insisted that the conclusions of law were not sufficiently full and explicit

as to the kind and manner of reformation that should be had, the court said: "It is not said that the conclusions of law in the case at bar are erroneous, but only that further and more detailed conclusions should be had. The conclusions are in favor of the appellee on the issues joined, and they are supported by the facts found. This is sufficient." *Citing Slaughter v. Favorite*, 107 Ind. 291, and *distinguishing Toops v. Snyder*, 47 Ind. 91.

Inconsistent Findings. — In an action to reform a mistake in a written contract a finding "that the defendant never made the contract by which it is sought to bind him in this action" is inconsistent with a finding "that in a verbal agreement made prior to the execution of said written instrument, it was stipulated that defendant should pay plaintiff interest on seven thousand dollars at the rate of one per cent per month," it not being sought by the action to bind the defendant to perform anything more than that. *Higgins v. Parsons*, 65 Cal. 280.

2. *Foster v. Winchester*, 92 Ala. 497; *Horner v. Bramwell*, 23 Colo. 238; *Harding v. Jewell*, 73 Me. 426.

3. *Foster v. Winchester*, 92 Ala. 497.

4. *Griffith v. Sebastian County*, 49 Ark. 24.

5. *Lestrade v. Barth*, 19 Cal. 660, in which case the court said: "The form

(2) *Expression of True Intent of Parties.* — A decree should be entered such as will carry out the true intent of the parties and make the instrument express what it was intended to express.¹

(3) *Requiring Execution of New Instrument.* — In a suit for the reformation of a deed or other written contract the court may, and usually does, require the respective parties to execute to each other such deeds, or to sign such contract, as may be necessary to do equity and protect the rights and interests of the respective parties,² but the decree should not direct new deeds

in which relief will be given, when a mistake in a material particular is established in a written agreement, must necessarily depend upon the circumstances of the particular case."

Enforcement of Contract with Compensation. — In *Ladd v. Chaires*, 5 Fla. 395, the court said: "Where there are no *indicia* of fraud, and the misdescription goes only to part of the estate, and is of such nature as not to prejudice the full enjoyment of the residue, or the objects the purchaser had especially in view in making the purchase, then the court will enforce the contract, with compensation." Quoting *Atkinson on Titles*, 100.

Decree Based upon Consent. — In *Coleman v. Woolley*, 3 Dana (Ky.) 486, it was alleged that two defendants purchased one-half of a lot, but that by mistake the other half was conveyed to them. One of the defendants consented to have the error corrected, provided the west half of the half actually purchased was conveyed to him, but the other failed to answer. It was held that a decree based upon such consent without giving the other defendant an opportunity to litigate the matter was erroneous.

1. *Kessel v. Kessel*, 79 Wis. 289; *Sawyer v. Hanson*, 48 Wis. 611.

Adjudicating Title in Respective Parties. — Where a deed by mistake conveys the entire interest of the grantor in a lot of land, instead of the undivided one-half of the land, and the defendant by his answer claims the ownership of the whole land, a judgment which decrees that the plaintiff is the owner in fee of an undivided one-half of the land, and that the defendant is the owner in fee of the other undivided one-half, while such provision might well have been left out, is not injurious to the defendant, and is not erroneous. *Holt v. Holt*, 120 Cal. 67.

Provision as to Time When Correction

Operates. — In *Essex v. Day*, 52 Conn. 483, which was a suit by a town for the correction of certain bonds which were in terms payable in twenty years from their date, but which were intended to be issued with a provision that the town might at its option pay them in ten years from date, the court rendered a decree for the correction of the bonds by inserting in them the omitted option; and it was said on appeal: "It is said that the decree does not fix the time when the correction of the mistake is to operate, whether from the date of the bonds, the commencement of the suit, or the date of the decree. But it is clear that the correction of the mistake is merely to make the bonds ten-twenty bonds, just as if they had been so printed at the outset. No particular time needed to be named. The bonds simply become changed from what, by the mistake, they are, into what the town intended that they should be; and the rights of the defendant are just what they would have been if the bonds had been made right at first."

2. *Pierson v. Pierson*, 5 Del. Ch. 11; *Barnes v. Barnes*, (Ky. 1891) 15 S. W. Rep. 1; *Burr v. Hutchinson*, 61 Me. 514.

Rectification or Reconveyance. — The court may, where a mistake has been made in a deed, and the grantee has received more land than it was intended to be conveyed, require a reconveyance, or it may direct that the deed may be rectified, as may be most convenient to the parties, the result being the same in either case. *Read v. Cramer*, 2 N. J. Eq. 277, 34 Am. Dec. 208.

Execution of Proper Deed on Pain of Rescission. — In *Harris v. Calmes*, 100 Ky. 272, it was declared that where by mistake a covenant is omitted from a deed, the court should decree that the grantor execute a proper deed and that the deed as corrected be complied

to be signed by parties who are not before the court.

Execution of New Deed by a Master or Commissioner. — A course sometimes pursued where there is a mistake in a deed is to direct a master or commissioner to execute for the parties who are under disability, and for those able to convey and who refuse to unite, such quitclaim deed, or other deed, as may be necessary to express the real intention of the parties,² or the court may direct a deed to be executed by the defendant under the supervision of the register.³

d. ENFORCEMENT OF INSTRUMENT AS REFORMED. — The court by its decree should not only reform the instrument, but also enforce the instrument as reformed, where such additional relief is prayed.⁴

with, or, in case of his refusal, that the contract be rescinded.

Production of Contract in Court and Correction. — In *Menomonee Locomotive Mfg. Co. v. Langworthy*, 18 Wis. 444, a judgment was entered directing that the contract be produced in court by the defendant, and corrected in accordance with the prayer of the complaint, and that until this was done the defendant be enjoined from using it, or any copy of it, as evidence, or making secondary proof thereof in any suit thereon, or any defense of any suit thereon.

Deed of Release. — In a suit for the reformation of a deed on the ground that it includes land which the complainant did not intend to convey, the court may require the plaintiff to execute a deed of release covering the land which was improperly included in the original deed. *Andrews v. Andrews*, 81 Me. 337.

Where Reformation Is Asked by Defendant in Ejectment. — In *Lestrade v. Barth*, 19 Cal. 660, in which case the defendant in an action of ejectment asked relief against a mistake in a deed, the court said: "In the present case that object would have been effected by a conveyance from the plaintiff, and had the equitable matter presented been first heard by the court, according to what we have indicated to be the proper practice, a direction for such conveyance would undoubtedly have been embodied in the decree, pursuant to the prayer of the answer."

1. *Coleman v. Woolley*, 3 Dana (Ky.) 486, in which case it was held that on a bill for the reformation of an instrument a decree requiring the execution of new instruments should not compel the wives of the parties to join in the

new instruments, where such wives are not before the court.

2. *Vincent v. Collins*, (Ky. 1895) 32 S. W. Rep. 1096.

Commissioner to Execute Deed for Decedent. — In *Kentucky*, in a suit to reform a deed, if the grantor is dead the court will appoint a commissioner to make the proper deed for the grantor. *Barnes v. Barnes*, (Ky. 1891) 15 S. W. Rep. 1.

3. **Execution of Deed under Supervision of Register.** — In *Weathers v. Hill*, 92 Ala. 492, which was a suit to reform a deed which improperly described the land intended to be conveyed, it was held that a decree that the strip of land in dispute be vested in the complainant was not authorized by Code Ala. 1886, § 3595, and the decree was so modified as to direct that the defendant should, within a certain time, under the supervision of the register, execute a proper deed of conveyance to the complainant; and that in default of the execution of such deed on or before the date mentioned, the decree as so modified should operate to vest the title to said strip of land in the complainant as fully as if said conveyance had been made by the defendant.

4. *Franklin Ins. Co. v. McCrea*, 4 Greene (Iowa) 229. See also *supra*, VI. 3. *Consistent Causes of Action.*

Judgment for Amount of Note as Reformed. — In *Gilbranson v. Squier*, 5 Wash. 99, in which case reformation of a note was sought, the court, in holding that it was proper to render a judgment for the plaintiff for the amount of the note as reformed, said: "The rule is well settled that a court of equity, once having obtained jurisdiction of a cause, retains it for all purposes; and, in accordance with the previous hold-

4. Injunction. — In a suit for rescission the court may decree that the defendant shall be enjoined from proceeding at law upon the contract or from enforcing a judgment upon the contract,¹ and in a suit for reformation the court may, where the circumstances of the case seem to require it, enjoin the defendant from taking any advantage of the mistake in the instrument.²

ings of this court, the motion to dismiss must be granted."

Reformation of Mortgage as Reformed. — In *Haynes v. Whitsett*, 18 Oregon 454, which was a suit to correct a mistake in a mortgage and foreclose it as reformed, the court said that when courts of equity "acquire jurisdiction for one purpose, they maintain it for all purposes, and administer complete relief; they neither invoke the aid of other courts or permit their interference with their process."

Decree for Damages under General Prayer. — In *Jaeger v. Whitsett*, 3 Colo. 105, in which case the plaintiff alleged that the defendant agreed to convey with warranty of title, and by false representations induced the plaintiff to accept a deed without such covenant, the court, in holding that reformation could not be decreed, because no such relief was demanded, said: "If, however, the general prayer extends to all relief that may be properly granted upon the facts alleged, it is doubtful whether the damages which might perhaps be recovered upon a covenant of warranty in an action at law can be awarded in equity upon a bill to reform the deed. The general rule is that courts of equity will not entertain bills for compensation or damages, except as incidental to other relief, where an adequate remedy for such compensation or damages lies at law. Story's Eq. Jur., § 798. Whether under this rule upon bill to compel a conveyance with warranty damages resulting from defects in the title to the property purchased can be recovered, is at least doubtful. And certainly, in so far as relief is grounded upon alleged false representations respecting the title to the lot, there is adequate remedy at law for the deceit."

Recital in Decree Awarding Damages. — Where the plaintiff asks the reformation of an instrument and damages for its breach as reformed, the court may render a decree in accordance with the prayer, and it is not necessary that the court should recite in the de-

cree that the damages are given by way of equitable relief. *West v. Suda*, 69 Conn. 60.

1. Injunction Against Judgment. — In *Waters v. Mattingly*, 1 Bibb (Ky.) 244, the plaintiff asked the rescission of a contract whereby he had bought a horse, and an injunction against a judgment which had been recovered on a note given in payment for the horse, and the court directed the entry of a decree "assigning a day on or before which the said complainant shall deliver up the said horse to the defendant, unless the said horse shall have died or escaped from the possession of the complainant before the said day to be assigned; and upon the said complainant's delivering or tendering said horse to the defendant, or showing that he has been prevented from so doing by the death or escape of said horse as aforesaid, then, and in that case, being proved to the satisfaction of the court, that they decree a perpetual injunction against the judgment at law complained of, with costs at law and in chancery."

2. Injunction Against Conveyance of Land. — The court may enjoin the defendant from making any conveyance of the land intended to be conveyed, but which by mistake was omitted. *Burr v. Hutchinson*, 61 Me. 514. See also *Farley v. Bryant*, 32 Me. 474, where the decree provided that "all the defendants be perpetually enjoined from claiming to own the tract of land excluded from the conveyance by a correction of that mistake, and from the exercise of any acts of ownership over the same, and from conveying or attempting to convey the same."

Injunction Against Judgment. — Where a mistake has been made in a settlement pursuant to which a judgment bond is executed, and afterwards a judgment is procured upon the bond, upon a bill in equity for relief the decree will be for a perpetual injunction against the judgment to the extent that it is inequitable. *McMullen v. Lockwood*, 4 Del. Ch. 568.

5. Relief under General Prayer. — In a suit for the rescission, cancellation, or reformation of a contract the court applies the familiar doctrine that if the plaintiff in his special prayer mistakes the relief to which he is entitled, in response to the prayer for general relief he may be awarded any relief not inconsistent with the case made by the pleadings or with the special prayer, to which the pleadings and evidence entitle him,¹ but the court will not, under a general prayer for relief, make a decree or grant relief which has no proper basis in the facts set up in the bill or petition.²

6. Protection of Strangers. — In a suit to set aside a deed on the ground of the maker's mental incapacity, where it appears that the rights of creditors and purchasers have intervened since the

1. *Worsley v. Burlington Ins. Co.*, 74 Iowa 464; *Franklin v. Greene*, 2 Allen (Mass.) 519; *Barkwell v. Swan*, 69 Miss. 907; *Silberberg v. Pearson*, 75 Tex. 287, in which case the court cited *Trammell v. Watson*, 25 Tex. Supp. 210.

Decree for Specific Performance. — Although the main object of the bill is to procure a rescission of the contract, yet if the bill contains a prayer for general relief, and it appears that a rescission of the contract cannot be decreed, the court may, if the evidence warrants it, render a decree for specific performance. *Edwards v. Hanna*, 5 J. J. Marsh. (Ky.) 18.

Reformation of Instrument in Suit for Cancellation. — In *Grafton v. Remsen*, (Supm. Ct. Spec. T.) 16 How. Pr. (N. Y.) 32, the complaint prayed that an instrument be declared "void, null, and of no effect," and this relief was denied because there was no evidence to warrant it, but under a prayer "for such further or other relief as may be agreeable to equity and good conscience" the court allowed the instrument to be reformed by inserting in it a power of revocation.

Injunction Against Waste. — Where the prayer is that a sale of land be set aside and that the defendant be restrained from making any conveyance of the premises, and the bill also contains a general prayer, the general prayer is sufficient to authorize a decree enjoining the removal of gravel from the land. *Thompson v. Heywood*, 129 Mass. 401.

Trespass to Try Title — Rescission Under General Prayer. — In *Texas*, in an action of trespass to try title, where there are allegations impeaching the

validity of a deed and a prayer for restitution of the premises and for general and equitable relief, the court may, under the general prayer, set aside the deed. *Garvin v. Hall*, 83 Tex. 301, in which case the court said: "The circumstances attending the sale, added to the inadequacy of price, are abundantly sufficient cause for setting it aside. It is true that the special prayer for relief is for the restitution of the premises; but there was an offer to refund the purchase money, and a prayer for general and special relief, which we think would entitle the plaintiffs to have judgment setting aside the sale and for recovery of the lands as the result thereof."

2. *Casady v. Woodbury County*, 13 Iowa 113, in which case it was held that the court could not, under a general prayer, correct or reform a contract made under a mistake of law or fact, because the bill was framed upon the idea that the contract therein set forth was legal and binding upon the parties and should be specifically performed, and there was no allegation that the parties had innocently mistaken the law in fixing the terms of the contract. See also *Crow v. Owensboro, etc.*, R. Co., 82 Ky. 134, which was a suit to rescind a contract.

Judgment as in Trespass to Try Title. — In *Texas* it has been held that in an action to cancel a deed, where the petition contains a prayer for general relief and the defendant sets up title in himself under the deed, the action is practically one of trespass to try title, and that instructions and a judgment applicable to the question of title are appropriate. *Silberberg v. Pearson*, 75 Tex. 287.

execution of the deed, the court should respect their rights;¹ but where rescission is sought on the ground of fraud, purchasers from the grantee who had notice of the plaintiff's claim of fraud are not entitled to protection.²

1. *Reeve v. Bonwill*, 5 Del. Ch. 1.

Protecting Interests of Strangers. — In *Ashmead v. Colby*, 26 Conn. 287, the cancellation of certain notes was sought on the ground that they had been procured pursuant to a conspiracy to defraud the plaintiff, and it was insisted that as there was nothing to show in what proportion the defendants were interested in the notes, and as there were certain parties to the conspiracy who were strangers to the action, it was impossible to frame a decree without doing violence to the interests of parties not before the court; but the court decreed that the defendants should release and discharge all such interests as they, or either of them, had in the fraudulently procured notes, and enjoined them from assigning or in any mode attempting to enforce or collect the notes. The court said: "This, while it is just to the parties

before the court, will leave the interests of all other persons to be considered without prejudice whenever they shall institute proceedings for the purpose of enforcing any rights growing out of these instruments."

Protection of Mechanics' Lien. —

Where, after the procurement of a deed by fraud, innocent mechanics perfect a lien for improvements upon the premises conveyed, the court in its decree of rescission should protect such mechanics' liens, and should not set aside the deed and discharge the property from all liens, but a personal judgment should not be rendered against the plaintiff for the amounts due the lienholders, as the property only is liable for their payment. *West v. Badger Lumber Co.*, 56 Kan. 287.

2. *Brady v. Harper*, (Ky. 1895) 30 S. W. Rep. 664.

RESCRIPT.

See articles *DECISIONS*, vol. 5, p. 936; *MANDATE AND PROCEEDINGS THEREON*, vol. 13, p. 835; *OPINIONS OF COURTS*, vol. 15, p. 304.

RESCUE.

See article *ESCAPE, PRISON BREAKING, RESCUE*, vol. 7, p. 913.

RESERVED CASE.

See articles *CERTIFIED CASES*, vol. 3, p. 918; *REPORT AND CASE MADE*, *ante*, p. 725.

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See article *OBSTRUCTING JUSTICE*, vol. 15, p. 1.

RESTITUTION.

BY HENRY STEPHEN.

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I. SCOPE OF ARTICLE. — This article deals with the restitution of property to one improperly deprived of it by virtue of a writ of *habere facias possessionem*; restitution to a party, after the reversal of a judgment against him, of, as far as may be, all that he lost by occasion of the judgment; and restitution by a plaintiff who has recovered a judgment and enforced it as preliminary to his right to appeal therefrom.¹

II. OBJECT OF RESTITUTION. — The object of restitution is to restore to a party the specific thing, or its equivalent, of which he has been deprived by the enforcement of a judgment against him.²

III. RIGHT TO RESTITUTION — 1. **As Preliminary to Appeal or Error by Plaintiff.** — Where a plaintiff in an action at law has recovered a judgment the payment of which has been coerced from the defendant, an appeal afterwards taken by such plaintiff

1. Statutes of Forcible Entry and Detainer in many instances apply the term "writ of restitution" to what is known at common law as a writ of possession, as to which see article POSSESSION, WRIT OF, vol. 16, p. 744.

2. *Haebler v. Myers*, 132 N. Y. 363.

may be dismissed on motion. And if the plaintiff coerces payment after he has taken such appeal, the appellate court, on being informed of such proceeding, will withhold a certificate of reversal unless the money collected is restored to the defendant.¹

In Courts of Chancery and in cases where the defendant has voluntarily paid the judgment or decree without being coerced by execution, restitution will not always be enforced as a preliminary to hearing an appeal or permitting the plaintiff to assign error.²

2. After Reversal on Appeal or Error—*a.* WHERE JUDGMENT IS FINAL—(1) *In General.*—Where a judgment or decree of an inferior court is reversed by a final judgment in a court of review, a party is in general entitled to restitution of all things lost by reason of the judgment in the lower court; and accordingly the courts will, where justice requires it, promptly and as far as practicable place him as nearly as may be in the same condition he stood in previously.³

1. *Hall v. Hrabowski*, 9 Ala. 278; *Bradford v. Bush*, 10 Ala. 274; *Knox v. Steele*, 18 Ala. 815; *Riddle v. Hanna*, 25 Ala. 484; *Murphy v. Murphy*, 45 Ala. 123; *Earle v. Reid*, 25 Ala. 463; *Shingler v. Martin*, 54 Ala. 354; *Phillips v. Towles*, 73 Ala. 406; *Houck v. Swartz*, 25 Mo. App. 17.

The Reason for the Rule is that it is deemed both vexatious and oppressive in the plaintiff to prosecute a suit in a court of review to reverse a judgment "the correctness of which he impliedly affirms by coercing payment from the defendant under it," and that "such coercion of payment would be unjust, inasmuch as the plaintiff, if he succeeds in reversing the judgment, "may upon another trial entirely fail to recover anything." *Hall v. Hrabowski*, 9 Ala. 278.

Voluntary Payment—Insolvency of Plaintiff.—In New York it is held that where, after the amount of a judgment for the plaintiff, affirmed upon appeal, has been paid to his attorney and deposited in bank, an application of the defendant for leave to appeal to the Court of Appeals is granted and the appeal is perfected by the defendant, the latter is not entitled to obtain by motion, upon proof that the plaintiff is insolvent, an injunction restraining the plaintiff and his attorney from drawing and the bank from paying out the money so deposited therein, until the further order of the court. There is nothing in section 1323 of the Code of Civil Procedure, providing for restitution where a judgment is reversed, under which such a party acquires the

right to move for, or the court derives the power to compel, restitution of the money paid under such circumstances. *Klinker v. Third Ave R. Co.*, 33 N. Y. App. Div. 556.

2. *McCreliss v. Hinkle*, 17 Ala. 459; *Knox v. Steele*, 18 Ala. 815; *Tarleton v. Goldthwaite*, 23 Ala. 346; *Hoard v. Hoard*, 41 Ala. 590; *Phillips v. Towles*, 73 Ala. 406.

Payment under Stipulation.—Where a stipulation concerning the matters in controversy was entered into, under which a decree was made and voluntarily executed, it was held that a party who was enjoying the benefits of the decree would not be permitted to assign error respecting it before his adversary was placed in his original position. *Garner v. Prewitt*, 32 Ala. 13.

3. *Alabama.*—*Crocker v. Clements*, 23 Ala. 296.

Arkansas.—*Ringgold v. Randolph*, 13 Ark. 328.

California.—*Raun v. Reynolds*, 18 Cal. 275; *Hewitt v. Dean*, 91 Cal. 617.

Connecticut.—*Richards v. Comstock*, 1 Conn. 150.

Illinois.—*Hays v. Cassell*, 70 Ill. 670; *Major v. Collins*, 17 Ill. App. 239; *M'Lagan v. Brown*, 11 Ill. 519.

Indiana.—*Doe v. Crocker*, 2 Ind. 575; *Martin v. Woodruff*, 2 Ind. 237.

Iowa.—*Zimmerman v. National Bank*, 56 Iowa 133; *Weaver v. Stacy*, 93 Iowa 683.

Kentucky.—*Gregory v. Litsey*, 9 B. Mon. (Ky.) 43; *Morgan v. Hart*, 9 B. Mon. (Ky.) 79; *Ball v. Lively*, 4 Dana (Ky.) 371; *Breeding v. Taylor*, 6 B. Mon. (Ky.) 65.

Effect of Dismissal of Action. — The defendant will not be precluded from restitution by the fact that his adversary has, after obtain-

Louisiana. — *Mooney v. Corcoran*, 15 La. 46.

Maine. — *Bryant v. Fairfield*, 51 Me. 149.

Massachusetts. — *Cummings v. Noyes*, 10 Mass. 433; *Lazell v. Miller*, 15 Mass. 207; *Jones v. Hacker*, 5 Mass. 265; *Horton v. Wilde*, 8 Gray (Mass.) 425.

Missouri. — *Ming v. Suggett*, 34 Mo. 364.

Nebraska. — *Anheuser-Busch Brewing Assoc. v. Hier*, 55 Neb. 557.

New Hampshire. — *Pittsfield v. Barnstead*, 38 N. H. 115; *Eames v. Stevens*, 26 N. H. 117; *Gay v. Smith*, 38 N. H. 171; *Trow v. Messer*, 32 N. H. 361; *Thompson v. Carroll*, 36 N. H. 21; *Murray v. Emmons*, 26 N. H. 523; *Little v. Bunce*, 7 N. H. 485.

New Jersey. — *Scott v. Conover*, 10 N. J. L. 61.

New York. — *Woodcock v. Bennet*, 1 Cow. (N. Y.) 737; *Maghee v. Kellogg*, 24 Wend. (N. Y.) 32; *Field v. Maghee*, 5 Paige (N. Y.) 539; *Pangburn v. Ramsay*, 11 Johns. (N. Y.) 143; *Britton v. Phillips*, (Supm. Ct. Gen. T.) 24 How. Pr. (N. Y.) 111; *Wright v. Nostrand*, 100 N. Y. 616; *Chamberlain v. Choles*, 35 N. Y. 477; *Ex p. Reynolds*, 1 Cal. (N. Y.) 500; *People v. Johnson*, 38 N. Y. 63; *Klinker v. Third Ave. R. Co.*, 33 N. Y. App. Div. 556.

North Carolina. — *Dulin v. Howard*, 66 N. Car. 433; *Perry v. Tupper*, 70 N. Car. 538, 71 N. Car. 380; *Atlantic, etc., R. Co. v. Sharpe*, 70 N. Car. 509; *McMillan v. Love*, 72 N. Car. 18; *Heath v. Bishop*, 72 N. Car. 456; *Rollins v. Henry*, 77 N. Car. 467; *Lane v. Morton*, 81 N. Car. 38; *Manix v. Howard*, 82 N. Car. 125; *Meroney v. Wright*, 84 N. Car. 336; *Cottingham v. McKay*, 86 N. Car. 241; *Lytle v. Lytle*, 94 N. Car. 522; *Durham, etc., R. Co. v. North Carolina R. Co.*, 108 N. Car. 304; *Boyett v. Vaughan*, 86 N. Car. 725.

Ohio. — *Hiler v. Hiler*, 35 Ohio St. 645; *Stoffregen v. Biederman*, 3 Ohio Cir. Dec. 347.

Pennsylvania. — *Brightly v. McAleer*, 4 Pa. Super. Ct. 563; *Ranck v. Becker*, 13 S. & R. (Pa.) 41; *Benscotter v. Long*, 167 Pa. St. 595; *Breadding v. Blocher*, 27 Pa. St. 347; *Williams v. Coward*, 1 Grant Cas. (Pa.) 21; *Kirk v. Eaton*, 10 S. & R. (Pa.) 103.

Tennessee. — *Gates v. Brinkley*, 4 Lea (Tenn.) 710.

Texas. — *Peticolas v. Carpenter*, 53 Tex. 23.

Virginia. — *Stanard v. Brownlow*, 3 Munf. (Va.) 229; *Fleming v. Riddick*, 5 Gratt. (Va.) 272.

United States. — *U. S. Bank v. Washington Bank*, 6 Pet. (U. S.) 8; *Morris's Cotton*, 8 Wall. (U. S.) 507; *Ex p. Morris*, 9 Wall. (U. S.) 605; *Northwestern Fuel Co. v. Brock*, 139 U. S. 216.

England. — *Manning's Case*, 8 Coke 94; *Anonymous*, 2 Salk. 588; *Sympton v. Juxon*, Cro. Jac. 698; *Doe v. Lord*, 7 Ad. & El. 610, 34 E. C. L. 174; *Withers v. Harris*, 2 Ld. Raym. 806.

In *Reynolds v. Harris*, 14 Cal. 668, the court said: "The current of authority, broken by only a case or two, goes directly to the point that a party obtaining through a judgment, before reversal, any advantage or benefit must restore what he got to the other party after the reversal."

After Dissolution of Injunction. — In *Lake Shore, etc., R. Co. v. Taylor*, 134 Ill. 603, it was held that upon the dissolution of an injunction restraining the defendant from taking possession of certain land claimed by him, he was entitled to restitution, the plaintiff having taken possession of the land while the defendant was restrained by the writ.

The Receipt of Money in Good Faith under a decree will not, on reversal of the decree, destroy the right of restitution. *Keck v. Allender*, 42 W. Va. 420.

Rights Acquired by Motion. — Where the defendant failed to deliver property, levied upon by the sheriff under the execution on the judgment, which was reversed according to the terms of a delivery bond given by the defendant and his surety, and the plaintiff had obtained judgment by motion on the delivery bond, it was held that the rights acquired by him under such motion and judgment must be surrendered. *Jones v. Hart*, 60 Mo. 362.

Protection of Dower Right. — Where a certain sum was awarded to a married man as compensation for premises belonging to him which had been condemned, his wife claimed that the money should be invested during the husband's lifetime so as to protect her inchoate right of dower. This application was denied, but on appeal the decision was reversed. Pending ap-

ing possession by legal process, dismissed the action, after reversal of the judgment, thereby discharging himself from all

peal the husband obtained possession of the fund, and on motion to the appellate court he was compelled to make restitution. *Matter of New York, etc., Bridge, 89 Hun (N. Y.) 219.*

Modification of Judgment. — Where a judgment originally entered for \$3,492.50, besides cost of suit, was modified in the appellate court by merely striking therefrom the sum of one hundred and seventy-five dollars, and in other respects was affirmed, it was held not to be in accordance with equity or the provisions of Code Civ. Pro. Cal., § 957, that the property sold under the judgment should be restored to the defendants. *Hewitt v. Dean, 91 Cal. 617.*

Grantee in Fraudulent Conveyance Paying Money to Redeem Property from Sale. — Under Code Iowa, § 3198, providing for the restoration of property taken by virtue of a judgment or order which is afterwards reversed, it was held that where a decree determined that certain real estate fraudulently conveyed by a judgment debtor was subject to sale for the payment of the judgment against him, and the decree was afterwards reversed, the fact that the grantee in the fraudulent conveyance paid money to redeem such estate from sale did not, on reversal of the decree, entitle the grantee to restitution of the amount paid. *Weaver v. Stacy, 93 Iowa 683.*

Reversal of Judgment of Intermediate Appellate Court. — In *Fowler v. Stocking, 5 Day (Conn.) 539*, the plaintiff obtained judgment in a justice's court, and on appeal to the County Court judgment was rendered for the defendant, which judgment was reversed by the Superior Court. On error to the Supreme Court it was held, under a statute providing that upon reversal on writ of error the plaintiff should recover all that he had lost by the erroneous judgment except the costs of reversal, that the amount of the original judgment before the justice could not be included. The justice's judgment being revived, the plaintiff could have execution from the justice's court for its amount.

Setting Aside Judgment on Replevin Bond. — Where a judgment in replevin was reversed, but before its reversal judgment was taken on the undertak-

ing in replevin, it was held proper to set aside and annul the judgment on the undertaking on the ground that the judgment in replevin had been reversed. *McMillan v. Baker, 20 Kan. 50.*

The Burden of Proving an Equitable Right to Retain Money collected on a decree that has been reversed is cast on the plaintiff. *Crocker v. Clements, 23 Ala. 296.*

Joint Defendants. — Where one of two joint defendants has been compelled by the plaintiff to pay a judgment recovered by him against both, and the other defendant, upon his sole appeal, has obtained a reversal of such judgment and a remand for a new trial, the plaintiff is liable to restitution to the defendant who has satisfied the judgment, and on the new trial the cause should be tried as if no payment had been made, unless the payment by one defendant is adopted by both defendants as a payment of the debt and the right of restitution waived. *Brown v. Richardson, 4 Robt. (N. Y.) 603.*

Judgment Against Garnishee. — On reversal for irregularity of a judgment against a garnishee, where it appears that the amount paid by him was due to the defendant in attachment and by him to the plaintiff in attachment, there can be no recovery of the money paid by the garnishee. *Duncan v. Ware, 5 Stew. & P. (Ala.) 119.*

Money Held under Attachment. — Where an order that a sheriff holding money under an attachment should pay it to the younger lienor is reversed after the order has been obeyed, the plaintiff in attachment is entitled to restitution of the money so paid to the lienor. *Haebler v. Myers, 132 N. Y. 363, reversing 58 Hun (N. Y.) 179.*

Discretionary Power of Court—New York. — Under a code provision that "when the judgment is reversed or modified, the appellate court may make complete restitution of all property and rights lost by the erroneous judgment," it was held that the appellate court should make such restitution in all proper cases. It was said: "There is a class of cases where it would or might be improper to order restitution; such, for instance, as where the judgment appealed from is reversed and a new trial granted. In such case the court has a discretion in relation

relief or assertion of right in the action on the part of the defendant, and retaining the property or the fruits of it by means of the judgment upon which alone his right of possession rested.¹

Court Acting Within or Without Jurisdiction. — The fact that the court rendering the judgment reversed acted either within or without its jurisdiction does not affect the right of the defendant to restitution.²

The Defendant Must Be Dispossessed of His Property or Prejudiced by Process of Court, in the suit in which the appeal was taken, in order to have restitution; restitution will not be compelled from one who has acquired it in some other way.³

Costs. — Where an execution for costs has been collected the defendant will be entitled to restitution of the amount,⁴ but

to granting costs, and as the judgment is not final, there is no restitution to be ordered. But where the judgment of the appellate court is the end of the action, and no new trial is ordered, I think it is imperative upon the court to order restitution of all the appellant has lost; and where the judgment of the justice and the County Court are both reversed, complete restitution cannot be made short of paying to the defendant his costs of defending the action before the justice and of prosecuting the appeal before the County Court. *Estus v. Baldwin*, (Supm. Ct. Spec. T.) 9 How. Pr. (N. Y.) 80.

Setting Aside Sale as Cloud on Title. — A sale of land to the plaintiff under execution issued on a decree may be set aside as a cloud on title where the decree itself is reversed on review. *Forman v. Stickney*, 77 Ill. 575.

1. *Lane v. Morton*, 81 N. Car. 38; *Manix v. Howard*, 82 N. Car. 125; *Fish v. Toner*, 40 Minn. 211; *Ming v. Suggett*, 34 Mo. 364.

2. *Northwestern Fuel Co. v. Brock*, 139 U. S. 216. See also *Morris's Cotton*, 8 Wall. (U. S.) 507.

3. *Durham, etc., R. Co. v. North Carolina R. Co.*, 108 N. Car. 304, holding, in a case where the defendants were not in possession of the land in question when the proceedings began, and the plaintiff did not obtain possession thereof by virtue of the court's process, but in an entirely different way, with which the court had no connection, that it would be not only irregular but "violative of common right to grant a writ of restitution upon simple motion, and without allowing the plaintiff to litigate its right in some appropriate way pre-

scribed by law. A writ so granted would not be a writ of restitution." And see *Gillig v. George C. Treadwell Co.*, 151 N. Y. 552.

Property Taken and Sold under Judgments Other than the One Reversed, even though the effect of the reversal is to decide that such property was taken from the party legally entitled to it, cannot be restored as an effect of the reversal. *Murray v. Berdell*, 98 N. Y. 480; *Weaver v. Sheean*, (Iowa 1898) 77 N. W. Rep. 528.

Money Paid in Consequence of Order Not Appealed. — Where the money is not paid after and in consequence of the judgment appealed from, but is paid in consequence of an order, made prior to the judgment, which is not appealed from, the defendant has no right to restitution. *Reynolds v. Reynolds*, (Cal. 1885) 8 Pac. Rep. 184.

Eviction Caused by Process in Another Suit. — On dismissing a bill to remove a cloud on title a writ of restitution should not be awarded when the defendant was in possession of the land in controversy at the commencement of the suit, but, pending suit, was dispossessed by the complainant in other proceedings, unless relief of the kind is prayed by cross-bill. *Baxter v. Knoxville First Nat. Bank*, 85 Tenn. 34.

4. *Safford v. Stevens*, 2 Wend. (N. Y.) 158; *Eames v. Stevens*, 26 N. H. 117.

Restitution of Costs of Appeal. — Where a Circuit Court of the United States dismissed the complainant's bill on the merits, the complainant appealed to the Supreme Court, which dismissed the appeal, as the amount in dispute was insufficient to confer jurisdiction, and in its mandate the Supreme Court

costs which the defendant might have been entitled to recover had the judgment been correct in the first instance cannot be recovered.¹

Where Money Has Been Voluntarily Paid on account or in satisfaction of a judgment afterwards reversed, without any fraud being practiced on the defendant, he is not entitled to restitution.²

(2) *Discretion of Court.* — In a large number of cases it is held that restitution is not always of right,³ and while it is usually granted on a reversal of a judgment, unless there is something

required the complainant to pay the costs of appeal. Thereupon the complainant brought a bill of review in the Circuit Court praying that the decree of the Circuit Court should be set aside and a decree entered dismissing the cause for want of jurisdiction. On a motion for judgment on the bill of review the complainant asked that the costs of the original suit paid by her in the Circuit Court and in the Supreme Court be refunded and that the costs of the bill of review be taxed in her favor. It was held that inasmuch as the complainant had selected the Circuit Court as a tribunal to determine the question of her rights, and as the defendants had been forced to come into that court to contest the complainants' claims against their objection, the complainant could not, having been defeated in the tribunal selected, expect with propriety to have restitution of the costs, and the motion with respect thereto was accordingly denied. *Miller v. Clark*, 52 Fed. Rep. 900.

1. *Richards v. Comstock*, 1 Conn. 150, holding that the damages to be assessed in favor of a plaintiff in error on reversal of the judgment below are restricted to what was recovered from him by force of that judgment.

2. *Travellers' Ins. Co. v. Heath*, 95 Pa. St. 333; *Gould v. McFall*, 118 Pa. St. 455; *Teasdale v. Stoller*, 133 Mo. 645. And see *Klinker v. Third Ave. R. Co.*, 33 N. Y. App. Div. 556. But see *Scholey v. Halsey*, 72 N. Y. 578, and *Hiler v. Hiler*, 35 Ohio St. 645, wherein it was held that actions might be maintained for the recovery of money paid voluntarily in satisfaction of a judgment afterwards reversed.

Consent to Execution of Decree. — Where it appeared from the record that after an appeal was taken from an original decree the defendants, by their solicitor of record, consented to the execution of part of the decree, it was held that by reason of such voluntary

performance they were not entitled to restitution although the original decree was wholly reversed. *Groves v. Sennell*, 66 Fed. Rep. 179.

Return of Sheriff. — A refusal by a court to charge "that the return of the sheriff, 'money made; paid by John Heath,' implies a voluntary payment, and that the return of the sheriff, being of record, is conclusive and John Heath cannot recover in this case," is not error. *Travellers' Ins. Co. v. Heath*, 95 Pa. St. 333.

Payment Made under Reversed Decree. — Where a decree is set aside as based on misinformation, the fact that payment has been made in pursuance thereof affords no reason for refusing restitution to the party against whose right the decree was rendered. *Elliot's Estate*, 5 Pa. Dist. 349.

After Settlement and Compromise of both the judgment and the subject-matter the defendant is not entitled to restitution of the money paid in satisfaction of the reversed judgment. *Travellers' Ins. Co. v. Patten*, 119 Ind. 416; *Kaufman v. Dickensheets*, 30 Ind. 258. Compare *Smith v. Robinson*, 1 T. B. Mon. (Ky.) 14.

3. *Kentucky.* — *Smith v. Mitchell*, 1 J. J. Marsh. (Ky.) 270.

New York. — *Young v. Brush*, (Ct. App.) 18 Abb. Pr. (N. Y.) 171; *Radway v. Graham*, (Ct. Pl. Gen. T.) 4 Abb. Pr. (N. Y.) 468; *Coster v. Peters*, 7 Robt. (N. Y.) 386; *Cushing v. Vanderbilt*, 7 Daly (N. Y.) 512; *Marvin v. Brewster Iron Min. Co.*, 56 N. Y. 671.

Pennsylvania. — *Harger v. Washington County*, 12 Pa. St. 251; *Duncan v. Kirkpatrick*, 13 S. & R. (Pa.) 294; *McGee v. Fessler*, 1 Pa. St. 131; *Travellers' Ins. Co. v. Heath*, 95 Pa. St. 333; *Baker v. Smith*, 4 Yeates (Pa.) 192; *Boal's Appeal*, 2 Rawle (Pa.) 37; *Cooke v. Reinhart*, 1 Rawle (Pa.) 317; *Grant v. Rodgers*, 6 Phila. (Pa.) 132, 23 Leg. Int. (Pa.) 141; *Ranck v. Becker*, 13 S. & R. 41; *Haldane v. Duche*, 2 Dall.

peculiar in the case, the court, in its discretion, may refuse it where justice and propriety do not call for it.¹

Consideration of Matters Outside Original Suit.—Although discretion

(Pa.) 176; *Fitzalden v. Lee*, 2 Dall. (Pa.) 205; *Barr v. Craig*, 2 Dall. (Pa.) 151.

United States.—*Andrews v. Thum*, 71 Fed. Rep. 763.

In *Gould v. McFall*, 118 Pa. St. 455, it was said by Paxson, J.: "Restitution is not of mere right. It is *ex gratia*, resting in the exercise of a sound discretion, and the court will not order it where the justice of the case does not call for it nor where the process is set aside for a mere slip." Citing *Harger v. Washington County*, 12 Pa. St. 251.

California.—Under Code Civ. Pro. Cal., § 957, providing that the appellate court may make complete restitution of all property and rights lost by an erroneous judgment or order, the successful appellant has not an absolute right to restitution, but the power conferred thereby is to be exercised when the circumstances of the case call for a judicial discretion. *Spring Valley Water Works v. Drinkhouse*, 95 Cal. 220.

In **New York** the Code of Civil Procedure, §§ 1005, 1292, provides that the court "may direct and enforce restitution," and section 1323 provides that the court "may make or compel restitution." This, it has been expressly held, leaves the matter discretionary in the court. *Parker v. Lythgoe*, (Supm. Ct. Gen. T.) 14 N. Y. Supp. 528. And see *Carlson v. Winterson*, 146 N. Y. 345.

Nature of Reversal.—In *Coughanour v. Bloodgood*, 27 Pa. St. 285, Lewis, C. J., said: "Restitution is in general a matter of right on the reversal of a judgment, but where the reversal is only of a judgment of revival or of an execution, and the original judgment remains unreversed, restitution is discretionary."

There Is No Substantial Difference Between Law and Equity as to the basis on which restitution is required. It is ordered at law when conditions existing would require it at equity, and the law courts can protect the equities of all the parties. This relief may sometimes be refused at law because its processes are not adequate to do full justice in the premises. *Alabama, etc., Mfg. Co. v. Robinson*, 72 Fed. Rep. 708.

1. Where neither Plaintiff nor Defendant Was Entitled to Land of which the plaintiff had been put into possession, the appellate court refused to order restitution of the premises to the defendant or to remand with directions to the court below to enter such an order. *Dunning v. Bathrich*, 41 Ill. 425.

Where Reason of Reversal Is Gone.—Where the reversal was on an exception which has ceased to exist, a refusal of a writ of restitution is proper. *McGee v. Fessler*, 1 Pa. St. 131.

Laches in Making Application.—Where a writ of restitution was moved for on Nov. 8, 1873, as to lands taken under a *habere facias possessionem* on April 21, 1871, it was held that as it was perfectly clear that more land was taken than ought to have been taken, and the delay was not accounted for, the motion should be denied. *Rochfort v. Birmingham*, Ir. R. 7 C. L. 508.

Effect of Agreement.—In *Fitzalden v. Lee*, 2 Dall. (Pa.) 205, the court declined to order restitution where it appeared that the defendant agreed to let the plaintiff into possession of the land, although it was admitted that a judgment for possession could not be supported.

Retrial Resulting in Verdict for Plaintiff.—Where a judgment was reversed on appeal and remanded for a new trial, a motion for restitution was made, but was denied when it appeared that since the submission of the motion the action had been retried in the lower court, and that the trial had again resulted in a verdict and judgment for the plaintiff. *Carlson v. Winterson*, (C. Pl. Gen. T.) 7 Misc. (N. Y.) 689.

Restitution Dependent on Facts.—Whether restitution should be made of money paid in the progress of judicial procedure where the interests of the parties defendant are or may be diverse depends often on a question of fact. *Andrews v. Thum*, 71 Fed. Rep. 763.

Reversal of Order for Restitution.—An order for restitution will not be reversed unless the discretion of the court in directing restitution is abused, or the plaintiff has suffered harm by the order therefor. *Market Nat. Bank v. Pacific Nat. Bank*, 102 N. Y. 464.

should be used in the allowance of restitution, the court should not take into consideration any matter outside the original suit.¹

6. WHERE JUDGMENT IS NOT FINAL. — Where the judgment of reversal is not final, and it appears that the court of review has not decided anything which renders it certain that the plaintiff has not rightly received payment under the reversed judgment, and that on a new trial the plaintiff may be finally adjudged entitled to hold it, restitution will as a rule be refused until the rights of the parties have been ascertained,² or the plaintiff may be ordered to bring the money collected into court to await further directions.³

1. *Morgan v. Hart*, 9 B. Mon. (Ky.) 79, holding that if there be any reason why restitution should not issue, it should be brought forward as a ground for enjoining and not for preventing or modifying an order of restitution.

2. *Young v. Brush*, (Ct. App.) 18 Abb. Pr. (N. Y.) 171; *Whitman v. Johnson*, (C. Pl. Gen. T.) 24 Civ. Pro. (N. Y.) 350, 12 Misc. (N. Y.) 23, 1 N. Y. Ann. Cas. 238; *Marvin v. Brewster Iron Min. Co.*, 56 N. Y. 671; *Murray v. Berdell*, 98 N. Y. 480; *Cushing v. Vanderbilt*, 7 Daly (N. Y.) 512; *Estus v. Baldwin*, (Supm. Ct. Spec. T.) 9 How. Pr. (N. Y.) 80.

Reversal of Order Denying New Trial. — Where the plaintiffs appealed from an order denying their motion for a new trial, and on appeal a new trial was ordered, it was considered that there should have been also an order for restitution of the moneys collected under the judgment. *Whitman v. Johnson*, (C. Pl. Gen. T.) 24 Civ. Pro. (N. Y.) 350, 12 Misc. (N. Y.) 23, 1 N. Y. Ann. Cas. 238.

The Fact that There Are Grounds upon Which the Plaintiff May Still Finally Prevail is not always conclusive. Thus, where the defendant's property had been sold and taken out of his possession under an erroneous judgment which was reversed and a new trial ordered, and the property was bought in for the benefit of the plaintiff and was still in the hands of a trustee, it was held that the facts presented a proper case for restitution. *Murray v. Berdell*, 98 N. Y. 480.

Where There Is No Power to Order a New Trial, but the judgment of reversal is not a bar to a new action by the plaintiff for the same cause, restitution is not a matter of right. *Cushing v. Vanderbilt*, 7 Daly (N. Y.) 512.

Finality of Judgment of Reversal. —

The question whether the judgment of reversal is or is not final is for the court of review rendering it, and at the time of arguing his appeal the appellant should apply for restitution if the court decides to reverse the judgment against him; and in case of his omission so to do, on his success in having judgment released, he should ask for a reargument on the point of restitution. *Cushing v. Vanderbilt*, 7 Daly (N. Y.) 512.

New York Practice. — Under Code Civ. Pro. N. Y., § 1005, it is provided that where a new trial is granted a court may direct and enforce restitution, as where a judgment is reversed upon appeal. *Whitman v. Johnson*, (C. Pl. Gen. T.) 24 Civ. Pro. (N. Y.) 350, 12 Misc. (N. Y.) 23, 1 N. Y. Ann. Cas. 238. See also *O'Gara v. Kearney*, 77 N. Y. 423, wherein it was held, under Code Civ. Pro. N. Y., § 1292, that restitution might be awarded when the judgment was set aside for any cause upon motion in the same way as where judgment is reversed upon appeal.

Restitution Not Preliminary to New Trial — Where a judgment in detinue for the plaintiff was reversed and remanded for a new trial, and satisfaction of an execution thereon was compelled by the sheriff, it was held proper to deny a motion of the defendant requiring the plaintiff to restore the property or return it to the sheriff before proceeding to trial. *Traun v. Keiffer*, 31 Ala. 136.

3. *Kirk v. Eaton*, 10 S. & R. (Pa.) 103; *Blunt v. Greenwood*, 1 Cow. (N. Y.) 15; *Britton v. Phillips*, (Supm. Ct. Gen. T.) 24 How. Pr. (N. Y.) 111; *Marvin v. Brewster Iron Min. Co.*, 56 N. Y. 671.

Where Restitution Would Work Manifest Injustice. — It was held in *Ranck*

Where It Appears Probable that the Plaintiff Will Be Precluded from Maintaining the action, even if he avails himself of the privilege of a new trial, restitution will be awarded though the judgment be reversed and remanded for a new trial.¹

3. After Execution of Writ of Possession. — Where writs of possession have been executed irregularly or have been improperly issued, restitution of possession will, as a rule, and where the circumstances of the case call for it and no good reason is shown to the contrary, be awarded; but whether there ought to be restitution in any particular case is a question addressed to the sound discretion of the court.²

v. Becker, 13 S. & R. (Pa.) 41, that where the defendant's land had been sold under the reversed judgment, but was bound also by several judgments subsequent in date, justice required that the younger judgments which were a lien should be protected on the reversal of the older judgment; and accordingly the court, while ordering restitution, directed the restored money to be brought into court, after which it was to be applied to the discharge of all liens on the defendant's land according to their legal priority, and then the balance, if any, paid to the defendant. Citing *Kirk v. Eaton*, 10 S. & R. (Pa.) 103.

Reversal of Judgment on Scire Facias Post Annum, etc. — Where a judgment of scire facias *post annum*, etc., was reversed on technical grounds, and it appeared that the original judgment had been confessed by the defendant and remained in full force, restitution of the money made on a sale of the defendant's land under execution was refused, but it was directed that the money be brought into court to await its future order. *Kirk v. Eaton*, 10 S. & R. (Pa.) 103.

Practice in New York. — Section 1323 of the New York Code, extant in 1885, contemplated that where a judgment is reversed and a new trial ordered, restitution of the property sold under the judgment reversed to a bona fide purchaser is not compulsory; but that there may be an order compelling the value of such property or its purchase price to be restored or deposited to abide the event of the new trial. *Murray v. Berdell*, 98 N. Y. 480.

1. *Close v. Stuart*, 4 Wend. (N. Y.) 95. Restitution of Money Originally Plaintiffs. — In *Hayes v. Nourse*, 15 Daly (N. Y.) 364, 25 Abb. N. Cas. (N. Y.) 95, the plaintiff had purchased real estate

formerly belonging to the assignors of the defendant at an assignee's auction sale, and, under the terms of sale, paid a percentage of the amount of her bid to bind the bargain. She subsequently rejected the title and brought an action to recover the amount of her deposit and obtained a judgment in her favor. The defendant paid the judgment and took an appeal. On a reversal of the judgment, even though the money was originally the plaintiff's and did not stand for property of which in the first instance the defendant had been deprived, restitution was ordered because it appeared that there was no visible chance of the plaintiff obtaining a different result on a new trial.

2. *Alabama*. — *Howard v. Kennedy*, 4 Ala. 592; *Hall v. Hilliard*, 6 Ala. 43.

California. — *Thompson v. Thornton*, 41 Cal. 626; *Ford v. Doyle*, 37 Cal. 346; *Rogers v. Parish*, 35 Cal. 127; *California Quicksilver Min. Co. v. Redington*, 50 Cal. 160; *McCreery v. Everding*, 54 Cal. 166; *Huerstal v. Muir*, 64 Cal. 450; *Green v. Hebbard*, 95 Cal. 39; *Pignaz v. Burnett*, 119 Cal. 157; *Gutierrez v. Superior Ct.*, 106 Cal. 171.

Illinois. — *Coleman v. Doe*, 3 Ill. 251.

Kentucky. — *Smith v. Mitchell*, 1 J. J. Marsh. (Ky.) 270; *Ball v. Lively*, 1 Dana (Ky.) 66; *Kouns v. Lawall*, 2 Bibb (Ky.) 237; *Pope v. Pendergrast*, 1 A. K. Marsh. (Ky.) 122; *Dedman v. Smith*, 2 A. K. Marsh. (Ky.) 262; *Breading v. Taylor*, 6 Dana (Ky.) 226; *Smith v. Robinson*, 1 T. B. Mon. (Ky.) 14; *Jones v. Chiles*, 2 Dana (Ky.) 25; *Richart v. Goodpaster*, (Ky. 1896) 37 S. W. Rep. 77.

Maryland. — *Amey v. Marshall*, 63 Md. 369; *Klinefelter v. Carey*, 3 Gill & J. (Md.) 349.

Massachusetts. — *Com. v. Bigelow*, 3

IV. TO WHOM RIGHT PERTAINS. — The right to claim restitution of the property taken under a reversed judgment, or its

Pick. (Mass.) 31; Clark v. Parkinson, 10 Allen (Mass.) 133.

Michigan. — Campau v. Coates, 17 Mich. 235.

Mississippi. — Natchez v. Vanderfelde, 31 Miss. 706; Lum v. Reed, 53 Miss. 71.

Nevada. — Bullion Min. Co. v. Croesus Gold, etc., Min. Co., 2 Nev. 168.

New Jersey. — Den v. O'Hanlin, 18 N. J. L. 127; Den v. Johnson, 12 N. J. L. 275; Den v. —, 7 N. J. L. 161; McQuade v. Emmons, 38 N. J. L. 397; Den v. Ferin, 6 N. J. L. 431; Alderman v. Diamant, 7 N. J. L. 197; Den v. Evaul, 1 N. J. L. 223; Den v. Ball, 3 N. J. L. 528.

New York. — *Ex p.* Reynolds, 1 Cai. (N. Y.) 500; Jackson v. Hasbrouck, 5 Johns. (N. Y.) 366; Jackson v. Rathbone, 3 Cow. (N. Y.) 291; Jackson v. Tuttle, 9 Cow. (N. Y.) 233; Skinner v. Hannan, 81 Hun (N. Y.) 376.

North Carolina. — McIlwain v. Shine, 1 Mart. (N. Car.) 54; Lytle v. Lytle, 94 N. Car. 522; Judge v. Houston, 12 Ired. L. (N. Car.) 108; McKay v. Glover, 7 Jones L. (N. Car.) 41; Cowles v. Ferguson, 90 N. Car. 308; Davis v. Higgins, 87 N. Car. 298; Springs v. Schenck, 99 N. Car. 551; Ferguson v. Wright, 115 N. Car. 568.

Ohio. — Poole v. Loan, etc., Co., 4 Ohio Dec. 504.

Pennsylvania. — Monongahela Valley Camp Meeting Assoc. v. Patterson, 96 Pa. St. 469; Hessel v. Fritz, 23 W. N. C. (Pa.) 299; Grossman's Appeal, 102 Pa. St. 137; Shaw v. Bayard, 4 Pa. St. 257.

Tennessee. — Blair v. Pathkiller, 5 Yerg. (Tenn.) 230; Caruthers v. Caruthers, 2 Lea (Tenn.) 71; Hickman v. Dale, 7 Yerg. (Tenn.) 149.

Texas. — Jones v. Barnett, 38 Tex. 637; Texas Land Co. v. Williams, 51 Tex. 51.

West Virginia. — Brown v. Cunningham, 23 W. Va. 109.

Wisconsin. — Gelpeke v. Milwaukee, etc., R. Co., 11 Wis. 454; Smith v. Pretty, 22 Wis. 655; Brown v. Cohn, 88 Wis. 635.

United States. — West v. Talman, 4 Wash. (U. S.) 200; Thomas v. Newton, Pet. (C. C.) 444.

England. — Doe v. Roe, 4 Burr. 1996; Cottingham v. King, 1 Burr. 629; Doe v. Wandlass, 7 T. R. 113; Doe v. Roe,

1 Q. B. 700, 41 E. C. L. 736; Doe v. Roe, 5 Taunt. 205, 1 E. C. L. 78; Connor v. West, 5 Burr. 2673; Rochfort v. Birmingham, Ir. R. 7 C. L. 508.

See also articles EJECTMENT, vol. 7, p. 260; POSSESSION, WRIT OF, vol. 16, p. 744.

Reversal of Judgment of Receiver. — In Smith v. Mitchell, 1 J. J. Marsh. (Ky.) 270, the ancestor of the plaintiffs had obtained a judgment in ejectment in 1810 against the ancestor of the defendants, which judgment was revived in 1820, but the judgment of revivor was reversed in 1822 because the personal representatives ought to have been parties. In the meantime the plaintiffs obtained possession under a habere facias and afterwards by another scire facias revived the judgment. The defendants, after the reversal of the first judgment of revivor, sued out a scire facias for restitution. It was held that restitution should have been refused.

Value of Mesne Profits. — The award or entry of reversal is that the defendant be restored to all things which he has lost by reason of the reversed judgment, and in case of a real action it may be more particular, viz., "that he be restored to the tenements aforesaid, with the appurtenances, together with the issues and profits thereof received in the meantime between the judgment aforesaid and the reversal thereof, and to all things," etc. Cummings v. Noyes, 10 Mass. 433.

Conclusiveness of Judgment of Restitution. — A judgment of restitution given upon the reversal of an erroneous judgment in ejectment is conclusive of the matters adjudicated by it. "It establishes beyond further question the right of the plaintiff in error to be restored to all things which he has lost by reason of the erroneous judgment. Its justice cannot be rejudged in any collateral proceeding. Its execution cannot be delayed to abide the final result of the suit in which it is rendered. Its object is to restore the parties immediately to the condition they were in when the suit was commenced." Breeding v. Blocher, 29 Pa. St. 347.

Restitution Is of Course where the issuing of a habere facias is an abuse of the court's discretion. Symphon v. Juxon, Cro. Jac. 698; Thomas v.

value, is one which belongs exclusively to the defendant or his representatives.¹

V. FROM WHOM RESTITUTION COMPELLED — 1. Parties to Action. — Restitution on reversal of a judgment can be compelled only from parties to the record² or from their beneficial

Owens, 2 Bulst. 194; Greer v. McClelland, 1 Phila. (Pa.) 128, 7 Leg. Int. (Pa.) 202.

Agreement for Restitution Upheld. — In Cahill v. Benn, 6 Binn. (Pa.) 99, the plaintiff, after recovery in ejectment, took possession of the premises in question under a habere facias, and the defendant afterwards sued out a writ of error. There was an agreement between the parties that the question of making restitution to the plaintiff should be submitted to an arbitrator, who decided that restitution should be made on the ground that the writ of error was a supersedeas. On the decision on the writ of error the court held that the award should be enforced, but did not decide the question of law.

1. M'Lagan v. Brown, 11 Ill. 519; Major v. Collins, 17 Ill. App. 239; Edwards v. Phillips, 91 N. Car. 355.

Property in Hands of Receiver. — Where the plaintiff in an action in which the judgment was reversed was a corporation, and all of its property had passed into the hands of a receiver, it was held unnecessary to make an order for a writ of restitution to place the defendant in his original possession. Atlantic, etc., R. Co. v. Sharp, 70 N. Car. 509.

Assignee in Bankruptcy. — Where, by reason of an assignment in bankruptcy, the rights of the defendant had passed from him, it was held that a writ of restitution should issue in favor of the bankrupt's assignee. McMillan v. Love, 72 N. Car. 18.

Motion by Landlord After Dispossession of Tenant. — Where only the tenant in possession was served, and, after judgment in ejectment, ejected, it was held that the landlord could not afterwards come in and move for a writ of restitution, and that his remedy to regain possession was by suit against the plaintiff. Edwards v. Phillips, 91 N. Car. 355.

Reversal of Judgment in Garnishment. — Where the defendant in the principal action is made a party to a garnishee action, and on appeal by him a judgment against the garnishee is re-

versed after payment of the money, the defendant in the principal action is a proper person to obtain restitution from the plaintiff; for as the garnishee is discharged from liability to him, no one is interested but the defendant. Lewis v. Chicago, etc., R. Co., 97 Wis. 368.

Judgment Against Sureties. — Where judgment against the sureties on an appeal bond is reversed, if their principal has paid money on the judgment to the plaintiff in the original action the sureties are entitled to restitution of the money, inasmuch as the principal is not a party to the action against the sureties. Marshall v. Macy, (Supm. Ct. Gen. T.) 10 Abb. N. Cas. (N. Y.) 87.

Where a surety on an appeal bond paid the amount due on the bond to the plaintiff upon the affirming of the original judgment by a state court, and the judgment of the state court was afterwards reversed by the Supreme Court of the United States, it was held that the surety or his assignees could not maintain an action against the plaintiff in the original judgment to recover the money so paid. Garr v. Martin, 20 N. Y. 306, reversing 1 Hilt. (N. Y.) 358.

Interveners Entitled to Restitution. — Where third parties intervened, the plaintiff recovered judgment at the trial against the defendant and the interveners, from which judgment the interveners appealed, and the judgment against them was reversed, but pending appeal an execution was sued out by the plaintiff against the defendant, and was satisfied. It was held that by making payment under execution the defendant was discharged as against the interveners, but that the interveners were entitled to a judgment for restitution against the plaintiff for what he should collect from the defendant. Claflin v. Pfeifer, 84 Tex. 23.

2. Rex v. Leaver, 2 Salk. 587, holding, in a case where one was convicted upon an indictment and fined, and payment of the fine was made to collectors, and the judgment was afterwards reversed, that no remedy for restitution lay against the collectors, because they were not parties to the record. See

assignees,¹ or, in case of the death of the execution plaintiff, from his executor or administrator.²

2. Third Persons. — Restitution cannot be compelled from third persons who were *bona fide* purchasers at a sale under an execution dependent upon a judgment subsequently reversed, or who acquired *bona fide* collateral rights thereunder, and their rights are in no way affected by the subsequent reversal of the judgment.³

also *U. S. Bank v. Washington Bank*, 6 Pet. (U. S.) 9; *Stroud v. Casey*, 25 Tex. 754; *Doe v. Williams*, 2 Ad. & El. 381, 29 E. C. L. 122.

Where a Single Woman who has obtained the benefits of a judgment marries after that judgment has been reversed, restitution can be compelled from the husband. *Vesey v. Harris*, Cro. Car. 328; *Little v. Bunce*, 7 N. H. 485.

Reversal on Writ of Review. — Where the judgment is reversed on a writ of review the rule is the same. *Little v. Bunce*, 7 N. H. 485.

The United States cannot be ordered by the Supreme Court to make restitution of money recovered in a lower court. *Ex p. Morris*, 9 Wall. (U. S.) 605.

Where an Agent Is Party to a Suit and has received money under the judgment, which he has paid over to his principal, although he had knowledge that an appeal was to be taken, he can be compelled to make restitution when the judgment is reversed. *Penhallow v. Doane*, 3 Dall. (U. S.) 54.

Plaintiff's Attorney. — Where the attorney of the plaintiff bought land at an execution sale, he was considered to represent the plaintiff in so far as that he would be compelled to make restitution to the defendant upon a reversal of the judgment on which execution issued. *Hannibal, etc., R. Co. v. Brown*, 43 Mo. 294.

Where Bondholders Purchased at a Sale in which their trustee represented them as plaintiff, it was held that restitution from them could be compelled. *Robinson v. Alabama, etc., Mfg. Co.*, 67 Fed. Rep. 189.

1. Langley v. Warner, 3 N. Y. 327; *Winterson v. Hitchings*, (C. Pl. Gen. T.) 10 Misc. (N. Y.) 396.

Under Ball. Annot. Codes & Stat. Wash. (1897), § 6526, providing for the restoration to an appellant of property taken from him by means of a judgment or order reversed, but that property acquired by a purchaser in good

faith at a sale under such judgment should not be affected by such reversal, it was held that the assignee of the execution plaintiff is not a purchaser in good faith in the sense that he is entitled to retain property purchased by the execution plaintiff under the reversed judgment. *Singly v. Warren*, 18 Wash. 434.

2. Little v. Bunce, 7 N. H. 485.

Personal Representative of Plaintiff. — Where the plaintiff dies and the cause is revived against his executor, it is unnecessary to commence a new and original proceeding to recover money paid to the decedent, as the executor stands in his shoes and subject to the same remedies and proceedings as would be allowed against the plaintiff if he were alive. *Gates v. Brinkley*, 4 Lea (Tenn.) 710.

Administrator Liable in His Individual Capacity. — In *Burdine v. Roper*, 7 Ala. 456, an administrator caused an execution to be issued upon a judgment obtained by his intestate, and to be levied on a slave who was claimed by a third person. On a trial of the right of property the slave was condemned and sold, and the money was received by the administrator. Afterwards the judgment of condemnation was reversed, and upon another trial the slave was found not liable to the satisfaction of the execution. It was held that the administrator was liable for the money so received by him in his individual and not in his representative capacity.

Money Received by Representative of Estate. — Where money received from the defendant is still in the hands of the representative of the estate of a deceased person, and he has not been charged with it by any court, he may be compelled in his personal character to refund the money on a reversal of the judgment under which he received it. *Gillmore v. Meeker*, 2 Ohio Dec. (Reprint) 63.

3. Alabama. — *Marks v. Cowles*, 61 Ala. 299.

VI. EXTENT OF RESTITUTION — 1. Specific Property. — Where Property Taken under a Judgment Subsequently Reversed Is in the Actual Possession of the Plaintiff, by purchase or otherwise, the defendant may compel specific restitution thereof, because so far as the plaintiff is concerned his title thereto is at an end.¹

Florida. — *Florida Cent. R. Co. v. Bisbee*, 18 Fla. 60.

Illinois. — *McJilton v. Love*, 13 Ill. 486; *Guiteau v. Wisely*, 47 Ill. 436; *Horner v. Zimmerman*, 45 Ill. 14; *Wadhams v. Gay*, 73 Ill. 415; *Major v. Collins*, 17 Ill. App. 239.

Indiana. — *McCormick v. McClure*, 6 Blackf. (Ind.) 466; *Doe v. Crocker*, 2 Ind. 575.

Louisiana. — *Williams v. Gallien*, 1 Rob. (La.) 94; *Baillio v. Wilson*, 5 Mart. N. S. (La.) 214.

Missouri. — *Gott v. Powell*, 41 Mo. 416; *Vogler v. Montgomery*, 54 Mo. 577; *Jones v. Hart*, 60 Mo. 362.

Nebraska. — *McAusland v. Pundt*, 1 Neb. 211.

New Hampshire. — *Little v. Bunce*, 7 N. H. 485.

New York. — *Forstman v. Schulting*, 108 N. Y. 110; *Simpson v. Hornbeck*, 3 Lans. (N. Y.) 53; *Grauer v. Grauer*, (C. Pl. Gen. T.) 2 Misc. (N. Y.) 98; *Woodcock v. Bennet*, 1 Cow. (N. Y.) 734; *Lovett v. German Reformed Church*, 12 Barb. (N. Y.) 83.

Ohio. — *Taylor v. Boyd*, 3 Ohio 354; *McBride v. Longworth*, 14 Ohio St. 351.

Texas. — *Stroud v. Casey*, 25 Tex. 754.

Washington. — *Singly v. Warren*, 18 Wash. 434.

Wisconsin. — *Corwith v. Illinois State Bank*, 15 Wis. 289.

United States. — *U. S. Bank v. Washington Bank*, 6 Pet. (U. S.) 16; *Galpin v. Page*, 18 Wall. (U. S.) 350.

England. — *Manning's Case*, 8 Coke 94.

Restitution Cannot Be Compelled from the Attorney of the Plaintiff who has received the proceeds of the execution from the officer and has appropriated it according to a previous arrangement between him and his client in payment of a debt due from the latter to him, notwithstanding he is aware that steps have been taken to reverse the judgment. *Langley v. Warner*, 3 N. Y. 327. See also *Butcher v. Henning*, 90 Hun (N. Y.) 565.

Money Applied by Order of Court. — Where a decree was reversed after a court had ordered that the money col-

lected under it should be applied to the debt of the plaintiff to a third person, it was held that it could not be recovered back from the third person on reversal of the judgment. *Florida Cent. R. Co. v. Bisbee*, 18 Fla. 60. See also *White v. Butt*, 32 Iowa 335; *Phillips v. Johnson*, 7 Mart. (La.) 226; *Phillips v. Curtis*, 7 Mart. (La.) 237.

Payment to Judgment Creditors. — Where under a decree money was distributed among judgment creditors and on appeal the decree was reversed, the plaintiff filed a bill to carry the decree of reversal into effect, making the judgment creditors parties. They answered that they had received the money when offered to them under the decree and knew nothing of any conflicting claims. It was held that they should refund with interest and costs. *Bayley v. Pearman*, 1 Ohio Dec. (Reprint) 56.

Summary Remedies for Restitution. — Where the rights of third persons are involved, no proceeding by way of motion or other summary method of compelling restitution is applicable. *Farmer v. Rogers*, 10 Cal. 335; *Reynolds v. Reynolds*, (Cal. 1885) 8 Pac. Rep. 184; *Hanschuld v. Stafford*, 27 Iowa 301; *Outten v. Palmateer*, 7 J. J. Marsh. (Ky.) 242; *Horton v. Wilde*, 8 Gray (Mass.) 425; *Field v. Maghee*, 5 Paige (N. Y.) 539.

1. *California.* — *Reynolds v. Harris*, 14 Cal. 680.

Illinois. — *Hays v. Cassell*, 70 Ill. 670; *McJilton v. Love*, 13 Ill. 486. And see *M'Lagan v. Brown*, 11 Ill. 519.

Maine. — *Bryant v. Fairfield*, 51 Me. 149.

Missouri. — *Gott v. Powell*, 41 Mo. 416; *Vogler v. Montgomery*, 54 Mo. 577.

New York. — *Dater v. Troy Turnpike, etc., Co.*, 2 Hill (N. Y.) 629; *Lovett v. German Reformed Church*, 12 Barb. (N. Y.) 67.

Ohio. — *Hubbell v. Broadwell*, 8 Ohio 120.

United States. — *Robinson v. Alabama, etc., Mfg. Co.*, 67 Fed. Rep. 189; *U. S. Bank v. Washington Bank*,

Where the Specific Property Is Constructively in the Plaintiff's Possession, by reason of the purchase of it, at an execution sale under the judgment subsequently reversed, by one in privity with the plaintiff, the defendant may compel a specific return.¹

6 Pet. (U. S.) 8; Galpin v. Page, 18 Wall. (U. S.) 350; Northwestern Fuel Co. v. Brock, 139 U. S. 216.

England. — Hoe's Case, 5 Coke 90.

Contrary Opinions. — There are decisions holding that the fact that the complainant himself is the purchaser makes no difference, on the ground that it is the policy of the law to sustain judicial sales, and that there is the same reason for protecting parties who are purchasers that there is for protecting strangers. Parker v. Anderson, 5 T. B. Mon. (Ky.) 455; Gossom v. Donaldson, 18 B. Mon. (Ky.) 230; South Fork Canal Co. v. Gordon, 2 Abb. (U. S.) 479. In the case last cited it was said by Field, J.: "There is some contradiction in the adjudged cases as to the effect of a reversal of a judgment or decree upon rights acquired under it. This contradiction has arisen principally, if not entirely, from not distinguishing between the effect of the reversal upon the rights of the parties with respect to the subject-matter in controversy and its effect upon rights acquired on proceedings taken for its enforcement; and yet the difference in the operation of the reversal in the two cases is obvious, and need only be stated to be recognized. * * * The principle that the defendant or unsuccessful party in the court below is to be restored to all things which he lost by the erroneous judgment or decree cannot apply to those things the title of which may be transferred by proceedings taken for the enforcement of the judgment or decree when its enforcement is not stayed pending the appeal. The restoration *in specie* in such cases being impossible without infraction of the principle by which judgments of courts are upheld and enforced, it follows that the right which the reversal gives must be that of action to recover an equivalent for the lost thing. And perhaps the rule may be stated thus: That the defendant or unsuccessful party in the court below is to be restored, by reversal, to all things which he lost by the erroneous judgment or decree, if the title to them has not passed by the previous enforcement of the judgment or decree; and

in such case he is to have a right of action for a money equivalent. The rule, as thus stated, would leave the parties to take advantage of the proceedings for the enforcement equally with third persons."

Either Property or Damages. — It seems that in *California*, if the plaintiff be the purchaser at a sale under execution, the defendant may at his election either have the sale set aside and be restored to the possession or have an action for damages. Reynolds v. Hosmer, 45 Cal. 616; Johnson v. Lamp- ing, 34 Cal. 293.

Lien on Property Taken Improperly. — In Winterson v. Hitchings, (C. Pl. Gen. T.) 10 Misc. (N. Y.) 396, which was an equitable proceeding to obtain restitution of property sold under execution upon a judgment which was subsequently reversed, it was held that on reversal the legal right to retain anything obtained by virtue of the reversed judgment is gone, and that the property acquired under it cannot be held as security for a subsequent judgment so as to entitle an assignee of the judgment to retain it as matter of legal right until his claim is satisfied. Compare Carson v. Carson, 2 Met. (Ky.) 97, where a party against whom a proceeding was instituted to compel a restitution of money collected on a judgment afterwards reversed was permitted to defeat a recovery by showing that he had a demand against the claimant, who was a nonresident, equal in amount to the sum collected under the judgment.

Land Sold Subject to Plaintiff's Claim. — Where land belonging to the defendant was sold under judgment, subject to certain claims of the plaintiff, at a specific sum, and the plaintiff became the ultimate purchaser, the court declined to order restitution of more than the sum actually paid, though willing to order restitution of the land. Cassell v. Cooke, 8 S. & R. (Pa.) 296.

1. *California*. — Reynolds v. Harris, 14 Cal. 668; Johnson v. Lamp- ing, 34 Cal. 293; Reynolds v. Hosmer, 45 Cal. 616; Hewitt v. Dean, 91 Cal. 617; Hyde v. Boyle, 105 Cal. 102.

Illinois. — Major v. Collins, 17 Ill.

2. Recovery in Money.—Where the property cannot be restored *in specie* the authorities differ on the question whether the defendant may, after reversal of an erroneous judgment, recover the full value of his property sold on an execution thereunder before its reversal, or only so much as the plaintiff realized upon execution. It seems, however, that decisions holding the latter are more in accordance with principle for the reason that the judgment is valid until reversed.¹

App. 239; *McJilton v. Love*, 13 Ill. 486; *M'Lagan v. Brown*, 11 Ill. 519; *Fergus v. Woodworth*, 44 Ill. 374.

Missouri.—*Hannibal, etc., R. Co. v. Brown*, 43 Mo. 294.

Wisconsin.—*Corwith v. Illinois State Bank*, 15 Wis. 289.

United States.—*U. S. Bank v. Washington Bank*, 6 Pet. (U. S.) 8; *Robinson v. Alabama, etc., Mfg. Co.*, 67 Fed. Rep. 189; *Alabama, etc., Mfg. Co. v. Robinson*, 72 Fed. Rep. 708.

Where the Property Itself Is in the Hands of the Sheriff or has been transferred to the possession of the plaintiff through the instrumentality of the execution, the defendant is entitled to be restored to the specific property. *Gott v. Powell*, 41 Mo. 420; *Hannibal, etc., R. Co. v. Brown*, 43 Mo. 294; *Jones v. Hart*, 60 Mo. 362.

Where an Execution Has Issued Against the Defendant and Has Been Extended upon His Lands, he is entitled on reversal of the judgment to possession and seizin, together with the mesne profits. If the execution has been satisfied by his goods or money he should have restitution in money. *Murray v. Emmons*, 26 N. H. 523.

Restitution of Stock Sold under Decree.—Where stock was sold under a decree and purchased at a nominal sum by one of the plaintiffs, and by him assigned to his coplaintiff, it was held that on reversal of the decree the stock should be returned and the assignment canceled: *Brown v. Vancleave*, (Ky. 1893) 21 S. W. Rep. 756.

Deterioration of Property Bought at Sale.—It was held in *Ft. Madison Lumber Co. v. Batavian Bank*, 77 Iowa 393, under Code Iowa, 1873, § 3198 (Code 1897, § 4145), authorizing restitution or reversal of a judgment, that the defendants were entitled to a restoration of stock purchased at an execution sale by an agent of the plaintiffs, but not entitled to compel the plaintiffs to pay the amount of their bid for the stock, which had de-

teriorated at the time of reversal. *Citing Munson v. Plummer*, 58 Iowa 736.

But in *M'Lagan v. Brown*, 11 Ill. 519, in holding that no one but the defendant, his representatives or assigns, may demand restitution, *Caton, J.*, said: "Suppose the chief value of the estate sold consisted in improvements which had, through the carelessness of the purchaser, or by accident, burned down, so that when the judgment was reversed it was not worth one-fourth of the amount of the sale, can it be tolerated for a moment that a stranger may assert a supposed right of the debtor and defeat the purchaser's title, and thus prevent the defendant from recovering the price for which the premises sold, instead of the premises themselves? The proposition would be as absurd in reason as revolting to justice."

Imposition of Conditions as Preliminary to Restitution.—Where the defendants moved for restitution of the specific property on the ground that the purchasers thereof at the sale under the reversed decree were parties, it was ordered as a preliminary to restitution that the defendants should pay into court the amount at which the property had sold under the decree. *Alabama, etc., Mfg. Co. v. Robinson*, 72 Fed. Rep. 708.

1. Arkansas.—*McCracken v. Paul*, 65 Ark. 553.

Connecticut.—*Richards v. Comstock*, 1 Conn. 150.

Louisiana.—*McWaters v. Smith*, 25 La. Ann. 515.

Maine.—*Bryant v. Fairfield*, 51 Me. 149.

Minnesota.—*Peck v. McLean*, 36 Minn. 228.

Missouri.—*Shields v. Powers*, 29 Mo. 317; *Jones v. Hart*, 60 Mo. 362.

New Hampshire.—*Gay v. Smith*, 38 N. H. 171; *Little v. Bunce*, 7 N. H. 491.

New York.—*Langley v. Warner*, 3 N. Y. 327.

Where the Defendant Is the Purchaser at a Sale he cannot, of course, recover from the plaintiff more than was paid, inasmuch as he is in possession of the property taken from him.¹

VII. PROCEEDINGS TO OBTAIN RESTITUTION — 1. Motion —

a. AT COMMON LAW. — Where the specific thing of which a party was deprived or the amount that he has lost or paid under compulsion appears of record, as by the return of an execution satisfied, a motion for a writ of restitution is the proper remedy.²

North Carolina. — Bickerstaff v. Dellinger, 1 Murph. (N. Car.) 272.

Ohio. — McGuire v. Ely, Wright (Ohio) 520.

Pennsylvania. — Cassell v. Cooke, 8 S. & R. (Pa.) 296.

England. — Goodyer v. Junce, Yelv. 179; Backhurst v. Mayo, 1 Rolle's Abr. 778; Eyre v. Woodfine, Cro. Eliz. 278; Western v. Creswick, 4 Mod. 161.

Authorities to the Contrary. — In Gould v. Sternberg, 128 Ill. 510, it was said to be well settled that if the purchaser be a third party, the defendant may recover from the plaintiff the value of the property. See also Hays v. Cassell, 70 Ill. 670; McJilton v. Love, 13 Ill. 486; Trow v. Messer, 32 N. H. 361.

The value of land at the date of sale under a decree subsequently reversed, together with interest, may be recovered from the plaintiff, and the defendant is not confined to the price that the purchaser paid for it. Maynard v. May, (Ky. 1894) 25 S. W. Rep. 879.

In Western v. Creswick, 4 Mod. 161, the court declined to permit the money collected on execution of a reversed judgment to be paid either to the defendant or into court for his benefit, he being a prisoner in the King's Bench, and remarked that it would be better for the plaintiff to "agree" with the defendant, otherwise the defendant might in trespass recover the full value.

The Reason for the Rule that the amount received by the plaintiff is all that can be recovered is, according to Gay v. Smith, 38 N. H. 171, "the party's folly that he does not pay the judgment." Quoting Goodyer v. Junce, Yelv. 179.

Though It May Seem a Hardship to the Defendant that under an erroneous judgment his property may be sold for greatly less than its value, and his right of restitution be limited to what

came into the hands of the plaintiff, "such hardship, when it occurs, will generally, if not always, be the result of his own acts. If, by failing to appeal, or to obtain a supersedeas on an appeal, he permits the judgment to remain in force and enforceable, he can hardly complain that the other party proceeds to enforce it." Peck v. McLean, 36 Minn. 228.

Interest on the Amount made at the sale is allowed in some cases. McGuire v. Ely, Wright (Ohio) 520; McCracken v. Paul, 65 Ark. 553.

Sale Pending Devolutive Appeal — Louisiana. — If a sale of property under a judgment takes place pending a devolutive appeal, the reversal of the judgment in no manner impairs the sale made under the execution, but the right of the successful appellant is against the proceeds, for the amount of which the plaintiff in execution will be liable to the successful appellant. McWaters v. Smith, 25 La. Ann. 515.

Amount of Recovery Regulated by Statute. — By statute in *Indiana* (now Horner's Stat. Ind. 1896, § 670), where restitution of the specific property cannot be had, the defendant is entitled to an action against the person by virtue of whose judgment he has been injured, and the amount recoverable in such an action is specified. See Doe v. Crocker, 2 Ind. 575.

Amount of Recovery Regulated by Statute. — Under the early statute in *Indiana*, where restitution of the specific property could be had, the defendant was entitled to an action against the person by virtue of whose judgment he had been injured, and under the statute the amount or sum which might be recovered in such an action was regulated. Doe v. Crocker, 2 Ind. 575.

1. McCracken v. Paul, 65 Ark. 553.

2. Anonymous, 2 Salk. 588; Norton v. Sanders, 3 J. J. Marsh. (Ky.) 5; Farrow v. Farrow, 2 J. J. Marsh. (Ky.) 388; Crockett v. Lashbrook, 5 T. B.

b. UNDER STATUTE.—In most states the practice as to obtaining restitution is regulated by statute, and almost every conceivable case is provided for, but as a general rule it is proper to move for a rule or order in the nature of a *scire facias* calling on the parties interested to show cause why restitution should not be made.¹ This summary remedy, however, has been held

Mon. (Ky.) 530; *Haebler v. Myers*, 132 N. Y. 363.

Motions for Restitution Where Facts Are Doubtful.—"Motions for writs of restitution, when they depend entirely on facts to be proved or disproved by swearing only, have never been favored in this court, and they ought only to be tolerated in cases where there is no controversy about the facts, unless the controversy of fact is settled by some other legal proceeding, and for the best of reasons. The decision of the court granting restitution cannot settle the facts or conclude the rights of the parties. They may again be contested in an action at law; of course, in doubtful cases of fact it is better to leave the parties to an action at first than to disturb the attitude in which they stand. Courts generally will, in a summary way, correct the abuse of their process, but when the fact becomes doubtful whether the process has been abused or rightfully executed, it is better to leave the parties to their remedy by action, especially in a case where none of their rights will be barred by not disturbing the process." *Crockett v. Lashbrook*, 5 T. B. Mon. (Ky.) 530.

Whenever the facts necessary to authorize restitution are not apparent on the record, or are not admitted to be true, there should be no summary restitution on motion, but the parties should have an opportunity to try the facts in a regular proceeding and have them proved and ascertained on a full hearing in the ordinary course of litigation. *Morton v. Sanders*, 2 J. J. Marsh. (Ky.) 192; *Logan v. M'Nitt*, 3 Bibb (Ky.) 530; *M'Chord v. M'Clintock*, 5 Litt. (Ky.) 305; *Gardiner v. Schuylkill Bridge Co.*, 2 Binn. (Pa.) 450.

The Quantity of Land Actually Recovered can be ascertained on reference to the records and title deed, etc. *Farrow v. Farrow*, 2 J. J. Marsh. (Ky.) 388; *Simpson v. Shannon*, 5 Litt. (Ky.) 322.

Feigned Issue to Try Facts.—A motion for restitution will be granted unless the plaintiff agrees to a feigned

issue to try the facts. *Jackson v. Hasbrouck*, 5 Johns. (N. Y.) 366; *Connor v. West*, 5 Burr. 2672.

1. California.—*South Beach Land Assoc. v. Christy*, 41 Cal. 501.

Illinois.—*Coleman v. Doe*, 3 Ill. 251; *Wangelin v. Goe*, 50 Ill. 459.

Indiana.—*Martin v. Woodruff*, 2 Ind. 237.

Kentucky.—*Frank v. Hickman*, 7 J. J. Marsh. (Ky.) 635; *Smith v. Hornback*, 3 A. K. Marsh. (Ky.) 392; *Lively v. Ball*, 8 Dana (Ky.) 313; *Fowler v. Currie*, 2 Dana (Ky.) 53; *Smith v. Robinson*, 1 T. B. Mon. (Ky.) 14.

New Jersey.—*Tenant v. Saxton*, 17 N. J. L. 313; *Anonymous*, 3 N. J. L. 459.

New York.—*Sheridan v. Mann*, (Supm. Ct. Spec. T.) 5 How. Pr. (N. Y.) 201; *Hayes v. Nourse*, (C. Pl. Spec. & Gen. T.) 25 Abb. N. Cas. (N. Y.) 95; *Dawley v. Brown*, (Supm. Ct.) 43 How. Pr. (N. Y.) 17; *Badger v. Appleton*, (C. Pl. Gen. T.) 12 Civ. Pro. (N. Y.) 93; *Market Nat. Bank v. Pacific Nat. Bank*, 102 N. Y. 464; *Kidd v. Curry*, 29 Hun (N. Y.) 215.

Pennsylvania.—*Gardiner v. Schuylkill Bridge Co.*, 2 Binn. (Pa.) 450; *Benscotter v. Long*, 167 Pa. St. 595; *Greer v. McClelland*, 1 Phila. (Pa.) 128, 7 Leg. Int. (Pa.) 202.

Tennessee.—*Caruthers v. Caruthers*, 2 Lea (Tenn.) 71.

Virginia.—*Fleming v. Riddick*, 5 Gratt. (Va.) 272.

Proceeding in Equity.—The proceeding by rule or motion was said to be well known in courts of law and equally allowable in the courts of equity, where, under the *Kentucky* practice in 1848, it was often resorted to. *Morgan v. Hart*, 9 B. Mon. (Ky.) 80.

Writ of Entry — Massachusetts.—Where it appeared that the judgment was satisfied by the levy and extent of an execution issued thereon upon real estate which was of greater value than the sum at which it was appraised to satisfy the judgment, and that the plaintiff had no property, and that a judgment against him for damages would be of no value, it was held on a

inapplicable where the rights of third persons are involved,¹ or where the payment was made by an officer on his own responsibility,² or where no judgment has in fact been enforced,³ or where the property was taken and sold under other judgments than the one reversed.⁴ It has also been held that the statutory

motion for a writ of restitution to restore the land specifically that if the title had passed to another person a writ of restitution would not help him, but that he might maintain a writ of entry. *Horton v. Wilde*, 8 Gray (Mass.) 425.

Recovery of Money — California. — Where the reversed judgment is for the recovery of money and its execution is not stayed by giving a statutory undertaking, it is held that provisions in the California Code of Civil Procedure for complete restitution of all property and rights lost by an erroneous judgment or order, on reversal or modification of such judgment or order, do not apply, and that the rights of purchasers at a sale under such execution are in no respect affected by the subsequent reversal of the judgment. Such provisions apply only to cases where the judgment operates upon specific property in such a manner that its title is not changed, as by directing the possession of real estate, or the delivery of documents, or of particular personal property in the hands of the defendant, and the like. *Farmer v. Rogers*, 10 Cal. 335; *Hewitt v. Dean*, 91 Cal. 617.

1. Where property of which restoration is sought was taken by means of a judgment afterwards reversed, as by voluntary sale, or by seizure and sale under process, and passed to an innocent purchaser, or where the money so taken was recovered and held in a fiduciary capacity, and in the proper and *bona fide* discharge of such fiduciary duty, pursuant to an order of court, has been paid over to another, the summary remedy by motion for restitution under the *Iowa* statute cannot properly be administered, and in such cases the party must be limited to his remedy by a proceeding in which he can have all necessary parties brought before the court and the rights of all adequately protected. *Hanschild v. Stafford*, 27 Iowa 301.

Where Third Persons Had Received Money under a decree because they had an equitable lien upon the money which was recovered, and the decree

was reversed, it was held that the court could not compel them, upon a summary application, to refund the money received. *Field v. Maghee*, 5 Paige (N. Y.) 539.

2. Payment Not under Order Appealed From. — Under Code Civ. Pro. N. Y., § 1323, providing that where a judgment or order is reversed the court may compel restoration of property or a right lost by the erroneous judgment, a payment made by an officer on his own responsibility and not under the order or judgment subsequently reversed cannot be summarily restored on motion. *Gillig v. George C. Treadwell Co.*, 151 N. Y. 552.

3. Restitution on Reversal of Justice's Judgment — Wisconsin. — Under Rev. Stat. Wis., § 3772, authorizing a special proceeding to enforce, in a summary manner, the restoration of money collected on a judgment of a justice which is afterwards reversed on appeal, by an order on motion, which may be enforced as a judgment, it has been held, where it was ordered by a justice of the peace that a garnishee should pay into court the amount of his indebtedness to the principal defendant, or in default thereof judgment would be rendered against him, which was done and the amount collected on execution, that upon the reversal of such order restitution of the amount collected could not be ordered on motion, because no judgment of a justice had been collected; no judgment had been reversed; the judgment actually collected had never been appealed or reversed; an order of the justice only was reversed; the money was not collected on the order, nor was the order complied with by payment. *Eilers v. Wood*, 64 Wis. 422.

4. Property Sold under Other Judgments. — A court of appeal may restore in a summary manner, under Code Civ. Pro. N. Y., § 1323, property or rights which have been lost on the judgment which it has reversed, and is thus enabled to make its reversal effectual and undo what has been done under the erroneous judgment without the institution of a new action, but it cannot

remedy by motion does not prohibit a recovery by appropriate action.¹

c. REQUISITES OF MOTION. — A motion for restitution should show clearly that the circumstances of the case are such that restitution is proper, from the fact that payment or satisfaction of the judgment afterwards reversed has been made, and should be supported by an affidavit to that effect.²

Where a Sale under Execution Has Taken Place the motion should pointedly state who was the real purchaser of the property at the execution sale; and if there was more than one purchaser at such sale, there should be a further statement of the amount purchased by each.³

Previous Demand. — It does not seem necessary that any demand for restitution should have been made before moving for restitution.⁴

d. NOTICE OF MOTION. — Proper notice of the motion should be given to those parties liable to be affected by the order.⁵

interfere in this summary manner to restore property taken and sold under other judgments. *Murray v. Berdell*, 98 N. Y. 480.

1. *Indiana*. — *Doe v. Crocker*, 2 Ind. 575. See also *infra*, 5. *Assumpsit or Action in Nature Thereof*.

2. *Eames v. Stevens*, 26 N. H. 117; *Murray v. Emmons*, 26 N. H. 523; *Sheridan v. Mann*, (Supm. Ct. Spec. T.) 5 How. Pr. (N. Y.) 201; *Safford v. Stevens*, 2 Wend. (N. Y.) 158; *Martin v. Rector*, 28 Hun (N. Y.) 409.

An Ex Parte or Extrajudicial Affidavit should not be acted upon, although if not objected to it may be considered. *Morton v. Sanders*, 2 J. J. Marsh. (Ky.) 192.

Upon Establishing the Fact of the Satisfaction of an Erroneous Judgment, either by a return of the execution issued or by affidavits, the court will grant leave for the suggestion of the fact upon the record, and judgment of restitution will be awarded. *Eames v. Stevens*, 26 N. H. 117; *Murray v. Emmons*, 26 N. H. 523.

What Affidavits Must Show. — Where it does not appear from the affidavits used on a motion for repayment of money under Code Civ. Pro. Cal., § 957, that the money was paid after and in consequence of the judgment appealed from, the motion will be denied. *Reynolds v. Reynolds*, (Cal. 1885) 8 Pac. Rep. 184.

The fact that more land was taken than was recovered should be set out in the affidavit, if that be the ground

on which the motion is based. *Jackson v. Hasbrouck*, 5 Johns. (N. Y.) 366.

Where the statement respecting the duration of the lease of premises from which the defendant had been evicted and other elements were but meagre, and there was no proof of what had taken place as to the occupancy of the property since the judgment, a restitution was refused. *Zinsser v. Herrman*, (Supm. Ct. App. T.) 23 Misc. (N. Y.) 645.

3. *McCracken v. Paul*, 65 Ark. 553.

4. *Marshall v. Macy*, (Supm. Ct. Gen. T.) 10 Abb. N. Cas. (N. Y.) 87.

5. *Breeding v. Taylor*, 6 Dana (Ky.) 228; *Anonymous*, 3 N. J. L. 459; *Hall v. Emmons*, (N. Y. Super. Ct. Gen. T.) 11 Abb. Pr. N. S. (N. Y.) 435; *Young v. Brush*, (Ct. App.) 18 Abb. Pr. (N. Y.) 171; *Grauer v. Grauer*, (C. Pl. Gen. T.) 2 Misc. (N. Y.) 98; *Fleming v. Riddick*, 5 Gratt. (Va.) 272; *Northwestern Fuel Co. v. Brock*, 139 U. S. 216. As to notice of motions generally, see article **MOTIONS**, vol. 14, p. 121 *et seq.*

Where Restitution Is Sought in Equity redress may be awarded in a lower court by a decretal order, founded upon a rule to show cause, or upon motion after notice to the adverse party. *Fleming v. Riddick*, 5 Gratt. (Va.) 272.

Want of Notice of Motion for a writ of restitution cannot be assigned for error, if the order be awarded, where the party appears and a decision is given on the merits. *Smith v. Robinson*, 1 T. B. Mon. (Ky.) 14.

Restitution Not Directed by Appellate

e. HEARING OF MOTION. — The court will not, as a general rule, suffer the merits of the controversy to be gone into and examined at the hearing of a motion for restitution.¹

f. WHERE MADE — (1) *In Appellate Court.* — The power to make restitution was exercised at common law by courts of review as incidental to their power to correct errors. They not only reversed erroneous judgments, but restored to the aggrieved parties that which they had lost in consequence thereof. It was usually a part of the judgment of reversal "that the defendant be restored to all things which he has lost on occasion of the judgment aforesaid," and in cases where the facts allowed, a writ of restitution thereupon issued.² It is a common practice, therefore, to make an application for restitution to the court modifying or reversing the judgment.³

(2) *In Trial Court.* — Where the judgment is set aside by the

Court. — Notice of a motion for restitution should be given to the party to be affected by an order therefor, where the cause has been remanded for a new trial and the court of review has not directed restitution in its remittitur. *Young v. Brush*, (Ct. App.) 18 Abb. Pr. (N. Y.) 171.

1. *Watson v. Floral College*, 2 Jones L. (N. Car.) 211; *Meroney v. Wright*, 84 N. Car. 336.

Reversal of Judgment in Ejectment. — Whether legal or equitable titles have been acquired by the plaintiff since the original judgment in his favor, will not be considered. *Heileman v. Frey*, 54 N. J. L. 284.

Restitution After Reversal of Foreclosure Decree. — On the hearing of a motion for restitution on the reversal of a decree of foreclosure, the grounds upon which the appellate court acted in reversing the decree cannot be considered. *Robinson v. Alabama, etc., Mfg. Co.*, 67 Fed. Rep. 189.

2. *Wright v. Hurt*, 92 Ala. 593; *Kennedy v. Hamer*, 19 Cal. 374; *Com. v. Bigelow*, 3 Pick. (Mass.) 31; *Haebler v. Myers*, 132 N. Y. 363.

In *Com. v. Bigelow*, 3 Pick. (Mass.) 31, it was held that where a writ of restitution in a process of forcible entry had been executed and the proceedings were afterwards quashed upon certiorari the court had power to award a writ of restitution. In reply to a suggestion that there was no statutory provision for such a writ it was said that "it would be nugatory to quash the proceedings unless such a writ should be granted, and that in many instances where the statutes give a remedy with-

out providing for a writ by which it is to be effected the court will nevertheless award a suitable process."

Authorized by Statute. — The statutes in many states provide for the granting of orders of restitution by an appellate court. See the various statutes and codes of the United States.

Motions Proper in Trial or Appellate Court. — Under the practice in some of the states writs of restitution may be granted either in the court of review or in the trial court. *Reynolds v. Harris*, 14 Cal. 667; *Hanschid v. Stafford*, 27 Iowa 301; *Ft. Madison Lumber Co. v. Batavian Bank*, 77 Iowa 393; *Platt v. Withington*, (Supm. Ct.) 25 Abb. N. Cas. (N. Y.) 103.

3. *California.* — *Reynolds v. Harris*, 14 Cal. 668; *Spring Valley Water Works v. Drinkhouse*, 95 Cal. 220.

New Hampshire. — *Thompson v. Carroll*, 36 N. H. 21.

New Jersey. — *Scott v. Conover*, 10 N. J. L. 61.

New York. — *Carlson v. Winterson*, 146 N. Y. 345; *Biel v. Randell*, (Supm. Ct. App. T.) 20 Misc. (N. Y.) 335; *Murray v. Berdell*, 98 N. Y. 480; *Market Nat. Bank v. Pacific Nat. Bank*, 102 N. Y. 464; *Estus v. Baldwin*, (Supm. Ct. Spec. T.) 9 How. Pr. (N. Y.) 80; *Kennedy v. O'Brien*, 2 E. D. Smith (N. Y.) 41; *Klinker v. Third Ave. R. Co.*, 33 N. Y. App. Div. 556; *Hayes v. Nourse*, (C. Pl. Spec. & Gen. T.) 25 Abb. N. Cas. (N. Y.) 95.

Ohio. — *Hiler v. Hiler*, 35 Ohio St. 645.

Pennsylvania. — *Cassel v. Duncan*, 2 S. & R. (Pa.) 57; *Hughes's Appeal*, 90 Pa. St. 60; *Whitesell v. Peck*, 26 Pittsb.

trial court on its own motion or reversed by order of an appellate tribunal, the trial court has an inherent power to direct restitution.¹ And it is held that where a court of review does not

Leg. J. N. S. (Pa.) 355; *Kerr v. Sharpsburg, etc., Turnpike Co.*, 26 Pittsb. Leg. J. N. S. (Pa.) 354.

Tennessee. — *Caruthers v. Caruthers*, 2 Lea (Tenn.) 71.

Virginia. — *Stanard v. Brownlow*, 3 Munf. (Va.) 229; *Branch v. Burnley*, 1 Call (Va.) 160.

Where Order of Restitution Is Omitted in Reversal Order. — On the reversal of a judgment in ejectment, unless the appellate court has provided for restitution on reversal, the successful party cannot insert in his judgment an order of restitution merely by force of the decision in his favor. His proper course is to move the appellate court for the insertion of such a provision in its reversal order. *Martin v. Rector*, 28 Hun (N. Y.) 409.

Absence of Jurisdiction in Lower Court. — In *Anheuser-Busch Brewing Assoc. v. Hier*, 55 Neb. 557, the defendant moved in the District Court for restitution of moneys paid by him under a judgment which had been reversed on appeal. In sustaining a denial of this motion the Supreme Court said: "Had the record disclosed the fact of payment this court would have made an appropriate order for the protection and enforcement of that right. But we were not informed that any payment had been made under the erroneous judgment, and no application was made for a vacation or modification of the absolute order of dismissal entered here. So when the motion for restitution was presented the cause was not pending and the District Court was without jurisdiction of the parties. After the cause was dismissed the litigants were no more subject to the orders of the court than they were before the action was instituted."

Where the Judgment of an Appellate Court Is Simply One of Reversal, and no restitution is awarded, because the merits of the controversy between the parties are not before the court, a writ of restitution cannot be awarded by the clerk of the court upon the mere direction of the attorney of the appellant. *Mears v. Remare*, 34 Md. 333.

Upon Suggestion of Counsel that after entry of judgment in the lower court an execution had been issued and the money paid by the defendant under

protest, a court of appeal held that the proper course was that its mandate should issue to the lower court to carry its judgment of restitution into effect and that an application for a writ of restitution should be made there. *Stoffregen v. Biederman*, 3 Ohio Cir. Dec. 347.

Practice in Federal Courts. — Perhaps a case might be so plain as to warrant a court of review in directing restitution in the lower court. If not so plain, if the decree of the lower court is reversed and the case remanded with directions to dismiss, a court of review will reserve liberty to the defendants to file in the lower court a petition for restitution of the sums paid by them to the complainants under the decree of the lower court, or to adopt some other appropriate method for presenting their claim for restitution. *Andrews v. Thum*, 71 Fed. Rep. 763.

1. *Heydenfeldt v. Superior Ct.*, 117 Cal. 348; *Hall v. Emmons*, (N. Y. Super. Ct. Gen. T.) 11 Abb. Pr. N. S. (N. Y.) 435; *Chamberlain v. Choles*, 35 N. Y. 477; *Bickett v. Garner*, 31 Ohio St. 28; *Hiler v. Hiler*, 35 Ohio St. 645; *Fleming v. Riddick*, 5 Gratt. (Va.) 272; *Vroman v. Dewey*, 23 Wis. 626.

The Power of a Court to Repair an Injury occasioned by its own wrongful adjudication is not derived from a mandate of an appellate forum made upon rendering the judgment or decree of reversal, but is substantially the same as it exercises when its own process has been abused or used without authority; as, for example, where a writ of *habere facias possessionem* has been sued out improperly and the defendant therein turned out of possession, the court may award a writ of restitution. And so it may where its process has been misapplied by its own authority erroneously exercised, as is made manifest by a reversal of the judgment or decree on which it issued, whether accomplished by its own jurisdiction or that of a higher appellate tribunal. *Fleming v. Riddick*, 5 Gratt. (Va.) 272.

In *Anheuser-Busch Brewing Assoc. v. Hier*, 55 Neb. 557, the Supreme Court of *Nebraska* doubted the propriety of the rule stated in the text, remarking that it was apparent that the

carry out its own process, but a mandate goes from that court to the lower court, whence proper process issues, an application for restitution should be made in the lower court.¹

decision in *Fleming v. Riddick*, 5 Gratt. (Va.) 272, was "the product of an intemperate zeal to avoid the unjust consequences of the court's error. We cannot accept it as authority. It is illogical. It fails to recognize the cardinal principle that the power to make valid orders cannot survive the loss of jurisdiction. It ignores the self-evident proposition that a personal judgment against a party who is no longer in court is absolutely and utterly void."

Want of Jurisdiction in Trial Court. — Where the Supreme Court of the United States reversed a judgment of a Circuit Court for want of jurisdiction and remanded the case to the Circuit Court for further proceedings, it was held that proceedings to enforce restitution were under the control of the Circuit Court, and that the question of restitution did not depend upon the question whether or not the court rendering the judgment reversed acted within or without its jurisdiction. *Northwestern Fuel Co. v. Brock*, 139 U. S. 216. See also *Morris's Cotton*, 8 Wall. (U. S.) 507.

Equity Practice. — Where property is sold under a void decree, even if a court of chancery had no jurisdiction to order it sold it has jurisdiction to have the property brought back into court and to place the parties in the position they occupied before the void judgment was rendered. *Brown v. Vancleave*, (Ky. 1893) 21 S. W. Rep. 756.

Restitution a Step in Pending Action. — In *Ft. Scott First Nat. Bank v. Elliott*, 60 Kan. 172, it was contended that a summary remedy did not fall within those provided by the Kansas Code of Civil Procedure, and that, there being no writ of restitution in the state procedure, the practice of restitution by motion was not permissible. It was said, however, that there was no difficulty in the way, because the motion and order thereon were only steps in a pending action. "The parties being before the court, and the matter of restoration being incidental to the action, there can be no question of the power or duty of the court to enforce restoration in that proceeding. In-

stead of multiplying cases, it is the policy of our code that the rights of the parties should be determined as far as practicable in a single litigation; and we think the court was warranted in enforcing restitution in a summary manner upon the motion of the defendant."

The Omission of a Mandate for Restitution cannot, where there has been a reversal upon the merits, be treated as resulting in "the monstrous perversion of justice that there shall be no restoration to what has been lost by occasion of the erroneous judgment or decree; nor in ousting the court below of its inherent and salutary jurisdiction of correcting the misapplication of its own process, and so driving the party aggrieved to a new and perhaps unproductive action, it may be in another and distant forum." *Fleming v. Riddick*, 5 Gratt. (Va.) 272.

The Question of Restitution Is Not Adjudicated in the Appellate Court, but the mandate for it follows as a declaration or designation of the legal effect of the adjudicated reversal and dismissal. "In truth, the question of restitution is not presented to the appellate court for adjudication by the record from the court below, where it does not and cannot arise until after a reversal of the judgment or decree." *Fleming v. Riddick*, 5 Gratt. (Va.) 272.

In the States of New York, Iowa, and California it seems that writs of restitution may issue from either the appellate or the trial court. *Platt v. Withington*, (Supm. Ct.) 25 Abb. N. Cas. (N. Y.) 103; *Hanschid v. Stafford*, 27 Iowa 301; *Ft. Madison Lumber Co. v. Batavian Bank*, 77 Iowa 393; *Reynolds v. Harris*, 14 Cal. 667.

Judge at Chambers. — It is not within the jurisdiction of a judge at chambers to award a writ of restitution, such writ being always founded upon a special award of court. *Doe v. Williams*, 2 Ad. & El. 381, 29 E. C. L. 122.

1. *Grant v. Oliver*, 91 Cal. 158; *Hall v. Wells*, 54 Miss. 289; *Stoffregen v. Biederman*, 3 Ohio Cir. Dec. 347; *Russell v. Gray*, 6 S. & R. (Pa.) 208; *Harger v. Washington County*, 12 Pa. St. 251; *Andrews v. Thum*, 71 Fed. Rep. 763.

2. **Scire Facias.** — Where the right to restitution is not clear and uncontroverted, but depends upon matters *in pais*, unless an independent action is brought resort is had to a scire facias *quare restitutionem habere non debet* or proceedings in the nature thereof in the form of an order to show cause.¹ The facts are thus brought out by proof *dehors* the record in cases where it is not apparent therein that the party who received the money collected by reason of the judgment reversed was a party thereto,² or where it does not appear that the defendant has been deprived of possession of real estate,³ or where the amount actually taken

Mandates for Restitution. — In the English practice, "as indicated by the formal entries, the mandate for restitution is appended, as a matter of course, to the reversal of a judgment at law for the plaintiff." And the process of restitution does not issue as a matter of course, but must be applied for in the court to which the cause is remanded, or in which it is retained; it is awarded by such court and is adapted to the evidence of the loss. *Fleming v. Riddick*, 5 Gratt. (Va.) 272.

In *Virginia* the formal mandate for restitution is seldom appended to the reversal, and never without the application of the party aggrieved; and then it may be in general terms, "or more or less special, according to the evidence of the loss which the record may happen to contain; but is usually conditional upon its appearing to the court below that the erroneous judgment or decree has been enforced. And, indeed, the essential nature of the mandate subjects it to such a condition, whatever may be its terms; for it cannot be conceived as the duty of the court below to yield restitution where there has been no loss, or where it has been already made; or that the appellate court, without the direct and certain means of information possessed by the inferior court, has undertaken collaterally, incidentally, and without inquiry, upon merely casual evidence, to determine conclusively the question of loss." *Fleming v. Riddick*, 5 Gratt. (Va.) 272.

The mandate of the appellate court for restitution is, properly speaking, no part of the judgment or decree of reversal, but is rather supplemental thereto. It declares the legal consequence of the reversal, but it gives no specific relief and awards no process from the appellate court. *Fleming v. Riddick*, 5 Gratt. (Va.) 272.

The Lower Court Will Decline to Award a Writ of Restitution where the court of review declined to do so on reversing a judgment. *Fehr v. Graver*, 1 Leg. Rec. (Pa.) 64; *Hughes's Appeal*, 90 Pa. St. 60; *Whitesell v. Peck*, 176 Pa. St. 170.

1. *Martin v. Woodruff*, 2 Ind. 237; *Outten v. Palmateer*, 7 J. J. Marsh. (Ky.) 242; *Smith v. Mitchell*, 1 J. J. Marsh. (Ky.) 270; *Hall v. Wells*, 54 Miss. 289; *Scott v. Conover*, 10 N. J. L. 61; *Haebler v. Myers*, 132 N. Y. 363; *Cowden v. Hurford*, 4 Ohio 374; *Fleming v. Riddick*, 5 Gratt. (Va.) 272; *Keck v. Allender*, 42 W. Va. 420; *U. S. Bank v. Washington Bank*, 6 Pet. (U. S.) 8; *Anonymous*, 2 Salk. 588; *Vesey v. Harris*, Cro. Car. 328. And see in general article SCIRE FACIAS.

Indebitatus Assumpsit is said to be preferable to the "antiquated remedy by scire facias." *Clark v. Pinney*, 6 Cow. (N. Y.) 297.

2. *Outten v. Palmateer*, 7 J. J. Marsh. (Ky.) 242.

Where a Wife when Sole recovered judgment which was satisfied, but was reversed on writ of error, it was held that a scire facias would lie to have restitution against her and her husband, she having become covert. *Vesey v. Harris*, Cro. Car. 328.

3. *Cowden v. Hurford*, 4 Ohio 374; *Hall v. Wells*, 54 Miss. 289.

Use of Writ After Reversal in Ejectment. — Where scire facias was sued out for restitution of possession of realty it was said by the court: "It is certainly very unusual to attempt a restitution of possession by scire facias. The usual and most appropriate mode is by motion. But we suppose that the mode of presenting the question is not very essential if it be such as will enable the court to try all the facts necessary to a correct decision. If all the requisite facts are of

does not appear.

Parties. — All persons who were turned out of possession of real estate or who suffered by execution of the reversed judgment should be made plaintiffs.²

3. Bills of Review. — Where the prayer of a bill of review is that the party complaining of the former decree may be put into the situation in which he would have been if that decree had not been executed, restitution may be awarded.³

4. Petitions and Cross-bills. — A petition or cross-bill praying that a writ of restitution may issue seems in some instances to have been used instead of a motion. Where this is the case there should be an affidavit in support thereof,⁴ and the court should consider it in the light of a motion for restitution as to its necessary allegations.⁵

5. Assumpsit or Action in Nature Thereof. — As a general rule, assumpsit for money had and received, or a code action in the nature thereof, will lie to recover back money collected under a judgment subsequently reversed.⁶

record * * * we should incline to the opinion that a scire facias might be sustained." *Smith v. Mitchell*, 1 J. J. Marsh. (Ky.) 270.

1. *Martin v. Woodruff*, 2 Ind. 237; *Scott v. Conover*, 10 N. J. L. 61; *Haebler v. Myers*, 132 N. Y. 363; *Fleming v. Riddick*, 5 Gratt. (Va.) 272; *Keck v. Allender*, 42 W. Va. 420; Anonymous, 2 Salk. 588.

Claims Founded on the Original Cause of Action cannot be set up in response to a scire facias. *Conover v. Scott*, 11 N. J. L. 400.

2. *Smith v. Mitchell*, 1 J. J. Marsh. (Ky.) 270.

3. *McCall v. McCurdy*, 69 Ala. 65; *Forman v. Stickney*, 77 Ill. 575; *Cary v. Macon*, 4 Call (Va.) 605; *Nelson v. Suddarth*, 1 Hen. & M. (Va.) 350.

As to bills of review in general see article **BILLS OF REVIEW**, vol. 3, p. 569.

4. Petitions were presented in the following cases: *Blair v. Pathkiller*, 5 Yerg. (Tenn.) 230; *Hickman v. Dale*, 7 Yerg. (Tenn.) 149; *Wallen v. Huff*, 3 Sneed (Tenn.) 82; *Brightly v. McAleer*, 4 Pa. Super. Ct. 563.

Cross-bills were filed in the cases of *Madison v. Wallace*, 2 Dana (Ky.) 63; *McCracken v. Paul*, 65 Ark. 553.

5. *McCracken v. Paul*, 65 Ark. 553.

Allegations of Cross-bill Praying Restitution. — Where, after remand, restitution was applied for by an answer in the nature of a cross-bill, it was said by the court that the allegations of such a bill should be precise and spe-

cific, showing that the erroneous decree had been satisfied, and "whether it was discharged in money, in land, or how." *Madison v. Wallace*, 2 Dana (Ky.) 61.

6. *Alabama.* — *Burdine v. Roper*, 7 Ala. 466; *Duncan v. Ware*, 5 Stew. & P. (Ala.) 119; *Williams v. Simmons*, 22 Ala. 425; *Dupuy v. Roebuck*, 7 Ala. 484; *Stewart v. Conner*, 9 Ala. 803.

Arkansas. — *Ringgold v. Randolph*, 13 Ark. 328.

California. — *Raun v. Reynolds*, 18 Cal. 275.

Connecticut. — *Hosmer v. Barret*, 2 Root (Conn.) 156; *Lewis v. Hull*, 39 Conn. 116.

Florida. — *Florida Cent. R. Co. v. Bisbee*, 18 Fla. 60.

Illinois. — *Hays v. Cassell*, 70 Ill. 669; *Field v. Anderson*, 103 Ill. 403; *Major v. Collins*, 17 Ill. App. 239.

Indiana. — *Martin v. Woodruff*, 2 Ind. 237.

Iowa. — *Zimmerman v. National Bank*, 56 Iowa 133.

Louisiana. — *Mooney v. Corcoran*, 15 La. 46.

Maryland. — *Owings v. Owings*, 10 Gill & J. (Md.) 267; *Green v. Stone*, 1 Har. & J. (Md.) 405.

Massachusetts. — *Lazell v. Miller*, 15 Mass. 207.

Missouri. — *Ming v. Suggett*, 34 Mo. 364.

New Hampshire. — *Gay v. Smith*, 38 N. H. 171.

New York. — *Haebler v. Myers*, 132

Money Equitably Due the Plaintiff at the time of the judgment

N. Y. 363; *Field v. Maghee*, 5 Paige (N. Y.) 539; *Garr v. Martin*, 1 Hilt. (N. Y.) 358; *Badger v. Appleton*, (C. Pl. Gen. T.) 12 Civ. Pro. (N. Y.) 93; *Clark v. Pinney*, 6 Cow. (N. Y.) 297; *Kidd v. Curry*, 29 Hun (N. Y.) 215; *Maghee v. Kellogg*, 24 Wend. (N. Y.) 32; *Scholey v. Halsey*, 72 N. Y. 578; *Sturges v. Allis*, 10 Wend. (N. Y.) 354.

Ohio. — *Gillmore v. Meeker*, 2 Ohio Dec. (Reprint) 63; *Cincinnati Southern R. Co. v. Banning*, 21 Cinc. L. Bul. 9, 10 Ohio Dec. (Reprint) 385; *Hiler v. Hiler*, 35 Ohio St. 645.

Pennsylvania. — *Duncan v. Kirkpatrick*, 13 S. & R. (Pa.) 292.

Vermont. — *Catlin v. Allen*, 17 Vt. 158; *Jamaica v. Guilford*, 2 D. Chip. (Vt.) 103.

Virginia. — *Isom v. Johns*, 2 Munf. (Va.) 272.

United States. — *South Fork Canal Co. v. Gordon*, 2 Abb. (U. S.) 479.

But compare *Mead v. Death*, 1 Ld. Raym. 742, wherein it was held that *indebitatus assumpsit* would not lie to recover money paid on an order of justices which was afterwards quashed on certiorari. *Citing* Com. Dig., tit. Pleader, 3 B, 20.

Restriction on Rule—Judgment for Restitution. — It was remarked by Gibson, J., in *Duncan v. Kirkpatrick*, 13 S. & R. (Pa.) 292, that the doctrine that *assumpsit* would lie for money received under judgment which is reversed should be restrained to cases of reversal without an order of restitution; because an order of restitution, where one is made, is not merely collateral to the judgment of reversal, but a part of the judgment itself, and in this respect the judgment, when entered formally, is not only that the judgment of the court below be reversed, but that "it is considered that the defendant be restored to all things which he has lost on occasion of the judgment aforesaid," and the writ of restitution issued in pursuance of it is strictly an execution. It was said to be "clear and incontrovertible law" that an express or implied promise by a defendant to pay the amount of a judgment which had been rendered against him would not support *assumpsit*, "even though the promise be made on the additional consideration of a stay of execution; and this because the plaintiff would otherwise be

permitted to turn his judgment into a simple contract debt. But it seems to be agreed that such a promise would be a sufficient ground for an action, if made by a stranger. Had the plaintiff procured a reversal of the judgment without an order of restitution, the money obtained from him might have been recovered back by *indebitatus assumpsit*; but as he has obtained a judgment for it in a court of competent jurisdiction, the simple contract debt which would otherwise exist is merged, and he cannot recover."

Universality of Action. — In *Clark v. Pinney*, 6 Cow. (N. Y.) 298, it was held that the court could not compel the party to resort to the antiquated remedy of *scire facias*, but would permit a recovery by a direct action as for money had or received; *Savage, C. J.*, said: "The general proposition is that this action lies in all cases where the defendant has in his hands money which, *ex equo et bono*, belongs to the plaintiff. When money is collected upon an erroneous judgment which, subsequent to the payment of the money, is reversed, the legal conclusion is irresistible that the money belongs to the person from whom it was collected."

Remedy by Motion Cumulative. — The power conferred on appellate courts to make or compel restitution of property or of a right lost by means of a final erroneous judgment or order, where such judgment or order is reversed or modified upon appeal, is of a cumulative character and does not take away the common-law rights of a successful appellant. The remedies provided by statute are not exclusive. *Lott v. Swezey*, 29 Barb. (N. Y.) 87; *Haebler v. Myers*, 132 N. Y. 363.

Action to Recover Mesne Profits. — The practice at common law on reversal of a judgment for the plaintiff in a real action was that a writ of restitution issued to the sheriff commanding him to restore the defendant to his seizin of the land and also to inquire by a jury of the values of the issues and profits for the meantime, and to levy the amount, when ascertained by his inquiry, of the lands and chattels of the plaintiff, and to pay it to the defendant; but this mode of recovering the mesne profits appears never to have been adopted in *Massachusetts*, where

reversed, or of payment under it, cannot, however, be recovered back in such an action.¹

The Money Sued for Must Appear to Have Been Actually Received by the plaintiff in the original action or to have been applied to his use, to authorize a recovery.²

Demand for Restitution. — It seems that in those cases where a writ or order of restitution might have issued at once without the interposition of a *scire facias* or motion in the nature thereof, a demand before bringing suit is unnecessary.³

it seems that either assumpsit or trespass will lie for the mesne profits. There is, however, a reason operating very powerfully in favor of assumpsit. "It is that it will lie as well against the executor or administrator of the defendant in error as against the party himself in his lifetime. If trespass only could be maintained, the right owner would be without remedy if his adversary should die before the issues and profits were recovered." *Cummings v. Noyes*, 10 Mass. 433.

Election of Remedy. — Where it appeared that the court had had a writ of restitution satisfied on reversal of a judgment, it was held that the defendant could not in addition maintain an action of trespass on the ground that the original judgment was void, because where the law gives to a party an election of several remedies for the redress of a wrong, he is limited to that of which he first avails himself. *Gay v. Smith*, 38 N. H. 171.

Splitting Demand — Costs. — Where, in addition to the amount of the judgment, costs also have been paid, the defendant, on attempting to obtain restitution, must not split his demand into a claim for the amount of the debt and one for the costs, because the judgment which was paid and reversed is an entirety. *Camp v. Morgan*, 21 Ill. 255; *Clayes v. White*, 83 Ill. 540.

1. *Dupuy v. Roebuck*, 7 Ala. 484; *Stewart v. Connor*, 9 Ala. 803; *Green v. Stone*, 1 Har. & J. (Md.) 405.

2. *Isom v. Johns*, 2 Munf. (Va.) 272; *Catlin v. Allen*, 17 Vt. 158.

A Receipt of Money by the Agent of the Plaintiff fully authorized to receive it is sufficient for the purposes of an action to recover back money paid on an execution erroneously issued. *Lewis v. Hull*, 39 Conn. 116.

A Nominal Plaintiff in the Original Action Is Not Estopped from showing in an action brought to recover back money collected under a judgment subse-

quently reversed that he received no benefit from the judgment. Thus, where a sheriff was the nominal plaintiff in an action brought upon a bond given to him in his official capacity, he was entitled to show that the money collected on a breach of the bond was received by the person for whose benefit the bond was given. *Catlin v. Allen*, 17 Vt. 158.

Payment to Assignee. — In order to maintain assumpsit to recover an amount paid to the complainant under a reversed decree it need not be proved that the money was actually received by him, but it is sufficient if before the payment he had assigned the decree for a valuable consideration and the payment was made to his assignee. *Owings v. Owings*, 10 Gill & J. (Md.) 267.

Action Against Attorney of Party. — An action will not lie against an attorney to recover back money collected on a judgment and paid to the attorney who prosecuted the suit, although he be a creditor of such party and retained the money by agreement. *Butcher v. Henning*, 90 Hun (N. Y.) 565; *Langley v. Warner*, 3 N. Y. 327. But compare *Catlin v. Allen*, 17 Vt. 158, wherein it was held that an action would lie against the attorneys of the plaintiff in the original suit while they retained money in their hands collected on the judgment subsequently reversed.

3. *Martin v. Woodruff*, 2 Ind. 237.

Proof of Demand. — There seems to have been no proof of demand in *Green v. Stone*, 1 Har. & J. (Md.) 405; nor in *Clark v. Pinney*, 6 Cow. (N. Y.) 297.

The Fact that an Order of Restitution Was Not Made by the Court of Review, although it had power so to order on application made therefor, is no bar to an action in assumpsit. *Travellers' Ins. Co. v. Heath*, 95 Pa. St. 333; *Owings v. Owings*, 10 Gill & J. (Md.) 267.

Entry of Judgment of Reversal. — It does not appear to be necessary that the judgment of reversal has been entered on the records of the lower court before commencing suit.¹

VIII. ENFORCEMENT OF RESTITUTION. — Where restitution is directed it will be enforced by writ of restitution if that process can effect it; if not, and the order be not complied with, it is proper to move for the attachment as for contempt of the disobedient party.²

Mandamus. — It has been held that a mandamus will lie to compel execution of the order by the officer to whom it is directed.³

Where the Order for Restitution Has Been Made by an Appellate Court, it appears preferable to remit the record to the lower court in order to have its judgment carried into effect.⁴

IX. APPEALS FROM ORDERS AND MOTIONS TO QUASH WRITS —
1. Appeals from Orders. — As a general rule, there may be appeals from decisions either granting or denying motions for restitution, inasmuch as substantial rights are affected by them.⁵

1. *Glover v. Foote*, 7 Blackf. (Ind.) 293.

2. *Dawley v. Brown*, (Supm. Ct.) 43 How. Pr. (N. Y.) 17; *Greer v. McClelland*, 1 Phila. (Pa.) 128, 7 Leg. Int. (Pa.) 202; *Doe v. Lord*, 7 Ad. & El. 610, 34 E. C. L. 174; *Doe v. Williams*, 2 Ad. & El. 381, 29 E. C. L. 122; *Anonymous*, 2 Salk. 588.

In *New York*, before the code, a writ of restitution issued in all cases where restitution was required; but since the code restitution is in many instances directed by order of court. *Dawley v. Brown*, (Supm. Ct.) 43 How. Pr. (N. Y.) 17.

Lien on Property. — Where execution has issued it is a lien on the defendant's personal property in the county from the time when it is placed in the hands of the sheriff, and the defendant has no alternative but to pay the money or submit to a seizure and sale of his property. *Travellers' Ins. Co. v. Heath*, 95 Pa. St. 333.

A writ of restitution, being strictly an execution, is a lien on lands from the time of the levy. *Boal's Appeal*, 2 Rawle (Pa.) 37.

Enforcement of Order for Costs. — Where an order was reversed with costs, it was held that the defendant might either enrol the order and take out an execution against the plaintiff for the costs, or, in case of their non-payment, proceedings as for a contempt might be resorted to and an attachment applied for. *Brockway v. Copp*, 2 Paige (N. Y.) 578.

3. *Quan Wo Chung v. Laumeister*, 83 Cal. 384.

Where an Information in a District Court Was Filed by the United States against certain bales of cotton which it was alleged were liable to seizure and confiscation, and had come into the possession of the defendants, and a personal decree was entered against them for the value of the cotton, the amount of which was collected, an appeal was taken to the Supreme Court, which reversed the judgment and remanded the cause with a mandate to the District Court to cause restitution to be made. Nothing effectual was done under the mandate, and a petition for a mandamus was thereupon filed in the Supreme Court. By the return it appeared that the district judge was at a loss how to execute the mandate. In granting the mandamus the Supreme Court said that its mandate must be obeyed as far as practicable; that all those persons who had benefited by the decree of the District Court and were within reach of its territorial jurisdiction (except the United States) should be required by the proper order to refund what they had received, and if they failed so to do they should be dealt with promptly by attachment for contempt. *Ex p. Morris*, 9 Wall. (U. S.) 605.

4. *Russell v. Gray*, 6 S. & R. (Pa.) 208.

5. *Breading v. Taylor*, 6 Dana (Ky.) 226; *Hord v. Bodley*, 1 J. J. Marsh. (Ky.) 79; *Norton v. Sanders*, 3 J. J.

2. Motions to Quash Writs. — Where a writ of restitution is improperly issued, parties affected by its issuance may move to quash it.¹

X. RESTITUTION BONDS. — In some jurisdictions it seems that in actions on contract, notwithstanding an appeal and undertaking for the stay of proceedings, a decree or judgment may be enforced by the respondent on the filing of an undertaking to the effect that in case of reversal or modification of the judgment or decree the respondent will make such restitution as may be directed by the appellate court.²

Marsh. (Ky.) 3; Frank v. Hickman, 7 J. J. Marsh. (Ky.) 635; Smith v. Hornback, 3 A. K. Marsh. (Ky.) 392; Tribble v. Frame, 3 T. B. Mon. (Ky.) 51; Chamberlain v. Choles, (Ct. App.) 3 Abb. Pr. N. S. (N. Y.) 118; Benscotter v. Long, 167 Pa. St. 595; Lewis v. Chicago, etc., R. Co., 97 Wis. 368. Compare Smith v. Trabue, 9 Pet. (U. S.) 4.

In Tribble v. Frame, 3 T. B. Mon. (Ky.) 51, it was said that the adjudication of a court quashing a writ of possession and awarding a writ of restitution is final and the action of the court in so doing cannot be questioned in the same court after the term at which judgment was rendered. The remedy is not by motion there, but by writ of error.

1. Quigley v. Middleton, 10 N. J. L. 293.

The Return of the Sheriff on a writ of habere facias afterwards quashed, on which a writ of restitution was awarded, cannot be questioned on motion to quash the writ of restitution. Tribble v. Frame, 3 T. B. Mon. (Ky.) 51.

Refusal to Enjoin Execution of Writ. — Where a writ of restitution was ordered and the parties affected by it endeavored to restrain its execution by injunction, it was said that until the order had been obeyed the court could not, "honorably to itself, pass upon the further rights of the parties." Perry v. Tupper, 71 N. Car. 385.

2. Bickett v. Garner, 31 Ohio St. 28;

18 Encyc. Pl. & Pr. — 57

Holbrook v. Investment Co., 32 Oregon 104; Bodewig v. Standard Cattle Co., 56 Neb. 217.

Action on Bond. — When restitution is sought to be compelled by action on the bond, the cause of action upon which the original suit was brought cannot be made available as a set-off by dismissing the original action. Bickett v. Garner, 31 Ohio St. 28.

Judgment Against the Sureties may be rendered under Hill's Annot. Laws Oregon, § 540, on such an undertaking, although such power is not in direct terms conferred upon the court. Holbrook v. Investment Co., 32 Oregon 104.

Action on Bond — Claim for Malicious Prosecution. — A claim for actual damages on the bond and a claim for damages for malicious prosecution should be separately paragraphed in the complaint, because they are for different causes of action; and the complaint may be dismissed on the plaintiff's noncompliance with an order requiring him to paragraph. Thompson v. Gatlin, 58 Fed. Rep. 534.

Forcible Entry and Detainer — Arkansas. — Under Mansf. Dig. Ark., § 3353 (Sand. & H. Dig. Stat. Ark., § 3450), the plaintiff in an action of forcible detainer must execute a bond to the sheriff conditioned that he will restore possession of the lands, tenements, or other possessions mentioned in his complaint, if restitution thereof be adjudged. Thompson v. Gatlin, 58 Fed. Rep. 534.

Volume XVIII.

RESTRAINING ORDER.

See article *INJUNCTIONS*, vol. 10, p. 869.

RETRAXIT.

BY HENRY STEPHEN

I. DEFINITION, 898.

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III. WHAT IT EFFECTS, 900.

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CROSS-REFERENCES.

See in general articles *DISCLAIMERS*, vol. 6, p. 721; *DISMISSAL*, *DISCONTINUANCE*, AND *NONSUIT*, vol. 6, p. 830; *JUDGMENTS*, vol. 11, p. 840.

I. DEFINITION. — A retraxit is a voluntary acknowledgment that the plaintiff has no cause of action and therefore will not proceed further.¹

1. Beecher's Case, 8 Coke 58; Harris v. Preston, 10 Ark. 201.

A retraxit is the coming into court by the plaintiff in person and saying that he will not proceed further. 2 Sellon 46; Bullock v. Perry, 2 Stew. & P. (Ala.) 319; Broward v. Roche, 21 Fla. 477.

Statutory Definition. — "A retraxit is the open, public, and voluntary renunciation by the plaintiff in open court of his suit or cause of action, and if this is done by the plaintiff and a judgment entered up thereon by the defendant, the plaintiff's right of action is forever gone." 2 Code Ga., § 5042; Cunningham v. Schley, 68 Ga. 105.

Comparison with Nonsuit. — "A retraxit differs from a nonsuit in that the one is negative and the other positive; the nonsuit is a mere default and neglect of the plaintiff, and therefore he is allowed to begin his suit again upon payment of costs, but a retraxit is an open and voluntary renunciation of his

suit in court, and by this he forever loses his action." 3 Black. Com. 296.

Comparison with Nolle Prosequi. — As to the difference between the effect of a nolle prosequi and that of a retraxit, see Broward v. Roche, 21 Fla. 477; Herring v. Poritz, 6 Ill. App. 211; State v. Primm, 61 Mo. 166; Wohlford v. Compton, 79 Va. 333; U. S. v. Parker, 120 U. S. 95; Welch v. Mandeville, 1 Wheat. (U. S.) 233; Cooper v. Tiffin, 3 T. R. 511; Noke v. Ingham, 1 Wils. 90; Dale v. Eyre, 1 Wils. 307.

Criminal Proceedings. — A retraxit is believed to be unknown to criminal law. Wortham v. Com., 5 Rand. (Va.) 669.

At Common Law if a plaintiff wished to stay his suit, it had to be done either by a nolle prosequi or a retraxit. Partlow v. Elliott, Meigs (Tenn.) 547.

To Part of Declaration. — A retraxit may be entered to one or more counts of a declaration. South Branch R. Co. v. Long, 26 W. Va. 692.

II. HOW AND WHEN MADE — Plaintiff in Person. — A retraxit must be made by the plaintiff in person.¹ It cannot be entered by an attorney.²

In Open Court. — A retraxit must be made in open court.³

Before Declaration Filed. — A retraxit cannot be made before declaration is filed.⁴

Remittitur. — A remittitur entered after judgment will not have the effect of a retraxit if the judgment is set aside and a new trial granted. *Planters' Bank v. Union Bank*, 16 Wall (U. S.) 483.

Payment of Costs by Plaintiff. — Where a plaintiff, after judgment against him and an appeal by him, paid the defendant's costs and did not prosecute the action further, it was held to constitute a renunciation of his cause of action in effect like a retraxit. *Catlin v. Taylor*, 18 Vt. 104; *Armstrong v. Colby*, 47 Vt. 359.

1. *Kellogg v. Gilbert*, 10 Johns. (N. Y.) 220; *Lambert v. Sandford*, 2 Blackf. (Ind.) 137; *Harris v. Tiffany*, 8 B. Mon. (Ky.) 225; *Muse v. Farmers' Bank*, 27 Gratt. (Va.) 252; *Hallack v. Loft*, 19 Colo. 74.

Retraxit by One of Several. — Where there were several plaintiffs in an action of tort, one of the plaintiffs, against the will of the others, came into court after the pleadings were made up and entered a retraxit. The court said, *obiter*, that the more proper course would have been to permit the withdrawing plaintiff to strike his name out of the writ and declaration, and then, if the other plaintiffs could proceed without him, they should have been permitted to do so. *Wilkinson v. Gilchrist*, 5 Ired. L. (N. Car.) 228.

Where one of several plaintiffs files a retraxit, the other plaintiffs who have not joined cannot be prejudiced. *Nicodemus v. Simons*, 121 Ind. 564.

Nominal Plaintiff. — It has been said *obiter* that a retraxit cannot be entered by a nominal plaintiff, under a collusive agreement with the defendant, so as to bar the beneficiary. *Welch v. Mandeville*, 1 Wheat. (U. S.) 233.

Presumption of Entry in Person. — A retraxit made after judgment will, unless the contrary appears on the record, be presumed to have been entered by the plaintiff in person. *Coux v. Lowther*, 1 Ld. Raym. 597. And where the record was that "this day came the parties by their attorneys and the

plaintiff enters a retraxit," it was deemed to be the personal act of the plaintiff. *Thomason v. Odum*, 31 Ala. 108.

2. **Entry by Attorney.** — An attorney cannot enter a retraxit, because "it shall be a perpetual bar, and in a manner a release, and the admittance of the court cannot prejudice the plaintiff in so high a degree." *Beecher's Case*, 8 Coke 58.

California. — In California the necessary authority to enter a retraxit is held to be conferred on the attorney of record. *Merritt v. Campbell*, 47 Cal. 542; *Funded Debt Com'rs v. Younger*, 29 Cal. 147; *Westbay v. Gray*, 116 Cal. 660.

Colorado. — Under a somewhat similar statute in Colorado, it was held that entry of retraxit must be by the plaintiff personally and that it cannot be done by stipulation of counsel. *Hallack v. Loft*, 19 Colo. 74.

Indiana. — Under a provision of the Indiana Code, an attorney has full power to bind his client with a written retraxit filed with the clerk or entered on the written minutes of the court. *Barnard v. Daggett*, 68 Ind. 305.

3. *Muse v. Farmers' Bank*, 27 Gratt. (Va.) 252.

Order from Plaintiff. — Where the plaintiff did not go personally into court, and no declaration was filed, an order entitled in the court wherein the suit was pending, signed by the plaintiff, and addressed to the prothonotary, in the words: "You are hereby authorized and required to discontinue forever, and withdraw the above-stated suit forever, on the presentation of this paper," was held not to operate as a retraxit, but simply as a discontinuance or nonsuit. *Lowry v. McMillan*, 8 Pa. St. 157.

4. *Bac. Abr.*, tit. Nonsuit, A; *Eagin v. Musgrove*, Phil. L. (N. Car.) 137. *Lowry v. McMillan*, 8 Pa. St. 157.

Before Citation. — Where it appeared that a prior contest in an election proceeding had been dismissed before citation was served on the defendant, it was held that there was no retraxit and

III. WHAT IT EFFECTS. — When properly entered, the retraxit will be a total relinquishment of the suit,¹ and will operate as a present and perpetual release, surrender, and abandonment of all right of action in the subject-matter in dispute, so that at no subsequent time can the retractor, in any form of action, contest with the defendant his right or title to the possession of the rights or property in suit.²

IV. PLEADING. — It would seem necessary on principle that a plea in bar setting up a judgment by retraxit should allege that the judgment was entered on the same identical cause of action and that the plaintiff *in propria persona* made the retraxit.³ A replication to such a plea may aver that the entry of dismissal was obtained by fraud, and that the judgment was a fraudulent one.⁴

no bar to a subsequent contest. Lord v. Dunster, 79 Cal. 477.

1. Noke v. Ingham, 1 Wils. 90.

In *Trespass* a retraxit as to several defendants discharges all. Coux v. Lowther, 1 Ld. Raym. 597.

2. Bullock v. Perry, 2 Stew. & P. (Ala.) 319; Thomason v. Odum, 31 Ala. 108; Harris v. Preston, 10 Ark. 201; Merritt v. Campbell, 47 Cal. 542; Westby v. Gray, 116 Cal. 660; Justices v. Selman, 6 Ga. 432; Cox v. Griffin, 17 Ga. 249; Herring v. Poritz, 6 Ill. App. 211; Walker v. St. Paul City R. Co., 52 Minn. 130; Minor v. Mechanics' Bank, 1 Pet. (U. S.) 74.

Minnesota. — Under Gen. Stat. Minn. (1878), c. 66, § 262, a dismissal "by consent or voluntarily" was held not to have the effect of a common-law retraxit. Walker v. St. Paul City R. Co., 52 Minn. 127.

3. See in general article FORMER ADJUDICATION, vol. 9, p. 611.

Chitty, after alleging that the action was for the same cause, continues as follows: "The said A B came into the said court, in his own proper person, and confessed that he would not further prosecute his said suit against the said C D, but from the same altogether withdrew himself." 3 Chitty on Pleading 477.

Surplusage. — Where a plea substantially as above inserted the words "and dismissed the same," it was held good on demurrer. Evans v. McMahon, 1 Ala. 45. A similar plea, however, was held not to set up a retraxit, because the plaintiff did not admit in

the entry of dismissal that he had no cause of action. The court said that it was the admission upon the record that he had no cause of action which constituted the bar and operated as an estoppel. Pinner v. Edwards, 6 Rand. (Va.) 677; Coffman v. Brown, 7 Smed. & M. (Miss.) 125.

A Special Plea of Retraxit is a good plea and cannot be stricken out as a nullity. Williams v. Northern Bank, 7 Smed. & M. (Miss.) 28.

Proof under Pleading — Georgia. — Where the evidence was that the plaintiff had twice dismissed his suit, it was held, under an Act of 1843, not to support a plea of retraxit. Justices v. Selman, 6 Ga. 432.

In Hoffman v. Porter, 2 Brock. (U. S.) 156, a plea that the defendant was formerly impleaded for the same cause of action, "which suit, by the judgment of the court, the same being agreed by the parties, was dismissed," was held insufficient in law. See also Welch v. Mandeville, 1 Wheat. (U. S.) 233.

Where the plea was that the plaintiff, in his own proper person, in open court, entered a retraxit of the former suit, whereupon it was dismissed, to which the plaintiff replied that there was no such record, and the record showed that "this suit was dismissed by order of the plaintiff," it was held that such a dismissal was not proof of a retraxit. Coffman v. Russell, 4 Munf. (Va.) 207.

4. Welch v. Mandeville, 1 Wheat. (U. S.) 233.

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BY JOHN LEHMAN.

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CROSS-REFERENCES.

See in general articles *SERVICE OF PROCESS; SHERIFFS AND CONSTABLES; SUMMONS AND PROCESS.*

I. DEFINITION AND NATURE. — A return is the indorsement or written statement by an officer, certified to the court, under the sanction of his oath and official responsibility, of what he has done touching the execution of the mandates of the summons,

writ, or process which has been directed to him for execution.¹

Comprehensive Character — Filing and Indorsement. — The term "return" more comprehensively embraces not only the indorsement on the writ or process, but also the actual filing of the writ or process in the clerk's office.²

1. *Union Bank v. Barnes*, 10 Humph. (Tenn.) 245; *State v. Reed*, 50 La. Ann. 170; *Beall v. Shattuck*, 53 Miss. 358; *State v. Melton*, 8 Mo. App. 417; *Dickson v. Peppers*, 7 Ired. L. (N. Car.) 429.

On What Paper Indorsed. — The return of garnishment under an attachment should be on the back of the attachment writ and not on the notice of garnishment. The latter is not a judicial writ. *Hackett v. Gihl*, 63 Mo. App. 453. See also *Gregor Grocer Co. v. Carlson*, 67 Mo. App. 179; *Todd v. Missouri Pac. R. Co.*, 33 Mo. App. 110.

Indorsement on the Petition Annexed to the Writ instead of upon the writ itself is an irregularity of form which will not defeat the jurisdiction of the court. *Johnson v. Gilkeson*, 81 Mo. 55.

Indorsement on Bond Instead of on Execution. — When a bond is executed by one claiming property seized under an execution, for the purpose of trying the right of property, an indorsement on the bond instead of on the execution of the name of the court to which the bond is returnable, as the statute requires, becomes immaterial where the claimant finds the court and defends the suit. *Carney v. Marsalis*, 77 Tex. 62. See also *Union Bank v. Barnes*, 10 Humph. (Tenn.) 245.

Certificate of Service on Declaration. — Where by statute a suit could be commenced by filing a declaration and a service of the declaration and notice of rule to plead, it was held of no consequence whether the certificate of service was entered on the original declaration or on a copy. *Larned v. Wilcox*, 4 Mich. 335.

Separate Certificate. — It seems that sometimes a separate certificate of service is made under code provisions permitting proof of service by the officer's certificate. *Litchfield v. Burwell*, (Supm. Ct. Spec. T.) 5 How. Pr. (N. Y.) 345.

2. *Nelson v. Cook*, 19 Ill. 440, holding that the indorsement itself does not assume the character of a return until the writ is returned into the clerk's office; *Hogue v. Corbit*, 156 Ill. 540; *State v. Melton*, 8 Mo. App. 417; *Welsh v. Joy*, 13 Pick. (Mass.) 482; *Beall v. Shat-*

tuck, 53 Miss. 358; *Fleisher v. Friedman*, 7 Pa. Dist. 421; *Dunn v. Ball*, 2 R. I. 450; *Harman v. Childress*, 3 Verg. (Tenn.) 329. See also *State Bank v. Torre*, 2 Spears L. (S. Car.) 501.

Return of an Execution was held to mean the mere certificate by the officer written on the back of the execution, under a statute providing for the ultimate liability of a stockholder for corporate debts after judgment and return of an execution unsatisfied against the corporation. *Lovegrove v. Brown*, 60 Me. 592.

Return to Proper Office — Handing to Attorney. — The process must be returned to the proper office, else it is no return. A return is not completed by handing it to an attorney in the cause. *Wright v. Marvin*, 59 Vt. 437.

Return to Clerk's House. — In *Frink v. Scovel*, 2 Day (Conn.) 480, which was an action on the case against an officer for neglect of duty in returning process, it appeared that the officer returned the process to the house of the clerk of the court, and, he not being at home, left it with his wife, informing her what it was, but it was not entered in the docket, by reason of which the plaintiff could not obtain judgment and lost a great part of his debt. It was held that the officer was not liable for neglect of duty.

To Court — Execution. — The law requires that a writ of execution shall be returned to the court and not to the clerk. It is true that the clerk is the officer of the court to receive the writ and whatever may be raised upon it; and his office is the place where the records of the court are kept and preserved. But if the clerk will not receive the return when tendered to him, the sheriff, to discharge his duty, must return the precept and the money, if he has made it, to the court, which will, upon a proper representation, make such order as the case may require, and, in a proper case, direct the clerk to receive the process. *Hamlin v. March*, 9 Ired. L. (N. Car.) 35.

The Sheriff of Another County to whom process is directed is not required by law to return it either in

The Return Is Evidence of the fact of service, and is not itself the service which brings the defendant into court.¹

II. NECESSITY OF RETURN — 1. In General — Return Necessary as Evidence of Execution. — It is necessary that the process directed to an officer be returned according to the mandate of the process, with a statement of the acts done by the officer by way of executing it, because such return is the evidence of the fact as well as of the manner of execution.²

To Avoid Liability for Failure to Return. — A return is also necessary to avoid liability on the part of the officer for failure to make a return.³

As Foundation for Further Proceedings. — So where further proceedings depend upon conditions which are evidenced by an officer's return of process, a return is necessary to lay the foundation therefor.⁴

2. Original Process. — Original process to bring the defendant into court must be returned, because in the absence of the return showing its proper execution no valid judgment can be based upon the service of the process unless the defendant voluntarily appears.⁵ Jurisdiction *in rem*, however, may be

person or by deputy, but it is sufficient if he deposits it in the mail, properly directed, in time for it to reach the clerk of the court whence it issued by the return day. *Underwood v. Russell*, 4 Tex. 175.

After Surrender of Office by Justice. — Where a justice of the peace surrendered his office and placed his docket in the hands of the officer provided by law, it was held that a return was properly made to such officer. *Hampton v. Boylan*, 46 Hun (N. Y.) 151.

Under a Statute Merely Directory to the Sheriff, a return to the wrong clerk's office was held not to be bad. *Cutler v. Rathbone*, 1 Hill (N. Y.) 204; *Garlock v. Ontario Bank*, 1 Wend. (N. Y.) 288.

Filing Without Indorsement. — Putting a writ into the office without an official certificate of what has been done is no return thereof. *Trigg v. Shields*, Hard. (Ky.) 176.

1. *Tewalt v. Irwin*, 164 Ill. 592; *Smith v. Clinton Bridge Co.*, 13 Ill. App. 572. See also *infra*, VII. *Effect of and Objections to Return*.

2. *Metcalfe v. Gillet*, 5 Conn. 404; *Nelson v. Cook*, 19 Ill. 440.

3. *Caskey v. Nitcher*, 8 Ala. 622; *Fleisher v. Friedman*, 7 Pa. Dist. 421.

Liability for Failure to Return. — See title *Sheriffs and Constables*, Am. and Eng. Encyc. of Law. See also article *SHERIFFS AND CONSTABLES* in this work.

4. Supplementary Proceedings. — Thus, where by statute a judgment debtor may be examined upon the return of an execution unsatisfied in whole or in part, it is held that such a return is jurisdictional and must be made before such examination can be had. *Jennings v. Lancaster*, (N. Y. City Ct. Gen. T.) 15 Misc. (N. Y.) 444. But see *Barker v. Dayton*, 28 Wis. 367. And see article *SUPPLEMENTARY PROCEEDINGS*.

Nulla Bona — Creditors' Suits. — See article *CREDITORS' BILLS*, vol. 5, p. 388. See also *infra*, V. 4. *Non Est* and *Nulla Bona Before Return Day*.

Waiver — Arrest. — The requirement of a return of an execution against property before the issuance of execution against person may be waived. *New York Guaranty, etc., Co. v. Roberts*, 43 N. Y. Super. Ct. 551, *affirmed* 71 N. Y. 377. And see generally article *EXECUTIONS AGAINST THE BODY AND ARREST IN CIVIL CASES*, vol. 8, p. 630.

5. *Pratt v. Pond*, 45 Conn. 386; *Toby v. Reed*, 9 Conn. 216; *State v. Reed*, 50 La. Ann. 170; *Bradley v. Lamb*, Hard. (Ky.) 536; *Peers v. Carter*, 4 Litt. (Ky.) 268; *Long v. Montgomery*, 6 Bush (Ky.) 395; *Dunn v. Ball*, 2 R. I. 450; *Tallman v. Baltimore, etc., R. Co.*, 45 Fed. Rep. 156.

In Order to Confer Jurisdiction upon a Justice, the summons must be returned to the justice with a written return

acquired without a return of personal service, as in the case of an attachment.¹

A False Return is sufficient to confer jurisdiction where it is regular on its face, it being held that the remedy for a false return is an action against the officer.²

3. Final Process. — In the case of final process the rule requiring a return as prerequisite to jurisdiction does not apply, from the very nature of the process, as it begins to operate before the return is made,³ though it is apprehended that in the United

thereon by the officer or other person making service. *Jackson v. Sherwood*, 50 Barb. (N. Y.) 356; *Vandement v. Trisler*, 4 Ohio N. P. 37, 4 Ohio Dec. 447.

Where the process is actually returned to the justice and the case is called within the hour next succeeding that specified for the return, and such actual return and the officer's indorsement of the service constitute one continuing act, the mere fact that the indorsement is not made within such second hour will not defeat or suspend the justice's jurisdiction. *Carter v. Wyatt*, 43 Wis. 570.

Entry on Docket. — A statutory provision requiring a justice to enter on his docket the return of process showing service of notice on the defendant is directory merely, and failure to make such entry does not affect the jurisdiction of the justice or the validity of the judgment. *Bridges v. Arnold*, 37 Iowa 221; *Bacon v. Bassett*, 19 Wis. 45.

The return need not be copied at length. *Strohmier v. Stumph*, 1 Wils. (Ind.) 304.

Several Defendants Named in Summons.

— Where the return to a summons against several persons shows that one was served personally but is silent as to the others, a judgment by default against those not shown by the return to have been served cannot stand. *Dickison v. Dickison*, 124 Ill. 483; *Carper v. Woodford*, 24 Neb. 135.

Return of Service on Persons Not Named. — A sheriff's return that citation was served on persons other than the defendants named in the process will not support a judgment by default, and leave should be granted the defendants to answer. *Hough v. Coates* (Tex. Civ. App. 1894) 25 S. W. Rep. 995.

1. *Johnson v. Gilkeson*, 81 Mo. 55.

The Lien of an Attachment is held not to be affected by the return of the at-

tachment after the return day. *Horton v. Monroe*, 98 Mich. 195. See also *Hogue v. Corbit*, 156 Ill. 540; *Ritter v. Scannell*, 11 Cal. 238.

2. *Peck v. Strauss*, 33 Cal. 685; *Taylor v. Lewis*, 2 J. J. Marsh. (Ky.) 400; *Low v. Mills*, 61 Mich. 35; *Putnam v. Man*, 3 Wend. (N. Y.) 204; *Washington Mill Co. v. Kinnear*, 1 Wash. Ter. 99. See also article JUDGMENTS, vol. 2, p. 1177. But see further *infra*, VII, *Effect of and Objections to Return*.

3. *Clark v. Foxcroft*, 6 Me. 296, citing *Wells v. Pickman*, 7 T. R. 174. See also *infra*, V, *Return Time*; and see article SHERIFFS' SALES.

In *Mentz v. Hamman*, 5 Whart. (Pa.) 154, it was said that the sheriff is not obliged, unless ruled to do so, to make a return to a writ of fi. fa. This statement is held to have been meant probably as a statement of the practice rather than of the law. *Dixon v. White Sewing Mach. Co.*, 128 Pa. St. 397. See *Rex v. Sheriff*, 5 East 386; *Edmunds v. Watson*, 7 Taunt. 5, 2 E. C. L. 5, 2 Marsh. 330; *Richardson v. Trundle*, 8 C. B. N. S. 474, 98 E. C. L. 474.

The effect of delaying the return until *post litem motam* is to take away the presumption to which it is ordinarily entitled in the sheriff's favor. *Dixon v. White Sewing Mach. Co.*, 128 Pa. St. 397; *Trigg v. Shields*, Hard. (Ky.) 176.

Justification. — As against the officer himself it is said that if he seizes goods under a writ where it is his duty to make a return he never has a justification unless he discharges that duty. *Bayley, J.*, in *Shorland v. Govett*, 5 B. & C. 485, 11 E. C. L. 279; *Russ v. Butterfield*, 6 Cush. (Mass.) 242; *Williams v. Babbitt*, 14 Gray (Mass.) 141; *Munroe v. Merrill*, 6 Gray (Mass.) 238; *Ellis v. Cleveland*, 54 Vt. 437; *Wright v. Marvin*, 59 Vt. 437. To the same effect see *Rowland v. Veale*, 1 Cowp. 18; *Girling's Case*, Cro. Car. 446; *Middleton v. Price*, 2 Stra. 1184; *McPherson*.

States all process is now returnable.¹

4. Compelling Return. — The court may, upon rule to show cause, order the officer to return a writ directed to him for execution;² but what return he shall make is within his own control and the court cannot dictate what it shall be.³

III. AFFIDAVIT OF SERVICE — RETURN UNDER OATH — 1. In General. — When the service of process or other papers is the proper function of a particular officer, his return of such service is sufficient evidence thereof;⁴ but when such service is not

son v. Pemberton, 1 Jones L. (N. Car.) 378; Bac. Abr., tit. Trespass, B; Bulmer's N. P. 23.

Mesne and Final Process. — "Although otherwise in respect to writs of execution, yet with regard to mesne process, after the day appointed for the return, the sheriff or the principal officer to whom the writ is directed cannot justify under it without showing it actually returned." Brown v. Bissett, 21 N. J. L. 46, citing Pitt v. Knight, 1 Saund. 92, note; Rowland v. Veale, 1 Cowp. 20; Bayley, B., in Lucas v. Nockells, 10 Bing. 192; Oystead v. Shed, 12 Mass. 511; Cheasley v. Barnes, 10 East 73. See also Pratt v. Pond, 45 Conn. 386; Toby v. Reed, 9 Conn. 216; Clark v. Foxcroft, 6 Me. 296; Wright v. Marvin, 59 Vt. 437.

Ca. Sa. — Committur. — It has been held unnecessary for any return to be made on a ca. sa. in order to justify a committur. Fulton v. Wood, 3 Har. & M. (Md.) 99.

In *Ex p. Watkins*, 7 Pet. (U. S.) 577, it was said that Act Maryland 1795, c. 74, in express terms required the return of a ca. sa. to be made on the return day.

Where a Writ of Attachment Is Not Returnable until After Suit against the officer is begun, he may justify under the writ. Judd v. Langdon, 5 Vt. 231.

1. It is true that in England a ca. sa. was not considered to be returnable, and that a sheriff was not liable to an action merely for failing to make return. It was, nevertheless, strictly his duty to return the writ, and he was compellable to perform that duty. If he made a false return, or failed to execute the writ — having had the power to arrest the defendant — he was liable to an action on the case. 1 Arch. Pr. 306, 7; Beckford v. Montague, 2 Esp. 475; Phillips v. Vickers, 5 Blackf. (Ind.) 281. See also Dixon v. White Sewing Mach. Co., 128 Pa. St. 397;

U. S. v. Scroggins, 3 Woods (U. S.) 529.

2. People v. Needles, 3 Ill. 361; U. S. v. Scroggins, 3 Woods (U. S.) 529, which was a warrant of arrest directed to the United States marshal, the court saying that "the idea that a ministerial officer may pocket a warrant issued to him by lawful authority, and refuse to make any return, or give any reason for not executing it, is * * * without any foundation at either the common law or in the statutes of the United States;" Oswald v. New York, 2 Dall. (U. S.) 402; Edmunds v. Watson, 7 Taunt. 5, 2 E. C. L. 5, 2 Marsh. 330; Richardson v. Trundle, 8 C. B. N. S. 474, 98 E. C. L. 474.

The First Step to compel a return is to take a rule requiring it, and not a rule to show cause why an attachment should not issue. People v. Needles, 3 Ill. 361.

The sheriff may be ruled to return final process, a course which in the English practice precedes an attachment, and the court may enlarge the rule at its discretion. Clark v. Foxcroft, 6 Me. 296, citing Wills v. Pickman, 7 T. R. 174. See also Starnes v. Pierce, 2 Port. (Ala.) 227.

Service of the Rule upon an officer to return process should be by copy. People v. McHatton, 3 Ill. 566.

When an Execution Is Mislaid the officer may be excused for not returning it in time. Waring v. Thomas, 1 Litt. (Ky.) 253.

3. Vastine v. Fury, 2 S. & R. (Pa.) 426; Maris v. Schermerhorn, 3 Whart. (Pa.) 13. See *infra*, VI. *Amendment of Return*.

But it is said that a court may by rule compel a sheriff to make a better return and state distinctly and without evasion why he has not made the money, etc. Phillips v. Cunningham, 5 Yerg. (Tenn.) 416.

4. Parker v. Dacres, 1 Wash. 190.

within the official duty of the person making it, as where the process or equivalent paper is not directed to the officer and the law does not require him to serve it,¹ or where the service is by an officer of another state,² or by officers other than sheriffs, under provisions requiring returns under oath in such cases,³ or where the service is by any private and unofficial person, under various statutes which authorize such service and require the proof thereof to be by affidavit,⁴ the service is not shown by a mere certificate or return thereof, but must be proved by the affidavit of the person making it. So that as an extension of the rule heretofore stated that the officer's return must show service of process, it may be added that such service may be shown either by an official certificate of return or by an affidavit of service where the statute permits such a course.⁵

1. Anonymous, 1 Hen. & M. (Va.) 206; *Utica City Bank v. Buell*, (Supm. Ct.) 9 Abb. Pr. (N. Y.) 385. See also *infra*, VII. *Effect of and Objections to Return*.

Waiver of Irregularity. — The service of an order in supplementary proceedings was held not to be such as the sheriff was obliged to make, and therefore a return by him was not by itself proof of service, but the defendant having appeared and asked an adjournment it was held that he waived all irregularity in the proof of service. *Utica City Bank v. Buell*, (Supm. Ct.) 9 Abb. Pr. (N. Y.) 385.

2. *Higgins v. Beckwith*, 102 Mo. 456; *Thurston v. King*, (Supm. Ct. Spec. T.) 1 Abb. Pr. (N. Y.) 126; *Adams v. Heckscher*, 80 Fed. Rep. 742.

3. **Constable.** — *State v. Cohen*, 13 S. Car. 198; *Moss v. Blinn*, 7 Iowa 261.

Coroner. — In *Mississippi* it was held that inasmuch as proof of service would have validated service of a notice of a motion by a coroner, in the absence of evidence to the contrary the presumption would be indulged that such proof was made. *Coleman v. Mississippi*, etc., R. Co., 5 How. (Miss.) 419.

Special Deputy. — *Forbes v. Bringe*, 32 Neb. 757; *Filkins v. O'Sullivan*, 79 Ill. 524; *Layton v. Trapp*, 20 Mont. 453. A return with the name of a deputy alone, without showing that the deputy acted for the sheriff, must be sworn to. *Reinhart v. Lugo*, 86 Cal. 395. So where a special deputy failed to sign his return it was held that a certificate that such deputy had sworn to the return would not render the return sufficient. *Simms v. Simms*, 88 Ky. 642.

In the Absence of Such Provision,

where a person is especially appointed by the justice in the place of the regular officer, for the purpose of serving a process, the return of such person need not be sworn to. *Betts v. Stevens*, 6 Wis. 398; *Winsor v. Cole*, 10 Kan. 620. See also *Johnson v. Johnson*, 23 Fla. 413.

4. *Coffee v. Gates*, 28 Ark. 43; *State Bank v. Marsh*, 10 Ark. 129; *Calderwood v. Brooks*, 28 Cal. 151; *Yolo County v. Knight*, 70 Cal. 431; *Wostenholmes v. State*, 71 Ga. 669; *Kyle v. Kyle*, 55 Ind. 387; *Romain v. Muscatine County*, 1 Morr. (Iowa) 357; *Lloyd v. McCauley*, 14 B. Mon. (Ky.) 430; *Peers v. Carter*, 4 Litt. (Ky.) 268; *Layton v. Trapp*, 20 Mont. 453; *Utica City Bank v. Buell*, (Supm. Ct.) 9 Abb. Pr. (N. Y.) 385; *Kernan v. Northern Pac. R. Co.*, (Wis. 1899) 79 N. W. Rep. 403.

Service by Indifferent Person. — In *Connecticut* it was held that the statute authorizing the execution of writs by an indifferent person did not require such person to whom a writ of attachment was directed to swear to his return. *Edmonds v. Buel*, 23 Conn. 242.

Certified Copy. — Where a private person may serve process by copy, he may also attest the copy. *Stone v. Anderson*, 25 N. H. 221.

Return and Affidavit. — In *New York* it was held that where one who had been deputed to serve a summons appeared before the justice on the return day and swore that he personally served the summons upon one of the defendants, and on the other by a copy, but no return was indorsed upon the summons, the justice acquired no jurisdiction. *Jackson v. Sherwood*, 50 Barb. (N. Y.) 356.

5. *McCaslin v. Camp*, 26 Mich. 390.

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2. Sufficiency of Affidavit — Strict Construction. — The practice of allowing process to be served by persons other than officers of the law or their deputies acting under oath is a relaxation of the common-law rule, and no presumption will be indulged in such cases upon facts which are not wholly inconsistent with any other hypothesis than that the service was legally and properly made.¹

Judgment Invalid Without Proper Proof.

— Proof of service of summons must be made as required by the statute, else the court will acquire no jurisdiction, and a judgment rendered without such proof may be set aside upon motion or on appeal. *Reinhart v. Lugo*, 86 Cal. 395; *Linott v. Rowland*, 119 Cal. 452; *McMillan v. Reynolds*, 11 Cal. 372; *Schloss v. White*, 16 Cal. 66; *McKinlay v. Tuttle*, 42 Cal. 577; *People v. Bernal*, 43 Cal. 385; *Hoary v. McHale*, 2 Pa. Dist. 686. But see *Martin v. Gray*, 142 U. S. 236, holding that after a person has remained inactive for a long time, with full knowledge of the facts and of his rights, and then files a bill to have proceedings set aside upon the ground of a want of service of process upon him, the court will give any reasonable construction to the language of the return which will sustain the decree attempted to be impeached.

Appearance. — In *Forbes v. McHaffie*, 32 Neb. 742, wherein the defendant appeared and moved to dismiss the action because no return of summons was made as required by law, it was held that the grounds of the motion were too general; that the return of the summons was sufficient, though not made under oath, where no objection was made thereto.

Affidavit or Oath. — While the statute must be referred to in order to determine whether the proof of service is made by affidavit or by oath, it has been held that a return may be verified by affidavit although the statute requires only the oath of the person making the service. *Edwards v. McKay*, 73 Ill. 570.

Affidavit Annexed. — It is held to be immaterial if an affidavit of service of process which refers to an annexed summons is not in fact annexed. *Steinhardt v. Baker*, (Supm. Ct. Spec. T.) 20 Misc. (N. Y.) 470.

But where proof of service must be made by a copy sworn to or officially certified, it is not sufficient to state in the affidavit of service the mere substance of the notice, and it is held that

the court cannot properly act without knowing precisely what notice was served. *McCaslin v. Camp*, 26 Mich. 391.

Filing. — When a summons served by a person other than the sheriff is returned with the affidavit of service of such person, it is not necessary that the affidavit should be separately filed. *Hibernia Sav., etc., Soc. v. Clarke*, 110 Cal. 27.

By Whom the oath or affidavit shall be made depends upon the statute. Usually, as appears from the cases already cited in this section, it is made by the person making the service. *Doty v. Berea College*, (Ky. 1891) 15 S. W. Rep. 1063; *Edwards v. McKay*, 73 Ill. 570; *Hibernia Sav., etc., Soc. v. Clarke*, 110 Cal. 27.

Notice of Appeal. — Where the record is silent as to the service of a notice of appeal from a justice's court, the fact of notice may be proved by affidavit. *Dalzell v. Superior Ct.*, 67 Cal. 453.

Proof by Third Person. — In *Moore v. Besse*, 35 Cal. 186, upon the question of the proof of notice of appeal the court said, "The statute does not expressly provide how proof of service of the notice of appeal must be made. It is not doubted that the certificate of the sheriff, or the admission of the respondent's attorney, is competent proof of service, but it is insisted that service cannot be proved by the affidavit of a third person. The practice of proving service by affidavit has prevailed for many years, and, so far as we are apprised, without objection until the present time. Service of the notice, if not shown by an official certificate, or by the admission of the party served, must be proven by the affidavit of some competent person. No reason is suggested, and none occurs to us, why less value should be assigned to the affidavit of a third person than to that of the appellant or his attorney."

1. *Linott v. Rowland*, 119 Cal. 452; *McMillan v. Reynolds*, 11 Cal. 372; *Black v. Clendenin*, 3 Mont. 47; *Sayles v. Davis*, 20 Wis. 302.

Certainty Sufficient as Foundation for

Manner and Time of Service. — An affidavit of service by an unofficial person should show the time, place, and manner of service as required by the statute.¹

Competency of Person Making Service. — The mere fact that a paper or process is served by an individual is not even *prima facie* evidence of his right to serve it, but he must be such a person as is described in the statute, acting in the manner prescribed by the statute, and this must appear by his affidavit.² But the affi-

Indictment. — It has been held that an affidavit of service should be so positive that if false an indictment for perjury might be founded thereon. *Peers v. Carter*, 4 Litt. (Ky.) 268. See also *Van Wyck v. Reid*, (Supm. Ct. Spec. T.) 10 How. Pr. (N. Y.) 366.

1. *Hahn v. Kelly*, 34 Cal. 391; *Lloyd v. McCauley*, 14 B. Mon. (Ky.) 430; *People's Mut. Ben. Soc. v. Frazer*, 97 Mich. 627; *Allen v. McIntyre*, 56 Minn. 351; *Forbes v. Bringe*, 32 Neb. 757; *Hunter v. Lester*, (Supm. Ct. Spec. T.) 10 Abb. Pr. (N. Y.) 262; *Spaulding v. Lyon*, (Supm. Ct.) 2 Abb. N. Cas. (N. Y.) 203; *Doolittle v. Ward*, 5 Johns. (N. Y.) 359.

Upon a motion to vacate a judgment it was held that if an affidavit of service showed all that the code required, but failed to show other things required by a rule of court, the affidavit was properly filed and incorporated in the judgment roll, and was evidence which might be used upon the motion to vacate the judgment, to prove the jurisdictional facts stated therein, even though the failure to embody the facts required by the rule of court was an irregularity. If the rule of court makes it necessary to show facts in addition to those required by the code to be shown, it does not follow that both sets of facts must be shown by the same affidavit. *Moulton v. De ma Carty*, 6 Robt. (N. Y.) 470.

Rules as to Returns Generally. — In the main the rules to govern returns generally, as to showing service of process, apply to affidavits of service, except perhaps, as stated above, that greater strictness is required in the case of affidavits of service. Cases relating to affidavits of service have been cited throughout this article under the various sections treating of returns, and those cases only which deal with questions peculiar to the affidavit are treated here.

California. — See *Pellier v. Gillespie*, 67 Cal. 582; *Dalzell v. Superior Ct.*, 67

Cal. 453; *Perri v. Beaumont*, 88 Cal. 108; *Keener v. Eagle Lake Land, etc., Co.*, 110 Cal. 627; *Linout v. Rowland*, 119 Cal. 452; *Calderwood v. Brooks*, 28 Cal. 151.

Michigan. — *People's Mut. Ben. Soc. v. Frazer*, 97 Mich. 627; *Clark v. Lichtenberg*, 33 Mich. 307.

Minnesota. — *Cunningham v. Water-Power Sandstone Co.*, (Minn. 1898) 77 N. W. Rep. 137.

New York. — *Glines v. S. S. O. Iron Hall*, (Supm. Ct. Gen. T.) 21 N. Y. Supp. 543; *Spaulding v. Lyon*, (Supm. Ct.) 2 Abb. N. Cas. (N. Y.) 203; *Chalmers v. Wright*, 5 Robt. (N. Y.) 713; *Campbell v. Spencer*, (Supm. Ct. Spec. T.) 1 How. Pr. (N. Y.) 97; *Jackson v. Gardner*, 2 Cai. (N. Y.) 95; *People v. Lamb*, 10 Hun (N. Y.) 348; *Holmes v. Williams*, 3 Cai. (N. Y.) 126; *Jackson v. Giles*, 3 Cai. (N. Y.) 88; *Tremper v. Wright*, 2 Cai. (N. Y.) 101; *Paddock v. Beebe*, 2 Johns. Cas. (N. Y.) 117; *Robertson v. Robertson*, 9 Daly (N. Y.) 44; *Maples v. Mackey*, 89 N. Y. 146.

South Carolina. — *Lyles v. Haskell*, 35 S. Car. 391.

Wisconsin. — *Healey v. Butler*, 66 Wis. 9; *Hall v. Graham*, 49 Wis. 553; *Reed v. Catlin*, 49 Wis. 686; *Wilkinson v. Bayley*, 71 Wis. 131; *Zwickey v. Haney*, 63 Wis. 464.

2. *Black v. Clendenin*, 3 Mont. 47; *McMillan v. Reynolds*, 11 Cal. 379.

That the Affiant Was of the Required Age at the time of service must be shown under a statute permitting service by private persons only when such persons are at a certain age. *Maynard v. MacCrellish*, 57 Cal. 355; *Weil v. Bent*, 60 Cal. 603; *Doerfler v. Schmidt*, 64 Cal. 265; *Lyons v. Cunningham*, 66 Cal. 42; *Howard v. Galloway*, 60 Cal. 10; *Hahn v. Kelly*, 34 Cal. 391; *Horton v. Gallardo*, 88 Cal. 581. But see *Peck v. Strauss*, 33 Cal. 678, wherein the failure to state that the affiant was of the required age at the time of the service was held to be an irregularity which did not render the judgment void.

davit need not state in terms that the affiant is a competent witness; it is enough if the facts which make him a competent witness are set out.¹

Before Whom Made. — An affidavit of service must be made before such officer as is authorized under the law to take it.²

Jurat. — Where the ground of objection to a jurat is not called to the attention of the trial court, and is of a technical character, it will not be allowed to prevail when raised for the first time on appeal.³

A statute permitting service by a person over the age of eighteen years is not shown to have been complied with by an affidavit which shows that the affiant was "a white male citizen of the United States." *Lyons v. Cunningham*, 66 Cal. 42.

Presumption of Lawful Age of Attorney. — In *New York* it is held that the court will take judicial notice that one of its attorneys who makes affidavit of the service of process is over the age of twenty-one years. *Booth v. Kingsland Ave. Bldg. Assoc.*, 18 N. Y. App. Div. 407.

More than the Statute Requires need not be stated in the affidavit, and it is no objection to a judgment by default that the affidavit of service of summons does not show that the affiant was a white male citizen of the United States, or that he served a certified copy of the complaint, when the code requires neither of these things. *Williamson v. Cummings Rock Drill Co.*, 95 Cal. 652.

Disinterestedness. — Where the statute requires that service by one not an officer shall be by a person who is not interested in the suit, an affidavit of service is bad if it fails to show that the affiant is not interested. *Raub v. Otterback*, 89 Va. 645.

1. *Dimick v. Campbell*, 31 Cal. 238.

2. *Barnett v. Montgomery*, 6 T. B. Mon. (Ky.) 331; *Trabue v. Holt*, 2 Bibb (Ky.) 393; *Fitch v. Campan*, 31 Ohio St. 646. And see in general article AFFIDAVITS, vol. 1, p. 328.

A Notary Public may take the affidavit of a special deputy to his return. *Edwards v. McKay*, 73 Ill. 570.

Certificate of Official Character of Notary. — The act requiring a certificate of the official character of a notary of another state to be appended to an affidavit taken by him does not require such certificate to be appended at the time when the affidavit is taken, and, since it is only for the purpose of authenticating the official character of

the notary, it is sufficient if it is furnished to the court when the question of the sufficiency of the service is raised. *National Exch. Bank v. Stelling*, 31 S. Car. 367.

Service upon Nonresidents — Affidavit Before Clerk of Court. — Under a statute permitting service in another state and requiring the officer making the service to make an affidavit of service before the clerk or judge of the court of which he is an officer, an affidavit by such officer before the deputy clerk of the court of which he is an officer is not sufficient. *Murdock v. Hillyer*, 45 Mo. App. 287; *Adams v. Heckscher*, 80 Fed. Rep. 742.

In the Absence of Statute or a Rule of Court Providing Otherwise, proof of service on a nonresident may be made by affidavit taken before any officer qualified by law to take affidavits where the affidavit is made, and such an affidavit may be made before a consular agent of the United States. *Marine Wharf, etc., Co. v. Parsons*, 49 S. Car. 136.

3. *Froman v. Froman*, 53 Mich. 584. And see generally as to jurats to affidavits article AFFIDAVITS, vol. 1, p. 316.

But where the statute requires that before a justice may enter a judgment by default he must swear the constable to his return, a magistrate's record which says: "And now, Sept. 28, 1895, summons returned on oath, served a true copy of the within summons," etc., is no evidence that the constable was sworn to his return, but is a mere transcript of the constable's return on the back of the summons. "So answers on oath" at the end of the constable's return and preceding his signature means only that the return is made upon the officer's general oath as constable. *Bell v. Oakdale*, 5 Pa. Dist. 198.

Omission of the Affiant's Name is an immaterial defect. *Kirby v. Gates*, 71 Iowa 100.

IV. REQUISITES AND SUFFICIENCY OF RETURN — 1. Must Be Written. — A return of process must be in writing, since it is generally the only evidence of the acts of the officer thereunder.¹

2. By Whom Made — Signature — *a. SHOWING EXECUTION BY PROPER OR COMPETENT PERSON.* — It should appear from the return that the process was executed by one competent under the law to perform such an office.²

Where a Deputy Dies before making a return of a writ executed by him the sheriff may set forth the facts and return the writ.³

b. NECESSITY OF SIGNATURE. — A return must be signed before it becomes the legal act of the officer making it, a return of an officer being that only to which he signs his name.⁴

c. SUFFICIENCY OF EXECUTION OF RETURN — NAMES OF PRINCIPAL AND DEPUTY — (1) *In General.* — A return is made by the officer executing the process, but the general rule is that when process is executed by a deputy he should sign the return in the name of his principal by himself as deputy.⁵ In some

"Subscribed and Sworn To" is in form sufficient. *Gillig v. Independent Gold, etc., Min. Co., 1 Nev. 247; Ryan v. Driscoll, 83 Ill. 415; Williams v. Chalfant, 82 Ill. 218.*

1. *Jones v. Goodbar, 60 Ark. 182; State v. Reed, 50 La. Ann. 170.*

2. *Galveston, etc., R. Co. v. Ware, 74 Tex. 47.*

Person of Same Name as Party to Suit.

— A party to a suit not being competent to serve his own writ, it was held, where a writ was served by one of the same name as the plaintiff, that it would be presumed that the party serving the writ was the party plaintiff, nothing appearing to the contrary, and that such service would be bad. *Filkins v. O'Sullivan, 79 Ill. 524.*

Copy Passing through Hands of Third Person. — A return of service on the defendant by leaving a copy with a person who delivered it to the defendant in the presence of the officer is sufficient to show service by delivery of a copy to the defendant. *Palmer v. Belcher, 21 Neb. 58.*

3. *Ingersoll v. Sawyer, 2 Pick. (Mass.) 276,* wherein it was said that there is not only a privity but in some cases legal identity between the sheriff and his deputy; *Barber v. Goodell, (Supm. Ct. Spec. T.) 56 How. Pr. (N. Y.) 364.* See also *infra*, VI. 6. *b. By Whom Made.*

4. *Sheppard v. Hill, 5 Ark. 308; Long v. Montgomery, 6 Bush (Ky.) 395; Sullivan v. Frankfort B. & L. Assoc., 13 Ky. L. Rep. 48; Sommers*

v. Hinas, (Mich. 1894) 58 N. W. Rep. 66; Brecht v. Corby, 7 Mo. App. 300; Bennett v. Vinyard, 34 Mo. 216; Thomas v. Goodman, 25 Tex. Supp. 446; Windle v. Ricardo, 1 Brod. & B. 17, 5 E. C. L. 5. Contra, Graves v. Belser, 1 Nott & M. (S. Car.) 125. But see Parker v. Grayson, 1 Nott & M. (S. Car.) 171.

Signature by Hand of Officer. — In *Reno v. Pinder, 20 N. Y. 298, reversing 24 Barb. (N. Y.) 423,* it was held that a statutory requirement that the return of process to a justice's court shall be signed by the constable serving the process was satisfied for the purpose of supporting a judgment collaterally attacked by a return made out in the presence of the constable by the justice, the name of the constable being signed by the latter.

Signature by Mark. — Where the officer cannot write he may make his mark to an entry of a levy and signature written for him in his presence. *Cox v. Montford, 66 Ga. 62.* See also *Anthonissen v. Brunswick, etc., Steam Towing, etc., Co., 92 Ga. 409.*

5. *Alabama.* — *Land v. Patteson, Minor (Ala.) 14; Briggs v. Greenlee, Minor (Ala.) 123.*

Arkansas. — *Sheppard v. Hill, 5 Ark. 308; St. Louis, etc., R. Co. v. Barnes, 35 Ark. 97.*

California. — *Reinhart v. Lugo, 86 Cal. 395; Rowley v. Howard, 23 Cal. 401.*

Colorado. — *Thomas v. State Nat. Bank, 11 Colo. 511.*

jurisdictions, however, a failure by the deputy to add the name of his principal to a return is a mere irregularity,¹ and in others it is sufficient if the return is made by the deputy in his own name without adding that of his principal.²

(2) *Omission of Deputy's Name or Title.* — It has been held that the return to process may be signed with the name of the sheriff, omitting the name of the deputy, notwithstanding the process was in fact executed by such deputy,³ and it is sufficient if the sheriff adopts the service made by the deputy, though the deputy's name as signed to the service is not followed by any official description.⁴

(3) *Formality — Order of Names of Principal and Deputy.* — Mere informality in indicating that the process was executed by the principal through the deputy, as by inverting the usual order

Florida. — Gibbens v. Pickett, 31 Fla. 147; Johnson v. Johnson, 23 Fla. 413.

Illinois. — Ditch v. Edwards, 2 Ill. 127; O'Connor v. Wilson, 57 Ill. 226; Timmerman v. Phelps, 27 Ill. 496; Glencoe v. People, 78 Ill. 382; Ryan v. Eads, 1 Ill. 217.

Iowa. — Gray v. Wolf, 77 Iowa 630.

Oregon. — Dennison v. Story, 1 Oregon 272.

Pennsylvania. — Bolard v. Mason, 66 Pa. St. 138; Emley v. Drum, 36 Pa. St. 123.

Virginia. — Mitchell v. Com., 89 Va. 826; White v. Johnson, 1 Wash. (Va.) 159; Barksdale v. Neal, 16 Gratt. (Va.) 314.

Where the Sheriff Is Dead the deputy may sign his own name until a successor is appointed. Timmerman v. Phelps, 27 Ill. 496.

Special Deputy. — Where one is authorized by indorsement by the sheriff to execute a writ, the return should be in the name of the sheriff. Bolard v. Mason, 66 Pa. St. 138.

Exception — Return under Oath. — In *Illinois* it is held that where a special deputy must make his return under oath, such a return is sufficient in the name of the deputy and need not be in the name of the sheriff. Glencoe v. People, 78 Ill. 382.

1. Hill v. Gordon, 45 Fed. Rep. 276.

Jurisdiction of the court is not affected by such a defect. Kelly v. Harrison, 69 Miss. 856.

2. **Return in Name of Deputy.** — Bean v. Haffendorfer, 84 Ky. 685; Stoll v. Padley, 98 Mich. 13; Wheeler v. Wilkins, 19 Mich. 78; Calender v. Olcott, 1 Mich. 344; Allen v. Hazen, 26 Mich.

142; De Villers v. Ford, 2 McCord L. (S. Car.) 144; Miller v. Alexander, 13 Tex. 497; Towns v. Harris, 13 Tex. 507; Eastman v. Curtis, 4 Vt. 616.

Process Directed to Principal and Deputies. — Where a warrant was addressed to the constable of the commonwealth or either of his deputies, a return signed by one as "deputy state constable" was held to be sufficient over an objection that the person who executed the warrant had no special authority by law to do so. Com. v. Certain Intoxicating Liquors, 97 Mass. 63.

3. Hays v. Byrd, 14 Tex. Civ. App. 24, wherein the return was signed with the name and title of the sheriff, followed by the words "by C., Deputy," and the court said: "The law authorizes the sheriff to act by deputies, and while the statute requires the return upon every writ to be signed officially by the officer executing the writ, there is no prescribed form of the official signature when the sheriff acts by deputy; and this requirement of the statute, we take it, is complied with when the return is made over the official signature of the sheriff, either with or without the signature of the deputy by whom the sheriff executes the writ. The words of the statute 'that the return must be signed officially by the officer executing the writ,' have reference to the officers to whom the writ of citation is directed, 'the sheriff' or any 'constable,' and do not embrace the deputies of the sheriff."

4. Bennethum v. Bowers, 133 Pa. St. 332, wherein the return was signed with the name of the deputy sheriff without any official description follow-

in which the names of the principal and deputy are written upon the return, is of no consequence so long as it appears that the act is that of the principal by the deputy.¹

(4) *Addition of Official Title to Signature.* — The court will give verity to the official act of an officer evidenced by his signature, although no word descriptive of his office follows such signature;² and it is not necessary that a sheriff, in signing his name as such, should designate in what county he is sheriff.³

3. Date of Receipt and Return. — In the absence of statute it seems that neither the date of the delivery of the process to the officer nor the date upon which he returns it to the clerk's office need be stated.⁴ And it is held that the omission to indorse

ing, after which appeared: "Served as above. So answers George B. Schaeffer, sheriff." It was held that the adoption by the sheriff of the act of the person whose name was signed to the service sufficiently indicated the authority under which the latter acted.

1. *Zepp v. Hager*, 70 Ill. 223; *Briggs v. Greenlee*, Minor (Ala.) 123; *Guelot v. Pearce*, (Ky. 1897) 38 S. W. Rep. 892; *Humphrey v. Wade*, 84 Ky. 400. See also *Prince v. Dickson*, 39 S. Car. 477; *Gray v. Wolf*, 77 Iowa 630; *Es-lava v. Ames Plow Co.*, 47 Ala. 384.

2. *Martin v. Aultman*, 80 Wis. 150. But see *Spencer v. Medder*, 5 Mo. 458.

3. *Snelgrove v. Branch Bank*, 5 Ala. 295; *Higgins v. Bullock*, 66 Ill. 37; *Davis v. Burt*, 7 Iowa 56; *Whiting v. Hagerty*, 5 La. Ann. 686; *Stoll v. Pad-ley*, 98 Mich. 13; *Fleugel v. Lards*, 108 Mich. 682; *Maroonney v. McKay*, 3 Oregon 372.

But a certificate of service having a venue in one county, certifying a service in another, and signed without showing in what county the officer acts, is insufficient. *Clark v. Lichtenberg*, 33 Mich. 307.

Variance Between Signature and Address. — In *Com. v. Certain Intoxicating Liquors*, 97 Mass. 63 a warrant was addressed to the constable of the commonwealth or either of his deputies, and it was held that a return signed by one as "deputy state constable" was sufficient.

4. *Cobb v. Newcomb*, 7 Iowa 43; *Spengler v. O'Shea*, 65 Miss. 75; *Chickering v. Failes*, 26 Ill. 516; *Hogue v. Corbit*, 156 Ill. 540; *Fake v. Edger-ton*, 5 Duer (N. Y.) 681; *Wyche v. Newsom*, 87 N. Car. 145, holding that a statute which imposed a forfeiture upon an officer receiving process for

execution for failure to note upon it the date of the delivery to him had reference to final process only as shown by its connections; *Kightlinger's Appeal*, 101 Pa. St. 540. See also *infra*, IV. 4. *h. Time.*

The File Mark of the Clerk indicates the date of the return. *Hogue v. Cor-bit*, 156 Ill. 540; *Cariker v. Anderson*, 27 Ill. 358.

Discrepancy Between Entry of Clerk and Date of Return. — Where there is a discrepancy between the date of the return as made by the officer and the date as entered by the clerk, the date of the return as made by the officer will control. *Gilson v. Parkhurst*, 53 Vt. 384. But see *Macomber v. Wright*, 108 Mich. 109.

The Presumption is that a return to an execution was deposited with the clerk of the court on the return day. *Marks v. Hardy*, 86 Mo. 232, 12 Mo. App. 595.

The legal inference is that, after making an entry of no property the sheriff kept the execution until the proper return day. *Thornton v. Lane*, 11 Ga. 524. And in *Izod v. Addison*, 5 How. (Miss.) 432, it was held that a return upon an execution of "no property found" furnished no evidence that the process was returned into court on that day, and that parol evidence was admissible to show when the execution was returned to the clerk's office.

"Satisfied" on an execution is presumed to be legal, and the sheriff will not be permitted to show by the annexation of the date that the satisfaction was after the return day, in order to invoke the principle that money paid on an execution after the day on which it should have been returned will not amount to a satisfaction. *Barton v. Lockhart*, 2 Stew. & P. (Ala.) 109.

the time of receiving process does not affect the service, and that if this time becomes important the return may be amended or the date of service may be taken for such time.¹

4. Contents—*a. MUST SHOW LEGAL EXECUTION*—(1) *In General*.—The return of an officer is the evidence of his acts under the process, and must show without extraneous evidence,² and in some intelligible form of expression, what he has done, as well as that his acts have been responsive to the mandate of the writ³ and according to law.⁴

1. *Cobb v. Newcomb*, 7 Iowa 43.

Upon certiorari to a justice of the peace the omission of the date of the return of the process in the justice's court is not material where the return of the justice to the certiorari shows a proper return of the process. *Nicolls v. Lawrence*, 30 Mich. 395.

2. *Connecticut*.—*Metcalf v. Gillet*, 5 Conn. 404; *Sanford v. Pond*, 37 Conn. 591.

Illinois.—*Nelson v. Cook*, 19 Ill. 440.

Iowa.—*Harmon v. See*, 6 Iowa 171.

Massachusetts.—*Wellington v. Gale*, 13 Mass. 483; *Purrington v. Loring*, 7 Mass. 388.

Michigan.—*King v. Bates*, 80 Mich. 367.

Missouri.—*Gate City Electric Co. v. Corby*, 61 Mo. App. 630; *Madison County Bank v. Suman*, 79 Mo. 531.

New Jersey.—*Gardner v. Small*, 17 N. J. L. 162.

Tennessee.—*Union Bank v. Barnes*, 10 Humph. (Tenn.) 245.

Texas.—*Thompson v. Griffis*, 19 Tex. 115.

3. *Shannon v. McMullin*, 25 Gratt. (Va.) 218; *Earthman v. Jones*, 2 Yerg. (Tenn.) 492; *Stephens v. Frazier*, 2 B. Mon. (Ky.) 253.

A Return to a Distress Warrant for a delinquent liquor tax need not set forth that the officer demanded the amount before making the levy. *Wood v. Thomas*, 38 Mich. 686.

4. *Arkansas*.—*Dawson v. State Bank*, 3 Ark. 505; *Ex p. Cross*, 7 Ark. 44; *Fulcher v. Lyon*, 4 Ark. 449; *Southern Bldg., etc., Assoc. v. Holm*, 59 Ark. 583.

Connecticut.—*Metcalf v. Gillet*, 5 Conn. 400.

Illinois.—*Botsford v. O'Conner*, 57 Ill. 72.

Indiana.—*Bosley v. Farquar*, 2 Blackf. (Ind.) 61.

Iowa.—*Hakes v. Shupe*, 27 Iowa 465.

Louisiana.—*State v. Reed*, 50 La. Ann. 170.

Maine.—*Russ v. Gilman*, 16 Me. 209.

Massachusetts.—*Williams v. Amory*, 14 Mass. 20; *Walsh v. Anderson*, 135 Mass. 65.

Michigan.—*Brown v. Williams*, 39 Mich. 755; *Town v. Tabor*, 34 Mich. 262.

Mississippi.—*Moore v. Coats*, 43 Miss. 225; *Rankin v. Dulaney*, 43 Miss. 197.

Missouri.—*Spencer v. Medder*, 5 Mo. 458; *Gregor Grocer Co. v. Carlson*, 67 Mo. App. 179; *Madison County Bank v. Suman*, 79 Mo. 531; *Williams v. Monroe*, 125 Mo. 574.

Nebraska.—*Newlove v. Woodward*, 9 Neb. 502.

Pennsylvania.—*Fox v. Meyer*, 1 Woodw. (Pa.) 50; *Johnson v. Aylesworth*, 3 Pittsb. (Pa.) 237.

South Carolina.—*State v. Cohen*, 13 S. Car. 198.

Texas.—*Lauderdale v. R. & T. A. Ennis Stationery Co.*, 80 Tex. 496; *Williams v. Downes*, 30 Tex. 51; *O'Leary v. Durant*, 70 Tex. 409.

West Virginia.—*Hopkins v. Baltimore, etc., R. Co.*, 42 W. Va. 535.

United States.—*Rickards v. Ladd*, 6 Sawy. (U. S.) 42.

Where the Court Orders Process to Be Executed in a Particular Manner, a return of the marshal which shows that it was so executed establishes sufficient service. *Confiscation Cases*, 20 Wall. (U. S.) 92.

Seizure.—A return to a writ against a boat which omits to state that the officer seized the boat is defective. *Blaisdell v. Steamboat William Pope*, 19 Mo. 157.

Justifying Service on Sunday.—In *Arkansas*, if a writ be executed on Sunday, the return of the officer must show that the required affidavit that the defendant was about to leave the county was made and delivered to him. *Swinney v. Johnson*, 18 Ark. 534.

(2) *Personal or Constructive Service.* — A return of service of process must show a personal service or a proper constructive service as provided by statute, and if neither is shown the return is bad.¹

b. DEGREE OF CERTAINTY — CONSTRUCTION — (1) *In General* — *Reasonable Certainty.* — Reasonable certainty is required in showing the legality of the execution of process,² and if the return is reasonably certain in this regard it will be sufficient.³

The Title of an Innocent Purchaser is not affected by a defective return of an execution. *House v. Robertson*, (Tex. Civ. App. 1896) 34 S. W. Rep. 640.

1. *Doll v. Smith*, 32 Cal. 476; *Snyder v. Snyder*, 25 Ind. 399; *Gibbons v. Mason*, 1 Harr. (Del.) 452; *Dohms v. Mann*, 76 Iowa 723; *Johnson v. Macconnell*, 3 Bibb. (Ky.) 1; *Williams v. Monroe*, 125 Mo. 574; *Newlove v. Woodward*, 9 Neb. 502. See *infra*, IV.

4. 1. *Substituted or Constructive Service.*

2. *Dawson v. State Bank*, 3 Ark. 505; *Gilbreath v. Kuykendall*, 1 Ark. 50.

3. *State v. Still*, 11 Mo. App. 283; *Dunham v. Wilfong*, 69 Mo. 355; *Farnsworth v. Strasler*, 12 Ill. 482; *Cairo, etc., R. Co. v. Holbrook*, 92 Ill. 297; *McNab v. Young*, 81 Ill. 11; *Brown v. Miner*, 21 Ill. App. 60, 128 Ill. 148; *Bacon v. Bevan*, 44 Miss. 293; *Wells v. Turner*, 14 Neb. 445; *Pendexter v. Cate*, 66 N. H. 270.

In *Chicago Dock, etc., Co. v. Kinzie*, 93 Ill. 429, the return of the sheriff was: "The within-named Robert A. Kinzie, an G. H. Kinzie, hath not anything in my bailiwick, or plac, or by which I can give notice, as I am within commanded, nor is the said Robert A. Kinzie, an G. H. Kinzie found in the same." It was held that the words "bailiwick, or plac," meant and should be read "county," and that the word "an" should be read disjunctively, giving it its plain and obvious meaning.

In *Senescal v. Bolton*, 7 N. Mex. 351, the officer certified that he had served the summons on one of the defendants, without giving the date of such service, and further certified that he had served summons on another defendant, giving the date of such service. It was held that the whole should be taken as one sentence, though ambiguous in form, and should be construed to mean that both services took place at the same time.

Under a Writ of Monition Issued upon a Libel of information, commanding the

marshal to attach the note in controversy and to detain the same, subject to the further orders of the court, it was held that a return by the marshal that he had "arrested the property within mentioned" signified in apt and technical language that he had actually taken the property into his custody and under his control. *Pelham v. Rose*, 9 Wall. (U. S.) 103.

Informality will not vitiate a return. *Drake v. Duvenick*, 45 Cal. 455.

"Satisfied" on an execution is presumed to be legal, and the sheriff will not be permitted to show by the annexation of the date that the satisfaction was after the return day, in order to invoke the principle that money paid on an execution after the day on which it should have been returned will not amount to a satisfaction. *Barton v. Lockhart*, 2 Stew. & P. (Ala.) 109.

Such a return is sufficient without showing what disposition was made of the fund. *Person v. Newsom*, 87 N. Car. 142.

Cepi — Abbreviated Form. — In *Maryland* it was said that the courts had for so long a period sanctioned the abbreviated form of a return *cepi* by a sheriff to the writ of *capias ad satisfaciendum* that its correctness should be deemed to be settled, such a return being, in legal effect, a declaration that by virtue of the writ the officer had taken the body of the defendant, and had him ready before the court, at the time and place as commanded by the writ. *State v. Lawson*, 2 Gill (Md.) 62.

Reading Writ. — When the statute requires a *capias ad respondendum* to be served by reading to the defendant or delivering him a copy, a return that the defendant was arrested and gave bond for his appearance is not sufficient. *Fulcher v. Lyon*, 4 Ark. 449.

Bench Warrant — Bail. — Where a sheriff returns the execution of a bench warrant, if he has taken bail his return should show the fact. *Overaker v. State*, 4 Smed. & M. (Miss.) 738.

Although there may be some ambiguity about the return of a sheriff, the construction most favorable to his having discharged his duty should be given, and it is enough if, by such construction, the facts which constitute a legal execution of the process are shown with reasonable certainty.¹

No Construction in Favor of Palpable Defects.—But the ordinary platitude that an officer is presumed to do his duty does not possess sufficient potency to cure palpable defects in his return.²

(2) *Construction by Necessary Implication.*—What is necessarily implied from the express terms used in a return may be supplied by intendment.³

(3) *Clerical Errors.*—A return is not vitiated by reason of mere clerical errors.⁴

1. *Connecticut.*—Whittlesey v. Starr, 8 Conn. 134.

Georgia.—Gibson v. Robinson, 90 Ga. 756.

Illinois.—Cairo, etc., R. Co. v. Holbrook, 92 Ill. 299; Thompson v. Yates, 61 Ill. App. 262.

Indiana.—Hale v. Talbott, 86 Ind. 447.

Iowa.—Davis v. Burt, 7 Iowa 56.

Kentucky.—Cosby v. Bustard, Litt. Sel. Cas. (Ky.) 137; Scott v. Scott, 85 Ky. 385.

Mississippi.—Sanders v. Dowell, 7 Smed. & M. (Miss.) 206.

Missouri.—State v. Still, 11 Mo. App. 283; State v. Jacksonville 126 Mo. 69.

Texas.—Brown v. Hudson, 14 Tex. Civ. App. 610.

Vermont.—Pond v. Baker, 55 Vt. 400; Drake v. Mooney, 31 Vt. 617.

United States.—Coggsell v. Warren, 1 Curt. (U. S.) 223.

The return will be held good where the objection cannot be sustained without giving to the return a strained and unnatural construction. Cairo, etc., R. Co. v. Holbrook, 92 Ill. 99; Pendexter v. Cate, 66 N. H. 270.

2. *Per* Sherwood, J., in Gates v. Tusten, 89 Mo. 13. See also Fowler v. Banks, 21 Ala. 679; Faison v. Wolf, 63 Miss. 24; Case v. Calston, 1 Met. (Ky.) 145.

Where Strict Compliance with the Statute is necessary, as, for example, in the case of a return of a constructive service of process, it is said that if the return does not follow the language of the statute, and its terms can receive a reasonable interpretation which makes the return insufficient, that interpretation must prevail, and not one which

with equal reason would make the return sufficient. Gamasche v. Smythe, 60 Mo. App. 165.

3. Greenman v. Harvey, 53 Ill. 386; Barnes v. Hazleton, 50 Ill. 429; Hedges v. Mace, 72 Ill. 472; Reed v. Tyler, 56 Ill. 288; Farnsworth v. Strasser, 12 Ill. 482; Select v. Olmstead, 1 Root (Conn.) 497; Bliss v. Paine, 11 Mich. 92; Corning v. Burton, 102 Mich. 86.

Thus, where a notice was indorsed upon a declaration that upon the trial a note, a copy of which was given and referred to in the notice, would be read in evidence under the money counts, a return of the sheriff that he served a copy of the declaration and notice necessarily implies service of the copy of the note, the latter being an essential part of the notice. Bliss v. Paine, 11 Mich. 92.

4. Thompson v. State Bank, 5 Ark. 245; Alexander v. McDow, 108 Cal. 25; Fleugel v. Lards, 108 Mich. 686; Hammond v. Baker, 39 Mich. 472; Sandwich Mfg. Co. v. Earl, 56 Minn. 390; Allen v. Mayberry, 14 Nev. 115; Bartlett v. Winkler, 15 Tex. 515.

In Cheshire v. Milburn Wagon Co., 89 Ga. 249, it was held that where the middle initial of a defendant as given in the return is different from that stated in the declaration, such middle initial in the return should be treated as a clerical error.

In Barron v. Smith, 63 Vt. 121, it was held that the matter of punctuation in officers' returns, often hurriedly made, and by men little versed in that art, cannot justly be expected to afford much aid in construction, and, as a general thing, is entitled to but little consideration.

(4) *Abbreviations*.—Where abbreviations are used in a return they will be sufficient if it appears from the remainder of the writing what is intended.¹

(5) *Surplusage*.—The maxim *utile per inutile non vitiatur* applies to official returns; and while a return must be certain, yet where additional words, which cannot affect the validity of the return, may be stricken out without altering the sense, it is sufficient.²

c. COMPLIANCE WITH STATUTE.—The legal presumption in favor of the acts of a sheriff does not go to the extent of supplying the omission of a statement in a return which, by statute, is necessary to its sufficiency, and every act which the statute requires as a part of the service must be set out in the return.³

Substantial Compliance.—While the return may very properly follow the exact language of the statute,⁴ this is not absolutely necessary, since a return which on the whole shows a substantial compliance with the law is sufficient.⁵ Where, however, a stat-

1. *Odd Fellows Bldg. Assoc. v. Hogan*, 28 Ark. 264, wherein the indorsement on the summons was that it had been executed, etc., "by delivering a true copy of the within writ to Dr. Peter Brugman, President of O. F. B. A.," and it was held that the ambiguity of these letters was entirely removed by examining the writ as indicated in the indorsement, for in the writ it was clearly shown that such letters referred to the Odd Fellows Building Association, and could mean nothing else. And see generally article ABBREVIATIONS, vol. I, p. 42.

But Where There Is Nothing from Which It Could Be Understood what mere letters mean, such abbreviation will make a return too uncertain. Thus the letters N. E. I. are not a sufficient return of *non est inventus*. *Parker v. Grayson*, 1 Nott & M. (S. Car.) 171.

2. *Mentz v. Hamman*, 5 Whart (Pa.) 154; *Orendorff v. Stanberry*, 20 Ill. 89; *King v. Spearman*, 3 B. Mon. (Ky.) 289; *Hart v. Forbes*, 60 Miss. 745; *Jones v. Relfe*, 3 Mo. 388; *Norton v. Berlin Iron Bridge Co.*, 51 N. J. L. 442; *Confiscation Cases*, 20 Wall. (U. S.) 110.

Attempt to Avoid Service.—A return which shows a good service is not affected by a statement interjected that the defendant attempted to avoid service by concealing himself. *Orendorff v. Stanberry*, 20 Ill. 89.

3. *Arkansas*.—*Dawson v. State Bank*, 3 Ark. 505.

Delaware.—*Matthews v. Gordy*, 2 Houst. (Del.) 573.

Illinois.—*Noleman v. Weil*, 72 Ill. 502.

Mississippi.—*Dogan v. Barnes*, (Miss. 1899) 24 So. Rep. 965.

Missouri.—*Cabeen v. Douglass*, 1 Mo. 336; *Russell v. Grant*, 122 Mo. 161.

Pennsylvania.—*Gilbough v. Keller*, 11 Phila. (Pa.) 364, 33 Leg. Int. (Pa.) 382.

Texas.—*Graves v. Le Geirse*, 1 Tex. App. Civ. Cas., § 812; *Roberts v. Stockslager*, 4 Tex. 307; *International, etc., R. Co. v. Pape*, 1 Tex. App. Civ. Cas., § 241; *Lauderdale v. R. & T. A. Ennis Stationery Co.*, 80 Tex. 496.

Virginia.—*Wynn v. Wyatt*, 11 Leigh (Va.) 612.

United States.—*Rickards v. Ladd*, 6 Sawy. (U. S.) 42.

It Is Fair to Infer Everything Against a Return which its departure from the statute will warrant. *Blanton v. Jamison*, 3 Mo. 52; *Madison County Bank v. Suman*, 79 Mo. 531; *Diltz v. Chambers*, 2 Greene (Iowa) 479; *Swetland v. Stevens*, 6 Vt. 577.

4. *Collins v. Walling*, 6 La. Ann. 702.

5. *Arkansas*.—*Du Val v. Johnson*, 39 Ark. 182.

Illinois.—*Noleman v. Weil*, 72 Ill. 502.

Indiana.—*Pigg v. Pigg*, 43 Ind. 117; *Holsinger v. Dunham*, 11 Ind. 346.

Iowa.—*Macklot v. Hart*, 12 Iowa 428.

ute designates not only the particular manner of service, but the manner in which it shall be returned, it seems that a stricter construction is given.¹

d. MANNER OF EXECUTING — RETURN “EXECUTED,” “SERVED,” ETC. — **The Decisions Are Not Uniform** on the point whether a mere statement in a return that the process was executed or served will sufficiently import a legal execution or service without any statement of the manner thereof. This, however, depends upon the provisions of the statutes in force, especially concerning the manner of making personal service.

Return Sufficient. — In many cases such a general return is held to be sufficient to import a lawful execution of the process,² sometimes by express permission of the statute;³ but if in addition

Louisiana. — *Collins v. Walling*, 6 La. Ann. 702.

Mississippi. — *Presley v. Anderson*, 42 Miss. 274.

Nebraska. — *Bett v. Boyd*, 31 Neb. 815.

Texas. — *Graves v. Drane*, 66 Tex. 658; *Clark v. Wilcox*, 31 Tex. 328; *Bartlett v. Winkler*, 15 Tex. 515.

United States. — *Trimble v. Erie Electric Motor Co.*, 89 Fed. Rep. 51.

1. *Womack v. Slade*, (Tex. Civ. App. 1893) 23 S. W. Rep. 1002; *Poole v. Mueller*, (Tex. Civ. App. 1894) 26 S. W. Rep. 739.

Service on Defendant in Person. — In *Texas* it has been held that the return showing service upon the defendant is not good unless it is shown to have been upon the defendant in person. *Graves v. Robertson*, 22 Tex. 130; *Middleton v. State*, 11 Tex. 255; *Batey v. Dibrell*, 28 Tex. 172.

But in *Johnson v. Barthold*, 43 Tex. 556, it was held that a return, “Executed by delivering to B. C. H. Johnson a true copy of this citation,” etc., was sufficient under a statute requiring service upon the party in person, the party served having the same name as the defendant in the writ. *Quoted in Brooks v. Powell*, (Tex. Civ. App. 1895) 29 S. W. Rep. 809. See also *Brown v. Robertson*, 28 Tex. 555.

2. *Mayfield v. Allen*, Minor (Ala.) 274; *Snelgrove v. Branch Bank*, 5 Ala. 295; *Colerick v. Hooper*, 3 Ind. 316; *Bridges v. Ridgely*, 2 Litt. (Ky.) 396; *Harper v. Lexington*, etc., R. Co., 2 Dana (Ky.) 227; *Case v. Colston*, 1 Met. (Ky.) 146; *Stephens v. Frazier*, 2 B. Mon. (Ky.) 253; *Strayhorn v. Blalock*, 92 N. Car. 292; *Com. v. Murray*, 2 Va. Cas. 504.

Personal Service. — When actual personal service is made it is held to be sufficient if the return states merely the fact of such service. *Legg v. Stillman*, 2 Cow. (N. Y.) 418; *Hubbard v. Chapin*, (County Ct.) 28 How. Pr. (N. Y.) 407; *Barksdale v. Neal*, 16 Gratt. (Va.) 314; *Fears v. Thompson*, 82 Ala. 294; *M'Dowell v. Cooper*, 2 Harr. (Del.) 480.

Counterpart Writs. — Where counterpart writs are directed to different counties, the return “executed” will apply only to such parties as reside within the county of the officer making such return. *Bozman v. Brower*, 6 How. (Miss.) 43.

Special Bailiff. — The same presumption which is indulged in favor of an officer's return does not exist in the case of a return by a private person as special bailiff. *Simms v. Simms*, 88 Ky. 642.

3. In *Mississippi* the code expressly provided that a general return of “executed” should be sufficient. *Benson v. Holloway*, 59 Miss. 358; *Heirmann v. Stricklin*, 60 Miss. 234. Before this the cases held otherwise under the statutory provisions relating to the manner of service of process. *Merritt v. White*, 37 Miss. 438; *Jefferies v. Harvie*, 38 Miss. 97; *Moore v. Coats*, 43 Miss. 225. And under the code in effect before the provisions under which the last cases were cited the return in general terms was held to be sufficient. *Bozman v. Brower*, 6 How. (Miss.) 43.

Where a judgment by default could be rendered at the return term only where it appeared that the defendant was personally served, it was held that although the return “executed” imported a legal service it did not neces-

to the general return "executed" the officer attempts to show the manner in which the process was executed, then the return must show a full compliance with the law.¹

Return Insufficient.—In many other cases, however, and especially under statutes designating how personal service shall be made or alternative modes of service, it is held that officers executing process, being merely ministerial, must set out their acts in order that the court may determine the legal sufficiency thereof instead of leaving it to the officer to determine for himself, and in these cases such a general return as "executed," "served," "duly served," or the like, is not sufficient.² Nor is

sarily import a personal service under the requirements above stated. *Heir-mann v. Stricklin*, 60 Miss. 234. But see *Colerick v. Hooper*, 3 Ind. 316.

1. *Case v. Colston*, 1 Met. (Ky.) 146; *Thomas v. State*, 62 Miss. 184; *Burrus v. Burrus*, 56 Miss. 92; *Semmes v. Patterson*, 65 Miss. 6; *Faison v. Wolf*, 63 Miss. 24; *Rigby v. Lefevre*, 58 Miss. 639; *Dogan v. Barnes*, (Miss. 1899) 24 So. Rep. 965; *Benson v. Hol-loway*, 59 Miss. 358; *Fatheree v. Long*, 5 How. (Miss.) 661; *Gamble v. War-ner*, 16 Ohio 371. See also *Leftwick v. Hamilton*, 9 Heisk. (Tenn.) 310.

But where the statutory return is made, the word "summoned" or "executed" may be rejected as surplusage. *Norton v. Berlin Iron Bridge Co.*, 51 N. J. L. 442.

2. *Arkansas*.—*Gilbreath v. Kuyken-dall*, 1 Ark. 50; *Gatton v. Walker*, 9 Ark. 199.

Illinois.—*Ball v. Shattuck*, 16 Ill. 299; *Botsford v. O'Conner*, 57 Ill. 72; *Wilson v. Greathouse*, 2 Ill. 174; *Clem-son v. Hamm*, 2 Ill. 176; *Ogle v. Coffey*, 2 Ill. 239.

Iowa.—*Hakes v. Shupe*, 27 Iowa 465; *Hodges v. Hodges*, 6 Iowa 78; *Farris v. Powell*, 10 Iowa 553; *Park v. Long*, 7 Iowa 434.

Massachusetts.—*Perry v. Dover*, 12 Pick. (Mass.) 206; *Wellington v. Gale*, 13 Mass. 483; *Davis v. Maynard*, 9 Mass. 242.

Mississippi.—*Moore v. Coats*, 43 Miss. 225; *Rankin v. Dulaney*, 43 Miss. 197; *Roy v. Heard*, 38 Miss. 544; *Jefferies v. Harvie*, 38 Miss. 97; *Mer-ritt v. White*, 37 Miss. 438.

Missouri.—*Blanton v. Jamison*, 3 Mo. 52; *Charless v. Marney*, 1 Mo. 537; *Madison County Bank v. Suman*, 79 Mo. 531.

New Jersey.—*Crisman v. Swisher*, 28 N. J. L. 149.

New York.—*Wheeler v. Lampman*, 14 Johns. (N. Y.) 481; *Legg v. Still-man*, 2 Cow. (N. Y.) 418.

Oregon.—*Kohn v. Hinshaw*, 17 Ore-gon 308.

Pennsylvania.—*Weaver v. Springer*, 2 Miles (Pa.) 42; *Philadelphia v. Cath-cart*, 10 Phila. (Pa.) 103, 31 Leg. Int. (Pa.) 4.

Texas.—*Continental Ins. Co. v. Milliken*, 64 Tex. 46.

Vermont.—*Henry v. Tilson*, 19 Vt. 447.

In announcing this principle it is often held in general terms that the manner, time, and upon whom service is made are requisite to a good return. *Gilbreath v. Kuykendall*, 1 Ark. 50; *Botsford v. O'Conner*, 57 Ill. 72; *Bail v. Shattuck*, 16 Ill. 299; *Wilson v. Greathouse*, 2 Ill. 174; *Hakes v. Shupe*, 27 Iowa 465; *Perry v. Dover*, 12 Pick. (Mass.) 206.

Levy on Shares of Stock.—Under a statute providing that "the officer of the company who keeps a record or account of the shares or interest of the stockholders therein shall, upon the exhibiting to him of the execution, be bound to give a certificate of the number of shares or amount of the interest held by the judgment debtor," it is sufficient if the officer who levies an attachment upon such shares of stock returns the facts, and he need not return the certificate furnished to him. *Thompson v. Wells*, 57 Ill. App. 438.

Special Bailiff.—A return of a special bailiff which shows how and when the summons was executed is sufficient. *Barbour v. Newkirk*, 83 Ky. 529.

When the Officer Is in Doubt the safe course is to make a special return of the facts. *Johnson v. Aylesworth*, 3 Pittsb. (Pa.) 237.

Justice of the Peace.—A justice has no jurisdiction of the person of a de-

a return that the process was executed according to law or that it was personally served sufficient, where nothing is stated as to the manner of the service, to show sufficient personal service, the statute prescribing the method or more than one method in which the service can be made.¹

e. **PERSONAL SERVICE BY COPY OR READING.** — Upon principles above stated,² it has been held that a general return "executed" sufficiently imports the delivery of a copy when that is necessary;³ but according to the weight of authority, when the law requires the service of a copy of the pleadings⁴ or process,⁵ or provides for service by reading the process to the defendant or leaving a copy with him, or by reading it to the

defendant so as to authorize him to proceed against him in his absence, unless it appears by the constable's return that the summons has been served in the mode prescribed by the statute. *Gardner v. Small*, 17 N. J. L. 162.

A constable's return on a summons from a justice's court must show when and how the process was served. *Stediford v. Ferris*, 4 N. J. L. 120; *Moore v. Miller*, 16 N. J. L. 233; *Boylan v. Hooper*, 2 N. J. L. 88; *Layton v. Cooper*, 2 N. J. L. 59; *Zane v. Pissant*, 2 N. J. L. 301; *Mulford v. Perine*, 3 N. J. L. 66; *Charless v. Marney*, 1 Mo. 537; *Lenore v. Ingram*, 1 Phila. (Pa.) 519, 12 Leg. Int. (Pa.) 11.

Omission of Statement of Levy. — In *Missouri* it was held that a return on execution which did not state that the officer made a levy on the property, but simply set out that he sold and delivered the possession thereof, was sufficient, as it could be fairly inferred from such a statement that the officer had previously seized the property. *Howard v. Baum*, 73 Mo. App. 239.

Description of Property in Levy. — See article EXECUTIONS AGAINST PROPERTY, vol. 8, p. 557 *et seq.*

1. *Ball v. Shattuck*, 16 Ill. 299; *State v. St. Louis*, 1 Mo. App. 503; *Charless v. Marney*, 1 Mo. 537; *Crisman v. Swisher*, 28 N. J. L. 149.

2. See *supra*, IV. 4. *d.* **Manner of Executing** — Return "Executed," "Served," *etc.*

3. *Mayfield v. Allen*, Minor (Ala.) 274, in which case, however, there seems to have been an appearance; *Bridges v. Ridgley*, 2 Litt. (Ky.) 396; *Smith v. Bradley*, 6 Smed. & M. (Miss.) 485; *Barksdale v. Neal*, 16 Gratt. (Va.) 314. See also *Fears v. Thompson*, 82 Ala. 294; *Lenoir v. Broadhead*, 50 Ala. 58.

In the Absence of a Statute Requiring the statement in the return of the delivery of a copy, it was held that the presumption would be indulged in favor of the officer's act without such a statement. *Watts v. White*, 12 Iowa 330.

4. *Stevens v. Price*, 16 Tex. 572; *Hendley v. Baccus*, 32 Tex. 328; *Lauderdale v. R. & T. A. Ennis Stationery Co.*, 80 Tex. 496; *Woodward v. Whitescarver*, 6 Iowa 1, under a provision requiring the return to state the sending of a copy of the petition.

To a Subpœna in Chancery the return "executed" without showing a delivery of a copy of the bill is not sufficient. *Taylor v. Jackson*, 2 Bibb (Ky.) 573; *Ayers v. Scott*, *Sneed* (Ky.) 162; *Robertson v. Johnson*, 40 Miss. 500.

A Return to Process Against Husband and Wife, "executed and delivered copy of bill to J. W. L." (the husband), was held to show service upon the husband only. *Leftwick v. Hamilton*, 9 Heisk. (Tenn.) 310.

5. *Illinois*. — *Greenwood v. Murphy*, 131 Ill. 604.

Mississippi. — *York v. Crawford*, 42 Miss. 508; *Davis v. Patty*, 42 Miss. 509; *Rankin v. Dulaney*, 43 Miss. 197.

Nebraska. — *Newlove v. Woodward*, 9 Neb. 502.

New Jersey. — *Ross v. Ward*, 16 N. J. L. 23.

Ohio. — *Robbins v. Clemmens*, 41 Ohio St. 285.

Texas. — *Chamblee v. Hufsmith*, (Tex. Civ. App. 1898) 44 S. W. Rep. 616; *Schramm v. Gentry*, 64 Tex. 143; *Randolph v. Schwingler*, (Tex. Civ. App. 1894) 27 S. W. Rep. 955; *King v. Goodson*, 42 Tex. 153; *Holliday v. Steele*, 65 Tex. 388; *Fulton v. State*, 14 Tex. App. 32; *Vaughan v. State*, 29 Tex. 273; *Rutherford v. Davenport*,

defendant and leaving a copy with him,¹ the return must show a compliance with the law, though the cases vary upon the question of sufficiency in respect of the certainty with which particular expressions manifest such compliance. Generally, however, the rule of fair construction already adverted to is applied, as will be seen from the illustrations given below.²

(Tex. App. 1891) 16 S. W. Rep. 110; *Winans v. State*, 25 Tex. Supp. 175.

Service of Copy on Several Defendants.

— Where there are several defendants, the return of the officer must show execution by delivery of copy to all of them. "Executed by delivering a true copy of this summons," was held to be insufficient because it did not appear upon whom the summons was executed. *Woodliffe v. Connor*, 45 Miss. 552. See also *Graves v. Hughes*, 4 Bibb (Ky.) 84; *Leftwick v. Hamilton*, 9 Heisk. (Tenn.) 310.

But where the return shows generally that the process was executed by copy delivered to more than one person, it will be inferred that a copy was delivered to each of such persons. *McDonald v. Carson*, 94 N. Car. 497; *Isley v. Boon*, 113 N. Car. 249; *Greenman v. Harvey*, 53 Ill. 386; *Martin v. Hargardine*, 46 Ill. 322, holding further that where the officer noted costs upon three copies, this removed all doubt upon the question of the sufficiency of such a return; *Reed v. Moffatt*, 62 Ill. 300; *Turner v. Jenkins*, 79 Ill. 228; *Keith v. Stiles*, 92 Wis. 15.

Or if a collective service is sufficient, a return of the delivery of a copy to all the defendants is good. *Greenman v. Harvey*, 53 Ill. 386.

A return, "This writ personally served by delivering copies of the same to the within-named defendants," forces the implication that the process was served by copy on each individual defendant. *Barnes v. Hazleton*, 50 Ill. 429.

Where the return shows that a summons was served upon one person on a certain date and upon another on a certain other date, by delivery to them and leaving a certified copy thereof, this clearly imports that a copy was delivered to each defendant. *Keith v. Stiles*, 92 Wis. 19. See also *Ades v. Levi*, 137 Ind. 506.

Service of Separate Copy on Each Defendant.— In *Texas* the statute requires that a copy be delivered to each defendant, and it is held that a general return of the delivery of "a copy," or

other general expression which does not clearly show that each defendant was served with a copy, is insufficient. *Schramm v. Gentry*, 64 Tex. 143; *Randolph v. Schwingler*, (Tex. Civ. App. 1894) 27 S. W. Rep. 955; *King v. Goodson*, 42 Tex. 153; *Holliday v. Steele*, 65 Tex. 388; *Fulton v. State*, 14 Tex. App. 32; *Vaughan v. State*, 29 Tex. 273; *Rutherford v. Davenport*, (Tex. App. 1891) 16 S. W. Rep. 110; *Rush v. Davenport*, (Tex. Civ. App. 1896) 34 S. W. Rep. 380; *Swilley v. Reliance Lumber Co.*, (Tex. Civ. App. 1898) 46 S. W. Rep. 387; *Chamblee v. Hufsmith*, (Tex. Civ. App. 1898) 44 S. W. Rep. 616.

1. *Gilbreath v. Kuykendall*, 1 Ark. 50; *Holsinger v. Dunham*, 11 Ind. 346; *Hochlander v. Hochlander*, 73 Ill. 618; *Maher v. Bull*, 26 Ill. 348, holding that the law requires service by reading or copy, and that a return that the officer served the writ on the defendant "by informing him of the contents of the within writ, and he accepting service," is not sufficient, because the officer may have misunderstood the contents and purport of the writ, and the defendant is not bound by the officer's understanding.

Reading Alone Insufficient.— Where proper service is to be made by reading the process to the defendant and delivering a copy to him, a return which shows service by reading only is insufficient. *Campau v. Fairbanks*, 1 Mich. 152; *Ross v. Ward*, 16 N. J. L. 5023; *Noleman v. Weil*, 72 Ill. 502.

2. **Reasonable Certainty — Illustrations.**— The return must show with reasonable certainty what was delivered or read. "Executed * * * by delivering to * * * certified copies of plaintiff's" is bad. *Hart v. Clifton*, 19 Tex. 56.

Certainty to a common intent in showing that what was delivered is sufficient. *Dunham v. Wilfong*, 69 Mo. 355. Where the return was, "Served the within writ of petition and summons," etc., it was held that, there being no such thing as a writ of petition, the words "writ of" might be

But Where the Express Language of the Return Shows an Insufficient Service there is no room for construction. Thus, a return on a summons that it was executed by exhibiting and reading to the defendant

rejected as surplusage. *Jones v. Relfe*, 3 Mo. 388.

A general return of "executed in person and by copy" has been held sufficient. *Nelson v. Nye*, 43 Miss. 124. See also *Keithley v. Borum*, 2 How. (Miss.) 683.

But "executed on the defendants in person," without showing that a copy was delivered, is insufficient. *York v. Crawford*, 42 Miss. 508. See also *Ran-kin v. Dulaney*, 43 Miss. 197.

"Executed * * * by delivering a true copy to the defendant in person" is sufficient. *McCutchen v. Dougherty*, 44 Miss. 419. See also *Carter v. Daizy*, 42 Miss. 501; *Presley v. Anderson*, 42 Miss. 274; *Merrick v. Mayhue*, 40 Mich. 196.

"Served on defendant by reading and copy" was held to be a sufficient return of service by reading the summons to the defendant and giving him a copy thereof. *Wilson v. Hayes*, 18 Pa. St. 354.

But "served by serving a copy of original summons on defendant" was held to be bad, because it was the duty of the officer to serve the original summons in one of two alternative modes, and this return did not show a service according to either. *Philadelphia v. Cathcart*, 10 Phila. (Pa.) 103, 31 Leg. Int. (Pa.) 4.

"Served by reading to and delivering a true copy," etc., was held to be sufficient to show what was served. *Cairo, etc., R. Co. v. Holbrook*, 92 Ill. 297. And "duly served the within by reading the same and delivering a true copy thereof," was also held to be sufficient. *Carter v. Rodewald*, 108 Ill. 351. See also *Martin v. Harvey*, 54 Miss. 685. But in a former case in the same court, "served by reading to and leaving a copy with" the defendant, etc., was held to be too indefinite, because it failed to show what was read or served, or that a true copy of the writ was served. *Hochlander v. Hochlander*, 73 Ill. 618. See also *Tullis v. Scott*, 38 Tex. 537.

Delivery, and Delivery to the Defendant.—"Executed by leaving with" the defendant a copy is equivalent to service by delivering a copy, and a return in the former terms is sufficient.

Fitzhugh v. Hall, 28 Tex. 558. To the same effect see *Buck v. Buck*, 60 Ill. 105.

Where the statute required the summons in a justice's court to be served on the defendant by "delivering to and leaving with him personally true copies thereof," it was held that a certificate of service that a summons and complaint were personally served on the defendant by delivering to him copies thereof was defective for not stating that the copies of the complaint and summons were left with the defendant. *McMullin v. Mackey*, (Supm. Ct. Gen. T.) 6 N. Y. Supp. 885; *Syracuse Molding Co. v. Squires*, 61 Hun (N. Y.) 48, 21 Civ. Pro. (N. Y.) 58. See also *Wilkinson v. Bayley*, 71 Wis. 131; *Hall v. Graham*, 49 Wis. 553; *Matteson v. Smith*, 37 Wis. 333.

In *Texas* it was held that a return "executed * * * by delivering a certified copy of petition," etc., was not a good return of a service by delivery to the defendant. *Underhill v. Lockett*, 20 Tex. 130. See also *Graves v. Robertson*, 22 Tex. 130; *Middleton v. State*, 11 Tex. 256; *Batey v. Dibrell*, 28 Tex. 174; *Thomason v. Bishop*, 24 Tex. 302. But where the return states service by a delivery to the defendant by name, it is sufficient. *Johnson v. Barthold*, 43 Tex. 556; *Brooks v. Powell*, (Tex. Civ. App. 1895) 29 S. W. Rep. 809. And to this last point see also *Betts v. Boyd*, 31 Neb. 815; *Farnsworth v. Strasler*, 12 Ill. 485.

"Executed * * * by serving" a copy upon the defendant was held to be insufficient. *Thomason v. Bishop*, 24 Tex. 302; *Graves v. Robertson*, 22 Tex. 130. But "executed * * * by delivering" to the defendant a true copy" was held to be sufficient, the court distinguishing the above cases in which the return was executed by *serving*. *Hill v. Grant*, 33 Tex. 132. See also *Sanders v. City Nat. Bank*, (Tex. 1889) 12 S. W. Rep. 110.

But in other cases a return that the officer had served the process by copy has been held sufficient. *Hughes v. Mulvey*, 1 Sandf. (N. Y.) 92; *Hedges v. Mace*, 72 Ill. 472; *Drake v. Duvenick*, 45 Cal. 455, holding that upon collateral attack a return of service of

not only does not show, but by inference negatives, the delivery of a copy thereof, and if the delivery of a copy is required the return is insufficient.¹

f. SERVICE UPON CORPORATION — Manner of Service. — A return of service of process upon a corporation should show the manner in which the service was perfected.²

copy of summons was sufficient, although informal in not stating that a copy was delivered to the defendant.

A return that the officer made service "on the within-named defendant by delivering a summons in hand for his appearance at court" was held to be sufficient, the court saying that it could not, by any reasonable interpretation, be construed to mean a delivery in hand to any other person than the defendant. *Pendexter v. Cate*, 66 N. H. 270.

Subpœna to One Individually and as Executor. — Where a subpœna runs to one individually and in a representative capacity as executor, and a copy is served on him, he is a party to the suit in his individual capacity although the return shows merely that the subpœna was served on him in his representative capacity. The recital as to the character in which the party was served is immaterial, because the copy of the writ placed in his hand gives to him sufficient information that he is a party individually as well as in his representative capacity, and commands him to come into court and make whatever defense he has. *Cornell v. Green*, 88 Fed. Rep. 821.

Waiver of Copy. — The sheriff's return may show a waiver of the right to a copy, as that the party refused it. *Chapman v. Allen*, 1 Morr. (Iowa) 23; *Farmers' Ins. Co. v. Highsmith*, 44 Iowa 330; *Milan v. Strickland*, 45 Miss. 721.

An officer cannot compel one to take a summons from him, and if one refuses a summons when it is offered to him the officer may make a return in the usual form that he delivered it or he may return the facts. *Fuller v. Kenney*, 32 Me. 334; *Norton v. Meade*, 4 Sawy. (U. S.) 619.

To Whom Read. — In some cases it is held that a return by reading should show to whom the process was read, and that otherwise it will be bad. *Gilbreath v. Kuykendall*, 1 Ark. 50; *Pardon v. Dwire*, 23 Ill. 572; *Belingall v. Gear*, 4 Ill. 575; *Bain v. Galyear*, 10 Iowa 585. But though defective, a

return of service by reading without showing by whom the process was read is not fatally defective on collateral attack. *Boker v. Chapline*, 12 Iowa 204.

In other cases a return of personally served by reading, without designating to whom the process was read, is held to be sufficient. *Holsinger v. Dunham*, 11 Ind. 346; *Chandler v. Miller*, 11 Ind. 382; *Shaw v. Moser*, 3 Mich. 71.

A return of service on persons named by reading sufficiently shows service by reading to the person previously named. *Hunter v. Stoneburner*, 92 Ill. 75. So a return "I. R. Simms summoned by reading" is a sufficient return of service by reading to I. R. Simms. *Simms v. Klein*, 1 Ill. 371.

Reading in Presence or Hearing of Defendant. — A return of service by reading "in the presence and hearing" of the defendant has been held to be insufficient because the service can be made only by reading to the defendant. *Hynek v. Englest*, 11 Iowa 210. See also *Tooney v. State*, 5 Tex. App. 163; *Farris v. Powell*, 10 Iowa 553. *Contra*, *McPherson v. State Bank*, 4 Ark. 558. And in *Spencer v. Medder*, 5 Mo. 458, a return "by reading the same in his presence" seems to have been held bad, not because it failed to state that the process was read to the defendant, but because from the language used it could not be seen in whose presence the process was read — whether in that of the plaintiff, or of the defendant, or of the justice. But it is held that the defect of failing to return that the process was read to the defendant is remedied when the return shows that the defendant demanded a copy, and that the copy was given. *Anderson v. Kerr*, 10 Iowa 233; *Grosvenor v. Henry*, 27 Iowa 269.

1. *French v. State*, 53 Miss. 651; *Thomas v. State*, 62 Miss. 184; *Newlove v. Woodward*, 9 Neb. 502; *Greenwood v. Murphy*, 131 Ill. 604; *Robbins v. Clemmens*, 41 Ohio St. 285.

2. *Frazier v. Kanawha, etc., R. Co.*, 40 W. Va. 224; *Kanawha, etc., R. Co. v. Ryan*, 31 W. Va. 366; *Taylor v. Ohio*

Compliance with Statute. — When the sheriff assumes to make service upon a corporation by serving the summons upon such officer or managing agent as the statute designates, his return should show in terms that the service was made upon such officer or agent, in order to give to the court jurisdiction of the corporation in the absence of an appearance.¹ Every provision of the statute upon which the validity of such service depends should

River R. Co., 35 W. Va. 328; Kiufefe v. Merchants' Dispatch Transp. Co., 3 McCrary (U. S.) 547.

Process Against Corporation and Natural Person. — Where the action is against a corporation and a natural person a return, "served each of the defendants personally with a copy of the within summons," was held to be bad because it failed to state the manner of service on the corporation. *Hayden v. Atlanta Sav. Bank*, 66 Ga. 150.

1. *California.* — *Aiken v. Quartz*, etc., Min. Co., 6 Cal. 186; *O'Brien v. Shaw's Flat*, etc., Canal Co., 10 Cal. 343.

Georgia. — *Hargis v. East Tennessee*, etc., R. Co., 90 Ga. 42.

Illinois. — *Illinois Cent. R. Co. v. Pairpoint Mfg. Co.*, 55 Ill. App. 231; *Grand Tower Min., etc., Co. v. Schirmer*, 64 Ill. 106; *Cairo, etc., R. Co. v. Holbrook*, 92 Ill. 297.

Maryland. — *Northern Cent. R. Co. v. Rider*, 45 Md. 24.

Michigan. — *Kirby Carpenter Co. v. Tromley*, 101 Mich. 447.

Missouri. — *Haley v. Hannibal*, etc., R. Co., 80 Mo. 112; *Farmer v. Medcap*, 19 Mo. App. 250; *Werries v. Missouri Pac. R. Co.*, 19 Mo. App. 398.

Oregon. — *Willamette Falls Canal, etc., Co. v. Williams*, 1 Oregon 112; *Willamette Falls Canal, etc., Co. v. Clark*, 1 Oregon 113.

Pennsylvania. — *Central R. Co.'s Appeal*, 102 Pa. St. 38; *Dale v. Blue Mountain Mfg. Co.*, 167 Pa. St. 402; *Powder Co. v. Oakdale Coal, etc., Co.*, 14 Phila. (Pa.) 166, 37 Leg. Int. (Pa.) 14.

South Dakota. — *Mars v. Oro Fino Min. Co.*, 7 S. Dak. 611.

Wisconsin. — *Mariner v. Waterloo*, 75 Wis. 438.

United States. — *Tallman v. Baltimore*, etc., R. Co., 45 Fed. Rep. 156.

Thus, a return that the process was served by delivering a copy of the writ to "T. H. Larkin, the within-named defendant," was held insufficient to show service upon the corporation. *Blodgett v. Schaffer*, 94 Mo. 652. See also *Willamette Falls Canal, etc., Co.*

v. Clark, 1 Oregon 113; *Emmensite Gun, etc., Co. v. Pool*, 6 Pa. Dist. 47.

Character of Agency. — A return showing service upon an agent, without showing what kind of an agent he is, within the meaning of the statute, is bad. *Union Pac. R. Co. v. Pillsbury*, 29 Kan. 652; *Dickerson v. Burlington*, etc., R. Co., 43 Kan. 702; *Kirby Carpenter Co. v. Trombley*, 101 Mich. 447; *People's Mut. Ben. Soc. v. Frazer*, 97 Mich. 627; *Tallman v. Baltimore*, etc., R. Co., 45 Fed. Rep. 156, where the return failed to show that the service was upon a "regular" agent.

But a return of service upon a foreign corporation, omitting to state the character of the agent served, is held to be *prima facie* good, but may be overcome by evidence and the return set aside. *Hagerman v. Empire Slate Co.*, 97 Pa. St. 534; *Fulton v. Commercial Travelers' Mut. Acc. Assoc.*, 172 Pa. St. 117. *Contra*, *Crawford v. Wilmington Bank*, Phil. L. (N. Car.) 136, holding further that in any event the failure to designate the office of the party upon whom service is had is cured by judgment.

Where a summons was returned served upon a person as freight solicitor in charge of the defendant's business office, it was held that the return sufficiently designated one as an agent in charge of the office or place of business of defendant. *Davis v. Jacksonville Southeastern Line*, 126 Mo. 69. See also *Palmer v. Pennsylvania Co.*, 35 Hun (N. Y.) 369; *In re Hohorst*, 150 U. S. 653; *Barrett v. American Telephone, etc., Co.*, 56 Hun (N. Y.) 430, holding that a return showing service upon a general superintendent was sufficient as showing service upon a "managing agent," within the meaning of a statute providing for service upon the president or other head of the corporation or upon the secretary, managing agent, etc.

A return of service upon the vice-president, the president not being in the county, is sufficient. *Cook v. Imperial Bldg. Co.*, 152 Ill. 638; *Norfolk*,

appear by the return to have been complied with; and if the service can be made upon particular persons only under specified contingencies or at a particular place, as, for example, under statutes providing that service cannot be had upon certain officers or agents except in the absence of the president or other chief officer at the business office of the corporation, etc., the existence of such conditions should appear when the return shows service upon any of such persons.¹

etc., *R. Co. v. Cottrell*, 83 Va. 512. And there is no necessity to return that the president is absent from the county, under a statute providing for service upon the president or other head of the corporation in the first instance. *Comet Consol. Min. Co. v. Frost*, 15 Colo. 310.

A return showing service upon one, designating him as a particular officer, but omitting to say of what he is such officer, is bad. *Mathias v. White Sulphur Springs Assoc.*, 17 Mont. 542, 3 Am. & Eng. Corp. Cas. N. S. 344; *Chicago Planing Mill Co. v. Merchants' Nat. Bank*, 86 Ill. 587.

"I served the within summons * * * on the defendant by handing a copy to the station agent," sufficiently shows that the station agent was the agent of the defendant. *Talbot v. Minneapolis, etc., R. Co.*, 82 Mich. 66.

The delivery of a copy of a citation to the person alleged to be the mayor of the municipal corporation known as the "mayor, aldermen, and inhabitants of the city of Houston," the writ commanding that corporation to be summoned, was held sufficient service, although the return did not declare that the person was the mayor of the corporation so styled, but did declare that he was "mayor of the city of Houston." *Houston v. Emery*, 76 Tex. 282.

Name of Officer.—A return should state the name of the agent with whom the copy was left. *Singer v. Singer Mfg. Co.*, 2 Pa. Co. Ct. 578. See also *Truax v. Sterling*, 74 Mich. 160; *Grand Tower Min., etc., Co. v. Schirmer*, 64 Ill. 106.

The Full Name of such officer or agent need not be given. *Cincinnati, etc., R. Co. v. McDougall*, 108 Ind. 179.

Disclaimer of Authority by Officer.—Where a return shows proper service on an officer of a corporation it is good even if the officer disclaims any right to answer officially. *Lewis v. Glenn*, 84 Va. 947.

Effect of Appearance.—An appearance by the corporation waives the defect in the return for failure to state the officer served. *Dugan v. Baltimore*, 70 Md. 1.

1. *Arkansas Coal, etc., Co. v. Haley*, 62 Ark. 144; *Cairo, etc., R. Co. v. Trout*, 32 Ark. 17; *St. Louis, etc., R. Co. v. Barnes*, 35 Ark. 97; *Eel River R. Co. v. State*, 143 Ind. 231; *Palmetto Town Co. v. Rucker, McCahon (Kan.)* 146; *Hoen v. Atlantic, etc., R. Co.*, 64 Mo. 561; *Glines v. S. S. O. Iron Hall*, (Supm. Ct. Spec. T.) 22 Civ. Pro. (N. Y.) 437; *Miller v. Norfolk, etc., R. Co.*, 41 Fed. Rep. 431; *Kiufelke v. Merchants' Dispatch Transp. Co.*, 3 McCreary (U. S.) 547; *O'Hara v. Independence Lumber, etc., Co.*, 42 La. Ann. 226, holding that a return showing that the process was served by leaving a copy with a person named found at the domicile of the corporation, and that its general manager and president were absent, was defective for failing to state whether the person served was known to the officer or whether he learned such person's name by interrogating him.

Absence of Chief Officer from County.—A return of service upon a person "in the absence of the president or chief officer" of the corporation was held insufficient to show service, as it did not show that the president was absent from the county. *Hoen v. Atlantic, etc., R. Co.*, 64 Mo. 561.

But a statement in the return of the absence of the president or chief officer of the corporation from the county sufficiently shows the absence of such officer from the business office of the company in the county. *Story v. American Cent. Ins. Co.*, 61 Mo. App. 534.

One in Charge of Business Office.—Where the statute provides that service may be had by leaving a copy of the summons with a person having charge of the business office in the absence of the president or other chief officer

Effect of Recital in Judgment. — But it has been held that where a judgment entry recites a legal service of process, this will cure a return which is defective for not showing that the person served bore any relation to the corporation.¹

Service upon Agent Shows Service upon Corporation. — Where the return shows service upon one as agent of a corporation, this is a sufficient showing of service upon the corporation.²

g. NAME OF PERSON UPON WHOM PERSONAL SERVICE MADE — (1) *In General.* — Where a return is otherwise sufficiently certain, it is no objection that the defendant upon whom the service is made is not mentioned by name.³ And a return showing service on a person of the same name as that mentioned in the writ is sufficient without any further addition or description of such person.⁴

from the county, the return must show that service on one other than the president or other chief officer was upon one in charge of a business office. *Gate City Electric Co. v. Corby*, 61 Mo. App. 630.

A return of service on an agent of a corporation "at and in the only office of said" corporation, is a sufficient return of service at the "business office" of the corporation. *Hill v. St. Louis, Ore., etc., Co.*, 90 Mo. 103.

Foreign Corporations. — Under a statutory provision that a foreign corporation must designate a person upon whom service of process can be made, a return of service must show that it was made upon such person. *Southern Bldg., etc., Assoc. v. Hallum*, 59 Ark. 583; *Glines v. S. S. O. Iron Hall*, (Supm. Ct. Spec. T.) 22 Civ. Pro. (N. Y.) 437; *Ganasche v. Smythe*, 60 Mo. App. 163, wherein, as to service upon a foreign corporation, it was said that when the statute provides for constructive service of process the terms and conditions of the statute must be strictly complied with, and that no intendment will be indulged in favor of such service.

But where it was alleged in the complaint that the defendant was a foreign corporation engaged in business in the state, it was held that the return and complaint would be read together, and that the return need not show that the corporation was engaged in business in the state, nor that the person served was such agent as was authorized to represent the corporation, though the service in this case was made upon the president, as appeared by the return, and the decision was not based upon any statute similar to those in the cases

last above cited. *Farrell v. Oregon Gold Co.*, 31 Oregon 463. See also *St. Clair v. Cox*, 106 U. S. 350.

1. *Ford v. Delta, etc., Land Co.*, 43 Fed. Rep. 181.

2. *Keener v. Eagle Lake Land, etc., Co.*, 110 Cal. 627; *Grand Rapids Chair Co. v. Runnels*, 77 Mich. 104.

3. *Florence v. Paschal*, 50 Ala. 28; *Cardwell v. Sabichi*, 59 Cal. 490; *Cobb v. Newcomb*, 7 Iowa 43; *Robison v. Miller*, 57 Miss. 237.

See also in this connection the last preceding subsection.

Return in Blank to Writ in Blank. — But where a writ is issued in blank, a return as served upon —, naming no person, is a nullity and gives to the court no jurisdiction of a person who does not appear. *Brooks v. Allen*, 62 Ind. 401.

4. *Underhill v. Kirkpatrick*, 26 Ill. 84.

Affidavit of Service — Certificate of Identity of Defendant. — In *Wisconsin*, by statute, an affidavit of service by an unofficial person must show that he knew the person served to be the person named in the process as the defendant. *German Mut. Farmer F. Ins. Co. v. Decker*, 74 Wis. 556; *Grantier v. Rosecrance*, 27 Wis. 488; *Kernan v. Northern Pac. R. Co.*, (Wis. 1899) 79 N. W. Rep. 403; *Reed v. Catlin*, 49 Wis. 686; *Sayles v. Davis*, 20 Wis. 302; *Lewis v. Hartel*, 24 Wis. 504.

A rule of court requiring affidavits of service to show that the party making the service knew the person served to be the person named as the defendant will not control the sufficiency of an affidavit of service, but such affidavit will be good without complying with such rule if it is good under the statute, and the rule, being inconsistent

(2) *Showing Service upon Several.* — But where there are several defendants named in the process the return must show upon which of them service is made.¹

(3) *Mistake in Name — Wrong Name.* — A return showing service upon a person named should not vary from the name set out in the process, and a substantial variance will not support a judgment by default.²

Immaterial Misspelling. — But where the officer merely misspells a defendant's name, and sufficient appears in the return to establish the fact that the party named in the process is the person actually served, the mistake is not material.³

ent with the statute, is void. *Young v. Young*, 18 Minn. 90. See also *Cunningham v. Water-Power Sandstone Co.*, (Minn. 1898) 77 N. W. Rep. 137.

1. *Richardson v. Thompson*, 41 Ill. 202, holding that a return of service "on the within-named defendant," where there are two defendants, is not good; *Graves v. Hughes*, 4 Bibb (Ky.) 84; *Grider v. Payne*, 9 Dana (Ky.) 188; *Tappan v. Bruen*, 5 Mass. 193; *Parker v. Danforth*, 16 Mass. 299; *Woodliffe v. Connor*, 45 Miss. 552; *Stults v. Outcalt*, 6 N. J. L. 130; *Cook v. McDoel*, 3 Den. (N. Y.) 317; *Stephenson v. Kellogg*, 1 Tex. App. Civ. Cas., § 542; *Thompson v. Griffin*, 19 Tex. 115; *Rape v. Heaton*, 9 Wis. 328. See also notes in the last preceding subsection.

But in *Trespass* against several it has been decided that the plaintiff may proceed to judgment against those served, where the return is silent as to some. *Palmer v. Crosby*, 1 Blackf. (Ind.) 138.

To a *Scire Facias* Against Bail and principal, a return that the officer served the "defendant" is good, the bail being the only defendant proper upon the *scire facias*. *Gilmore v. Liden*, 23 Ga. 14.

Partners. — See article PARTNERSHIP, vol. 15, p. 908.

Presumption from Silence of Return. — A return of service upon one defendant which is silent as to another defendant raises the legal conclusion that there was no service upon the latter. *Granberry v. Wellborn*, 4 Ala. 118.

And a judgment by default against one upon whom no service is shown to have been made cannot be supported. *Carper v. Woodford*, 24 Neb. 135; *Dickison v. Dickison*, 124 Ill. 483.

Where There Are Two Defendants of the Same Name, of whom one was served with process and one is dead, a return is bad if it does not show whether the

service was upon the deceased before his death or upon the survivor. *Grider v. Payne*, 9 Dana (Ky.) 188.

Sufficiency. — Where two defendants are served separately with summons, a return showing such service "with all indorsements thereon" applies to both copies, although these words appear but once in the return. *Wells v. Turner*, 14 Neb. 445.

A General Return "Executed" has been held to imply that the process was executed upon all the defendants named in it. *Cantley v. Moody*, 7 Port. (Ala.) 443.

Waiver of Objection. — But it is held that if those who are served appear and go to trial they waive objections for any irregularity by reason of the silence of the return as to other defendants. *Gilson v. Powers*, 16 Ill. 355.

2. *Kennedy v. Merriam*, 70 Ill. 228, wherein it was held that a return showing service upon one whose Christian name was set out as May could not be taken as showing service upon one whose Christian name was Mary, and that these names must be taken to signify different persons [*distinguishing Pond v. Ennis*, 69 Ill. 341, in which case distinct proof was made upon collateral attack that the right person was served under a wrong name]; *Booth v. Holmes*, 2 Tex. Unrep. Cas. 232; *Hough v. Coates*, (Tex. Civ. App. 1894) 25 S. W. Rep. 995; *McClaskey v. Barr*, 45 Fed. Rep. 151, holding that a return of service upon "Jacob Krug" was not sufficient to show service upon "Jacob Kraig," the names not being *idem sonans*. See generally article NAMES, vol. 14, p. 270.

3. "The Within Named." — Thus, where the defendant's name in the writ was E. T. Stevens, and the officer returned service upon E. T. Stephen, "by delivering to E. T. Stephen, the

Omission of Christian Name. — So where the return shows service upon the defendant, setting out only his surname, it is good, the presumption being that the defendant was thereby intended.¹

Initials. — A return of service upon one, giving his surname and the initials of his Christian name, is sufficient.²

h. TIME. — A return to process should show when it was executed.³ When, however, a date appears in the return it will gen-

within-named defendant, in person, a true copy of this writ," the return was held sufficient. *Dunn v. Hughes*, (Tex. Civ. App. 1896) 36 S. W. Rep. 1084. To the same point see *Townsend v. Ratcliff*, 50 Tex. 148; *Alexander v. McDow*, 108 Cal. 27; *Galliano v. Kilfooy*, 94 Cal. 86.

Wrong Christian Name. — So where the defendant's proper Christian name is inserted in the writ, and the return shows service upon one of the same surname but of a different Christian name, with the words "the within-named defendant," the error in the Christian name will be considered a mere clerical one and will not invalidate the judgment. *Sandwich Mfg. Co. v. Earl*, 56 Minn. 396.

Omission of Addition — Presumption. — Where the name of the defendant in the return contained the addition "Jr.," and the return of service omitted such addition, it was held that it would be presumed that the sheriff had done his duty and served the process upon the proper person. *Sanders v. Dowell*, 7 Smed. & M. (Miss.) 206.

1. *Gate City Abstract Co. v. Post*, 55 Neb. 742; *Snelgrove v. Branch Bank*, 5 Ala. 295. See also *Veasey v. Brigman*, 93 Ala. 548; *Johnson v. Jones*, 2 Neb. 126.

2. *Johnson v. Jones*, 2 Neb. 126; *German Ins. Co. v. Frederick*, (Neb. 1899) 77 N. W. Rep. 1106; *Davis v. Burt*, 7 Iowa 56; *Simms v. Klein*, 1 Ill. 371. See also *Butterfield v. Johnson*, 46 Ill. 68. *Contra*, *Bancroft v. Speer*, 24 Ill. 227.

Conversely, where the process was against A. J. Veasey, a return that it was executed upon "Jack Veasey, the defendant," was held to be good, the court saying "Had only the surname been written in the return — had the service been 'by leaving a copy,' etc., with 'Veasey,' it would have been good, the presumption being that the defendant was thereby intended; * * * and surely the fact that a given name is set out, the initial letter of which is

the same as one of the initials by which the defendant is designated in the summons and complaint, can have no tendency to overturn this presumption, but rather to strengthen it. But the return goes further than this. It not only asserts that service was made upon Jack Veasey, thus raising the presumption that the person served was the person sued, but it affirms that 'Jack Veasey' is the defendant in the cause, and designated therein by the name of A. J. Veasey." *Veasey v. Brigman*, 93 Ala. 548.

Wrong Initials. — Where a middle initial of the Christian name of a member of a firm is not the same in the return as in the process, it will be taken to be a clerical error merely, the return showing that the person served is a member of the firm sued. *Cheshire v. Milburn Wagon Co.*, 89 Ga. 249.

But where the name of the defendant in the process was designated as "J. W. Booth," a return showing service upon "W. Booth" was held to be bad. *Booth v. Holmes*, 2 Tex. Unrep. Cas. 232.

3. *Arkansas.* — *Gilbreath v. Kuykendall*, 1 Ark. 50.

Illinois. — *Botsford v. O'Conner*, 57 Ill. 72; *Dick v. Moore*, 85 Ill. 66; *Chickering v. Failes*, 26 Ill. 518; *Wilson v. Greathouse*, 2 Ill. 174; *Ball v. Shattuck*, 16 Ill. 299; *Clemson v. Hamm*, 2 Ill. 176.

Iowa. — *Hakes v. Shupe*, 27 Iowa 465.

Kentucky. — *Long v. Montgomery*, 6 Bush (Ky.) 394, holding that a recital in the judgment that the summons was executed in due time, is merely formal and not sufficient proof of service.

Louisiana. — *O'Hara v. Independence Lumber, etc., Co.*, 42 La. Ann. 226.

Massachusetts. — *Perry v. Dover*, 12 Pick (Mass.) 206.

New Jersey. — *Stediford v. Ferris*, 4 N. J. L. 120.

New York. — *Stewart v. Smith*, 17 Wend. (N. Y.) 517.

erally be taken as the date of service,¹ and where the date appears to the statement of one of the acts constituting the serv-

Pennsylvania. — *Weaver v. Springer*, 2 Miles (Pa.) 42.

Texas. — *Texas State Fair v. Lyon*, 5 Tex. Civ. App. 382.

Return Only Evidence. — Where it was assigned for error that a deposition was taken before the appellant had been summoned it was held that the date of the service of the summons could be shown only by the return. *Harding v. Larkin*, 41 Ill. 413.

Showing Execution Before Return Day. — A return must show that the process was executed a sufficient number of days before the return day, in order to justify a judgment at the return term. *Chickering v. Failes*, 26 Ill. 518; *Johnson v. Deason*, 3 Bibb (Ky.) 259; *Williams v. Downes*, 30 Tex. 51; *Calhoun v. Matlock*, 3 How. (Miss.) 70. See also *O'Leary v. Durant*, 70 Tex. 409; *Philadelphia v. Newkumet*, 11 Pa. Co. Ct. 504, which were returns of service by publication.

Presumption. — But it is also held that where a return is not dated, the presumption is that the service was perfected within the time prescribed by law. *Reid v. Jordan*, 56 Ga. 282.

The Date of the Jurat to an Affidavit of service will be presumed to be the date of service. *Reed v. Catlin*, 49 Wis. 686.

Mandatory Statute. — A statutory requirement that the date of service must be indorsed on the writ is held to be mandatory. *Hakes v. Shupe*, 27 Iowa 465; *Wendel v. Durbin*, 26 Wis. 390.

Irregularity — Collateral Attack. — An omission to state the day of service is only an irregularity which will not render the judgment bad on collateral attack. *Wilson v. Call*, 49 Iowa 463.

Particular Hour of Day — Parol Testimony. — When it is important that a writ shall not be served before a particular hour of the day, and the return shows service on the particular day generally, the officer may testify as to the actual hour of service in support of the validity of the service. *Wardell v. Etter*, 143 Mass. 19.

1. *Carter v. Rodewald*, 108 Ill. 351; *Cairo, etc., R. Co. v. Holbrook*, 92 Ill. 297; *Cariker v. Anderson*, 27 Ill. 358; *Funk v. Hough*, 29 Ill. 145; *Cummings v. People*, 50 Ill. 132; *Greenman v. Harvey*, 53 Ill. 386; *Simms v. Klein*, 1 Ill. 371; *Marlow v. Kuhlenbeck*, 2

Colo. 602. See also *infra*, V. *Return Time*.

Sufficiency — Date of Return and Service. — The date of return is held insufficient to show date of service where there is but one date and it is not made to appear whether the date refers to the service or to the return. *Ogle v. Coffey*, 2 Ill. 239; *Bancroft v. Speer*, 24 Ill. 227, in which latter case a return, "Served the within by reading the same to and in the hearing of —, June 21, 1858," was held to be insufficient. But in the cases first above cited in this note the same character of return is held to be sufficient, it appearing that no date to the return was necessary.

But where subsequent indorsements on the return show that the date is not that on which the process is returned, it is sufficient. *Orendorff v. Stanberry*, 20 Ill. 89.

Favorable Construction — Omission of Month. — Where a return showed process executed on one on "the 6th —, A. D. 1840," and on another on "the 28th day of July, 1840," it was held that the month in which service was had on the first party was sufficiently shown. *Thompson v. State Bank*, 5 Ark. 245. To the same point see *Senescal v. Bolton*, 7 N. Mex. 351.

And where the sheriff's return showed that a summons was executed on the third day of a month, but the month was left blank, it was held that inasmuch as the summons issued on February 27, and the date of the return was March 4, the court was authorized to conclude that the summons was served on March 3. *Wilson v. King*, 1 Morr. (Iowa) 106.

Omission of Year. — So where a return of service on December 30 omitted the year, it was held sufficient because it appeared that no other December 30 had intervened between the date of the writ and the return day. *Select v. Olmstead*, 1 Root (Conn.) 497.

Time of One Levy Referred to Time of Another. — Where a sheriff had three executions against the same defendant, the first of which was levied on certain land on December 20, and the other two came into his hands on December 21 and were returned duly levied, it was held that it might be presumed that the last two were

ice it may be taken to show sufficiently the date of the service.¹

Date of Receipt of Process. — The entry of the date when the process came into the officer's hands may be read with the entry as to service.²

2. PLACE. — Where the statute does not require the officer to state expressly in his return the place where process was served, the legal presumption that he acted within the sphere of his power and according to the obligations of his official duty must be so far indulged as to warrant the conclusion that the act was done within the limits in which he was legally authorized to act, without any statement in the return of the place of execution.³

evied on the same day on the land which had the day before been levied on by virtue of the first execution, the sale appearing to be made in proper time as to the first execution. *Allison v. Taylor*, 3 B. Mon. (Ky.) 366.

1. *Harmon v. Campbell*, 30 Ill. 25, wherein the return was: "Served this writ on the within-named Augustus E. Harmon, by delivering a true copy of this with him, at his office or place of business, in person, by delivering a copy thereof to him the 16th day of March, 1861." It was held that the article "the" before the date left no doubt that the date given referred to the service and not to the return. And see *Talcott v. Rosenberg*, (C. Pl. Gen. T.) 8 Abb. Pr. N. S. (N. Y.) 295, holding that a return which showed that the officer, by virtue of an attachment, did on a certain date attach the property mentioned in an inventory annexed to the return, and further that he served a copy of said attachment and of the inventory, etc., was sufficient.

But in *Kittredge v. Bellows*, 4 N. H. 424, the court said: "We entertain no doubt that where all the doings of a sheriff, in a particular transaction, may, by relation, become valid from the day when he began to act, there, if he return several acts under a particular date, the court will intend that all the acts were done upon the day stated. But where the sheriff returns several distinct acts under one date, if the precise time when one of the acts so returned was done becomes material, so that the principle of relation cannot apply, the court will not intend that such act was done on the day stated, unless it appear that, from its nature, it must have been the first act done."

2. *Wheat v. State*, Minor (Ala.) 199, holding that "received January 9,

1822, and executed," imported that the notice was executed on the day it was received; *Scott v. Scott*, 85 Ky. 385.

Ambiguous Return — Favorable Construction. — Where the return is ambiguous it should be construed in favor of the plaintiff. Thus where the sheriff returned only on the summons, "Came to hand 30th January, 1811; and I have served the within petition and summons, by delivering a true copy thereof to each of the defendants, the same day," it was held that the obvious meaning was that the summons was executed on both the defendants on the day on which it came to the officer's hands. *Cosby v. Bustard*, Litt. Sel. Cas. (Ky.) 137.

Impossible Date. — A return which shows service on an impossible date, as on a date prior to the date of the issuance of the process, is no evidence of service. *Texas State Fair v. Lyon*, 5 Tex. Civ. App. 382; *Llano Imp. Co. v. Watkins*, 4 Tex. Civ. App. 428; *Keaton v. Moore*, 59 Ga. 553.

But it is held that a judgment based upon a return of this character is not void. Thus, upon a bill to set aside a levy of an execution under a judgment based upon such a return, it appeared that the summons in the original action issued on March 2, 1888, returnable on March 10, 1888, and the return of the officer showed service on March 3, 1886, instead of on March 3, 1888. It was held that no possible doubt could exist that the date should have been 1888 instead of 1886, the latter being a mistake which corrected itself. *Evans v. Calman*, 92 Mich. 427. See also *Johnson v. Shepard*, 35 Mich. 121.

3. *Arkansas.* — *Henry v. Ward*, 4 Ark. 150; *Ex p. St. Louis, etc., R. Co.*, 40 Ark. 143.

California. — *Crane v. Brannan*, 3 Cal.

192.

And where the return of service is entitled with the name of the

Colorado. — *Thomas v. Colorado Nat. Bank*, 11 Colo. 511.

Indiana. — *Baltimore, etc., R. Co. v. Brant*, 132 Ind. 37.

Iowa. — *Williams v. Sill*, 12 Iowa 511.

Louisiana. — *Whiting v. Hagerty*, 5 La. Ann. 686.

Massachusetts. — *Richardson v. Smith*, 1 Allen (Mass.) 541.

Michigan. — *Norvell v. McHenry*, 1 Mich. 227.

Missouri. — *Jones v. Relfe*, 3 Mo. 388; *Johnson v. Gilkeson*, 81 Mo. 55, holding that where a return to a writ of attachment described land as in a particular county the presumption was that the levy was made in that county.

Nebraska. — *Gilbert v. Brown*, 9 Neb. 90.

New York. — *Beach v. Baker*, 25 N. Y. App. Div. 9.

South Carolina. — *Lyles v. Haskell*, 35 S. Car. 391.

Texas. — *Hays v. Byrd*, 14 Tex. Civ. App. 24.

Virginia. — *Guarantee Co. of North America v. Lynchburg First Nat. Bank*, 95 Va. 480.

West Virginia. — *State v. Campbell*, 42 W. Va. 246.

United States. — *Knowles v. Logansport Gaslight, etc., Co.*, 19 Wall. (U. S.) 58, wherein the court referred to *Allen v. Blunt*, 1 Blatchf. (U. S.) 480, as a case which was supposed to have held that a return of service by a United States marshal without showing that the service was made in his district was insufficient to give to the court jurisdiction of the person, and said: "What Justice Nelson held in that case was this: that inasmuch as the eleventh section of the Judiciary Act declares that 'no suit shall be brought before either of said courts against an inhabitant of the United States, by any original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ,' therefore, the jurisdiction of said courts depends on service or inhabitancy in the district, one of which should appear of record; and inasmuch as the record in that case contained no allegation on the subject, and the jurisdiction of the court depended entirely on the marshal's return to the process, the return was insufficient to give it. This authority,

therefore, is not in point." But see *McAbee v. Parker*, 78 Ala. 575.

When It Is Proper to Designate the Place of Service in the return, it has been held that such a designation after the signature of the officer to his return is sufficient. *Wilson v. Call*, 49 Iowa 463.

Where it is required by statute that an affidavit of service shall state, *inter alia*, the place of service, it is held that in a collateral proceeding the presumption will be indulged that the sheriff acted within his jurisdiction, where the record shows that the land in suit was in the county in which the action was brought, that the summons was lodged in the office of the sheriff of the same county and was served by him, and the return showed service upon the party "at her residence." *Lyles v. Haskell*, 35 S. Car. 401.

Service in State. — A certificate of service need not show that service was made in the state. *Zwickey v. Haney*, 63 Wis. 464; *Lewis v. Hartel*, 24 Wis. 504.

Restricted Jurisdiction. — In *Crowley v. Wallace*, 12 Mo. 146, it was held that while the form of a return was not prescribed by statute, the return to a justice's summons should show regularly that it was executed within the officer's jurisdiction; but that an omission to show this, where it was not expressly shown that the execution was outside of his jurisdiction, would not be fatal on collateral attack.

Where a city marshal had no authority to serve process outside of the city it was held that his return to a writ of attachment must affirmatively show that it was served within the city. *Alverson v. Dennison*, 40 Mich. 179.

In a suit in the Superior Court of Detroit the officer returned that he served the declaration "in the city of Detroit," "by delivering to him in said county of Wayne a true copy thereof," and it was held that it sufficiently appeared that the service was in the city and that the reference to the county in the passage in which the mode of service was explained was perfectly consistent. *Elliott v. Preston*, 44 Mich. 189.

Where the Justice's Jurisdiction Is Coextensive with the County, and his process may be served anywhere within the county, the return need not state

state and county, acts of service set forth may be taken to have been performed in such county.¹

j. ACKNOWLEDGMENT OF SERVICE. — Acknowledgment of the service of process is merely a substitute for actual service. For a full discussion of this subject see article SERVICE OF PROCESS.

k. RETURN OF EVASION OF SERVICE. — An officer may return the facts that he served a summons on the defendant by offering to read the same to him or to give a copy to him, but that he would not stay to hear or receive it, and this is a good and sufficient service and return.²

l. SUBSTITUTED OR CONSTRUCTIVE SERVICE — (1) *Substituted Service — Strict Construction.* — Substituted service in actions purely *in personam* is a departure from the rule of the common law, and the authority for it must be strictly followed.

where the process was served. *Beach v. Baker*, 25 N. Y. App. Div. 9; *Potter v. Whittaker*, (Supm. Ct. Gen. T.) 27 How. Pr. (N. Y.) 10. So in *Richardson v. Smith*, 1 Allen (Mass.) 541, it was held that where a return of a constable of a town omitted to state the place of service it would be presumed that service was made within his precinct. And it is also held that where a constable returns that he has attached goods and chattels by virtue of a writ of attachment issued out of a justice's court, and the return is silent as to the place of seizure, the court must presume that the officer did not violate the provision of a statute commanding him to take the property of the defendant "within his county." *Bushey v. Raths*, 45 Mich. 181.

The Defendant's Residence need not be certified in an affidavit of service, as it will be presumed from the place where service was made. *Calderwood v. Brooks*, 28 Cal. 151. See also *Pellier v. Gillespie*, 67 Cal. 582.

1. *Davis v. Richmond*, 35 Vt. 419.

County Not in State. — The statement in the venue of a return of a county not in the state will be taken as a mere clerical mistake and will have no effect upon the return, as the court will take judicial notice of the counties in the state. *Higgins v. Bullock*, 66 Ill. 37.

But in *Gully v. Sanders*, Litt. Sel. Cas. (Ky.) 424, it was held that a return by the officer that a defendant was no inhabitant of his bailiwick was not sufficient to abate the writ against such defendant in an action of covenant upon a joint obligation under a statute authorizing an abatement as to one of such joint defendants in case the officer

should return that he was not an inhabitant of the county. But see *Lichfelt v. Kopp*, 38 Mich. 312.

2. *Slaght v. Robbins*, 13 N. J. L. 340; *Story v. Ware*, 35 Miss. 399, wherein the officer returned: "Executed personally on the defendant in the following manner: I told him I had a writ for him in the within-named case and offered him a true copy thereof, which he refused to receive. I then commenced reading the within to him, and he refused to hear it, and left me." See also *Fuller v. Kenney*, 32 Me. 334.

But the Mere Fact of the Running Away of the Defendant when the officer attempts to execute process upon him is held not a sufficient return unless it appears from the return that the attempt to execute the process was made by the officer in the presence and hearing of the defendant, and that the latter ran away in order to prevent service, or that the defendant was aware of the fact that the officer had process to serve upon him and ran away to avoid service. *Holden v. Ranney*, 45 Mich. 399.

Sufficiency. — In *Norton v. Meader*, 4 Sawy. (S. U.) 619, Field, J., said: "If a defendant declines to receive from the proper officer a paper presented by him for service, he may deposit it at any convenient place in the presence of the party. The objection that the officer did not explain the character of the paper cannot be heard from the defendant. She should have received it, and examined it herself, or, if unable to read, sought an explanation of its purport from those who could. Had she desired it, the officer would have given her the necessary information."

Therefore the existence of the conditions upon which the validity of such a service depends must be shown affirmatively by the return, and cannot be inferred.¹

(2) *Inability to Find Defendant.* — Thus where the statute requires service of process to be made upon the defendant personally, or, if he cannot be found, by delivering a copy of the process to some member of his family or other person designated at his dwelling house or usual place of abode, the inability of the officer to find the defendant must be shown by the return or the substituted service will not be sufficient.²

1. *Le Grand v. Fairall*, 86 Iowa 211; *Bustamente v. Bescher*, 43 Miss. 172; *Caro v. Oregon*, etc., R. Co., 10 Oregon 510; *Carter v. Shindel*, 7 Pa. Dist. 308; *Settlemer v. Sullivan*, 97 U. S. 444.

As to Service by Publication, see article PUBLICATION, vol. 17, p. 26.

Absence from Home. — Where substituted service depends upon the defendant's absence from home, the return must state such absence. *Oakey v. Drummond*, 4 La. Ann. 363; *Kendrick v. Kendrick*, 19 La. 38; *Corcoran v. Riddell*, 7 La. Ann. 268.

Nonresidence. — Where substituted service at the defendant's place of business in the county depends upon nonresidence, the return to a summons served by leaving a copy at such place of business must show the nonresidence. *Carter v. Shindel*, 21 Pa. Co. Ct. 126; *Boyle v. Whitney*, 8 Pa. Co. Ct. 501; *Taylor v. Brown*, 13 Pa. Co. Ct. 655.

Nonresidence — Attachment. — Where a substituted service in attachment depends upon the nonresidence of the defendant a return is sufficient without showing nonresidence where the warrant itself shows that the defendant is a nonresident. *Bell v. Moran*, 25 N. Y. App. Div. 461.

2. *Iowa.* — *Clark v. Little*, 41 Iowa 497; *Davis v. Burt*, 7 Iowa 56; *Chittenden v. Hobbs*, 9 Iowa 417; *Nosler v. Githens*, 9 Iowa 295; *Grant v. Harlow*, 11 Iowa 429; *Bonsall v. Isett*, 14 Iowa 309; *Sidles v. Reed*, 10 Iowa 589; *Eikenburg v. Barrett*, 10 Iowa 593.

Michigan. — *Wheeler v. Wilkins*, 19 Mich. 78.

Mississippi. — *Hammond v. Olive*, 44 Miss. 543; *Glenn v. Wragg*, 41 Miss. 654; *Foster v. Simmons*, 40 Miss. 585; *Mullins v. Sparks*, 43 Miss. 129.

Missouri. — *Williams v. Monroe*, 125 Mo. 574.

New Jersey. — *Gardner v. Small*, 17 N. J. L. 162; *Moore v. Miller*, 16 N. J.

L. 233; *Cooper v. Roberts*, 16 N. J. L. 353; *Polhemus v. Perkins*, 15 N. J. L. 435.

New York. — *Sperry v. Reynolds*, 65 N. Y. 179.

Oregon. — *Trullenger v. Todd*, 5 Oregon 36; *Hass v. Sedlak*, 9 Oregon 462.

Washington. — *Mitchell*, etc., Co. v. O'Neil, 16 Wash. 108.

Wisconsin. — *Matteson v. Smith*, 37 Wis. 333; *Knox v. Miller*, 18 Wis. 397.

United States. — *Settlemer v. Sullivan*, 97 U. S. 445; *Rickards v. Ladd*, 6 Sawy. (U. S.) 42.

Contra. — But it is also held that a return of substituted service need not show that the defendant could not be found, upon the principle that where a public officer is required to perform a ministerial duty in one of two ways, and he performs it in one of them, the general presumption that an officer of that kind does his duty operates as a presumption that the mode of performance was that which the circumstances authorized. *Vaule v. Miller*, 64 Minn. 485; *Goener v. Woll*, 26 Minn. 154.

Degree of Diligence. — The officer need not state the degree of diligence used to find the defendant. *Lewis v. Hartel*, 24 Wis. 504; *Sueterlee v. Sir*, 25 Wis. 357. See also *infra*, IV. 6. *Return Not Executed — Non Est, Nihil Est, etc.*

"I made inquiry at his last usual place of residence as to his whereabouts, but could not ascertain." was held to be sufficient in *Williams v. Hitzie*, 83 Ind. 303. See also *Lewis v. Hartel*, 24 Wis. 504.

But where the statute requires personal service to be made a certain number of days before the return of the writ, it is held that if the officer fails to show by his return that he retained the writ in his possession and made diligent search for the defendant during the time within which personal service might by law have been made,

(3) *Manner of Service — Strict Compliance with Statute* — (a) *In General.* — Substituted service being in derogation of the common law, the manner of service must be shown to have been in strict compliance with the terms of the statute permitting it, so that the court may judge of the sufficiency of the service,¹ and every detail as to the manner of service as prescribed by the statute, as, for example, that the process was left at the place designated, or was read to or left with the person pointed out by the statute, must appear to have been observed.² Where the statute provides that such service may be made by leaving a copy with a person of a certain age,³ or with a white person or a free white person of a certain age,⁴ or with one who is a member of the

his return of substituted service is insufficient to confer jurisdiction upon the justice to proceed. *Bargh v. Ermeling*, 110 Mich. 164; *Brown v. Williams*, 39 Mich. 756 [*citing* *Withington v. Southworth*, 26 Mich. 381; *Nicolls v. Lawrence*, 30 Mich. 395; *Town v. Tabor*, 34 Mich. 262]. See also *Wynn v. Wyatt*, 11 Leigh (Va.) 612.

Where the Defendant Is Out of the County and has no abode therein, the return on a summons from a justice's court should state that "he could not be found in his county so as to be served with process." *Moore v. Miller*, 16 N. J. L. 233.

For Necessity of Return "Not Found" see article PUBLICATION, vol. 17, p. 26.

1. *Parks v. Weems*, 9 Ark. 439; *Piggott v. Snell*, 59 Ill. 106; *Hessler v. Wright*, 8 Ill. App. 229; *Harmon v. See*, 6 Iowa 171; *Friend v. Green*, 43 Kan. 167; *Eskridge v. Jones*, 1 Smed. & M. (Miss.) 595; *Hammond v. Olive*, 44 Miss. 543; *Fatheree v. Long*, 5 How. (Miss.) 664; *Gamasche v. Smythe*, 60 Mo. App. 161; *Ballinger v. Sherron*, 14 N. J. L. 144; *Despreaux v. Barber*, 3 N. J. L. 593.

2. *Sperry v. Reynolds*, 65 N. Y. 179.

Different Modes of Service Regarded as Gradations. — Where the return must show that the defendant could not be found, that a copy was left with his wife or some free white person above a certain age, and that if there is no free white person willing to receive it, then the copy must be left at some public place at the defendant's dwelling house, it is said that the modes of service thus provided are regarded as gradations, and that the second cannot be used if the first can be made, nor the last until both the others have failed, and the officer should manifest,

if he adopts the last mode, that he could not make personal service because the defendant could not be found, and that he did not leave a copy with the wife or some other person, etc., because no such person was at the abode or would accept the copy. *Hammond v. Olive*, 44 Miss. 546. See also *Tomlinson v. Hoyt*, 1 Smed. & M. (Miss.) 518; *Fatheree v. Long*, 5 How. (Miss.) 664; *Eskridge v. Jones*, 1 Smed. & M. (Miss.) 595; *Dalzell v. Superior Ct.*, 67 Cal. 453; *Doll v. Smith*, 32 Cal. 476; *Longwell v. Kansas City*, 69 Mo. App. 177; *Jackson v. Gardner*, 2 Cal. (N. Y.) 95; *Holmes v. Williams*, 3 Cal. (N. Y.) 126.

3. *Hudspeth v. Gray*, 5 Ark. 157; *Barnett v. State*, 35 Ark. 501; *Bruce v. Arrington*, 22 Ark. 362; *Johnson v. Branch of State Bank*, 3 Ark. 522; *Ringgold v. Randolph*, 4 Ark. 428; *Davis v. Burt*, 7 Iowa 56; *Glenn v. Wragg*, 41 Miss. 654; *Proctor v. Whitchee*, 15 N. Y. App. Div. 227; *Sperry v. Reynolds*, 65 N. Y. 179; *Pollard v. Wegener*, 13 Wis. 569.

4. *Ringgold v. Randolph*, 4 Ark. 428; *Du Val v. Johnson*, 39 Ark. 182; *Boyer v. Robinson*, 6 Ark. 552; *Patrick v. Johnson*, 6 Ark. 380; *Ex p. Cross*, 7 Ark. 44; *Miller v. Mills*, 29 Ill. 431; *Cost v. Rose*, 17 Ill. 277; *Hammond v. Olive*, 44 Miss. 543.

Leaving a Copy with the Defendant's Wife without showing that she was a white person of the age required by the statute is insufficient. *Patrick v. Johnson*, 6 Ark. 380; *Miller v. Mills*, 29 Ill. 431. But such a statement is sufficient upon collateral attack. *Hewitt v. Weatherby*, 57 Mo. 279.

"A White Person" is sufficient to import a free white person. *Du Val v. Johnson*, 39 Ark. 182. But see *Hammond v. Olive*, 44 Miss. 543.

defendant's family and at the same time a person of a certain age or a white person of a certain age, or in the presence of a member of his family,¹ or with one who resides in the house with the defendant,² and that such service shall be made at the defendant's usual place of abode, dwelling house, or the like, as is generally a requirement in connection with the preceding provisions,³ and that the officer shall inform the person with whom

1. *Arkansas*. — *Parks v. Weems*, 9 Ark. 439; *Dawson v. State Bank*, 3 Ark. 505; *Ringgold v. Randolph*, 4 Ark. 428.

Illinois. — *Fischer v. Fischer*, 54 Ill. 231; *Wells v. Stumph*, 88 Ill. 56; *Townsend v. Griggs*, 3 Ill. 365; *Mack v. Brown*, 73 Ill. 295; *Montgomery v. Brown*, 7 Ill. 581; *Boylard v. Boyland*, 18 Ill. 551.

Iowa. — *Converse v. Warren*, 4 Iowa 158; *Dohms v. Mann*, 76 Iowa 723; *Lyon v. Thompson*, 12 Iowa 183; *Harris v. Wells*, 10 Iowa 587; *Pilkey v. Gleason*, 1 Iowa 85; *Davis v. Burt*, 7 Iowa 56.

Michigan. — *Laidlaw v. Morrow*, 44 Mich. 547.

Mississippi. — *Fatheree v. Long*, 5 How. (Miss.) 664; *Bustamente v. Bescher*, 43 Miss. 172; *Mullins v. Sparks*, 43 Miss. 129.

New York. — *Sperry v. Reynolds*, 65 N. Y. 179.

Pennsylvania. — *Bailey v. Jefferson* Tp., 21 Pa. Co. Ct. 20.

Wisconsin. — *Mayer v. Griffin*, 7 Wis. 82.

United States. — *Blythe v. Hinckley*, 84 Fed. Rep. 228.

A Return of Service on the Mother of the defendant by name and at his usual place of abode does not show service on a member of the defendant's family unless it affirmatively shows that his mother was a member of his family. *Lyon v. Thompson*, 12 Iowa 183.

Service on Husband and Wife. — A return that a woman was served with process by delivering to her husband a copy of the writ and by leaving with him a copy of the writ at her usual abode, for her, the wife, does not show that the copy of the summons was left for the woman with a person of her family, for the husband may have been living separate and apart from the wife and may have been only temporarily at her usual place of abode. *Wells v. Stumph*, 88 Ill. 56. But see *Prieto v. Duncan*, 22 Ill. 26.

But a return that notice was served

upon "Asa C. Call, by copy left at his usual place of residence, with Mrs. Call, she being a member of the family," was held to mean that Mrs. Call was a member of the family which resided at the usual place of residence of the defendant, and that this was equivalent to being a member of the defendant's family; that this was the meaning which the language conveyed to the ordinary understanding and was therefore sufficient. *Wilson v. Call*, 49 Iowa 463.

"With a Member of the Family," without saying a "person a member of the family," is good. *Phillips v. Evans*, 64 Mo. 17.

2. *Feazel v. Cooper*, 15 La. Ann. 462; *Oakey v. Drummond*, 4 La. Ann. 363; *Von Roy v. Blackman*, 3 Woods (U. S.) 98; *Taylor v. Whitworth*, 9 M. & W. 478.

3. *Arkansas*. — *Vaughn v. Brown*, 9 Ark. 20.

Illinois. — *Boylard v. Boyland*, 18 Ill. 551; *Bletch v. Johnson*, 35 Ill. 542; *Piggotti v. Snell*, 59 Ill. 106; *Hessler v. Wright*, 8 Ill. App. 229.

Iowa. — *Dohms v. Mann*, 76 Iowa 723; *Converse v. Warren*, 4 Iowa 158; *Davis v. Burt*, 7 Iowa 56; *Tavehor v. Reed*, 10 Iowa 416; *Clark v. Little*, 41 Iowa 497.

Louisiana. — *McCracken v. Simms*, 19 La. Ann. 33.

Michigan. — *Wheeler v. Wilkins*, 19 Mich. 78.

Mississippi. — *Bustamente v. Bescher*, 43 Miss. 172; *Mullins v. Sparks*, 43 Miss. 129; *Robison v. Miller*, 57 Miss. 237.

Missouri. — *Laney v. Garbee*, 105 Mo. 355; *Hewitt v. Weatherby*, 57 Mo. 276; *Brown v. Langlois*, 70 Mo. 226; *Smith v. Rollins*, 25 Mo. 408.

New Jersey. — *Polhemus v. Perkins*, 15 N. J. L. 435; *Penny v. Harrison*, 14 N. J. L. 24.

Pennsylvania. — *Bell v. Oakdale*, 5 Pa. Dist. 198.

Washington. — *Mitchell, etc., Co. v. O'Neil*, 16 Wash. 108.

the copy is left of the contents or purport of such copy, as is also sometimes required in connection with the provisions for service

West Virginia. — *Midkiff v. Lusher*, 27 W. Va. 439; *Vandiver v. Roberts*, 4 W. Va. 493.

Wisconsin. — *McConkey v. McCraney*, 71 Wis. 576.

At Whose Dwelling House or Place of Abode the summons was left must be shown by the return. *Polhemus v. Perkins*, 15 N. J. L. 435; *Penny v. Harrison*, 14 N. J. L. 24.

A return that service was made upon the defendant by leaving with his father "at his usual place of residence" a copy of a notice was held to be insufficient to show that the attempted service upon the father was made at the dwelling house of the defendant. *Mitchell, etc., Co. v. O'Neil*, 16 Wash. 109.

Where the sheriff's return showed that he had summoned the defendant by name by leaving a copy "at the usual place of residence," it was held that the fact that the return declared that the proper person was served in connection with the allegation that the copy was left at "the usual place of residence" sufficiently indicated that the copy was left at the usual place of residence of the person alleged to have been served. *Sexton v. Rock Island Lumber, etc., Co.*, 49 Kan. 153.

Boarding House. — A return "executed by leaving a copy at his [the defendant's] boarding house" is insufficient. *Smith v. Cohea*, 3 How. (Miss.) 35.

So a return of service by copy left at the defendant's boarding house is not good, it appearing by the same return that the defendant had sleeping rooms at a different place. *Converse v. Warren*, 4 Iowa 158. And "served on the defendant by leaving a copy at the house of M. K., said to be the boarding house of said defendant," is insufficient. *Caldwell v. Miller*, 2 Harr. (Del.) 146.

Usual Place of Residence in State. — In *Swift v. Meyers*, 37 Fed. Rep. 37, under a statute in *Oregon* providing for service, if the defendant be not found, by delivery of a copy of the summons to some person of the family above the age of fourteen years, at the dwelling house or usual place of abode of the defendant, it was held that in a suit to enforce the lien of a mortgage there was no presumption that the defendant

was a resident of the county where the suit was brought, and that a return of substituted service by delivery to a person at the defendant's usual place of abode in such county was bad for not showing that the substituted service was made at the usual place of abode in the state. But see *Ingraham v. McGraw*, 3 Kan. 521.

Last Usual Place of Abode — Nonresidence. — It is sometimes provided that substituted service may be made by leaving a copy at the defendant's "last usual place of abode." This is held to mean the defendant's place of actual abode at the time of service upon him, and the omission of the word "last" before the words "usual place of abode" does not vitiate the return. *Vaule v. Miller*, 64 Minn. 485.

In an action against an absent defendant a return of service on a trustee of such defendant by leaving the process at the "dwelling house" of the trustee sufficiently shows compliance with a statutory requirement that the process shall be left at the "last and usual place of abode" of the trustee. *Bruce v. Cloutman*, 45 N. H. 37.

Where a defendant is proceeded against by attachment, under How. Annot. Stat. Mich., §§ 6827, 6828, 6841 (Comp. Laws Mich., §§ 716, 717, 731), on failure to secure personal service of a justice's summons the return of the officer must show that he left a copy of the summons and of the attachment at the defendant's last place of residence in the county, or that he had no such last place of residence, in order to give jurisdiction to the justice to render judgment. *Segar v. Muskegon Shingle, etc., Co.*, 81 Mich. 344.

Insufficient for Service at Usual Place of Abode. — Service at the "last usual place of abode" is held to be insufficient to show service at the usual place of abode. *Madison County Bank v. Suman*, 79 Mo. 527. See also *Yaple's Estate*, 9 Kulp (Pa.) 141.

So service at the defendant's "last place of domicile" is insufficient under a statute requiring service at the defendant's "usual place of abode," unless it is shown without objection that it was the defendant's usual place of abode. *McFaddin v. Garrett*, 49 La. Ann. 1379.

But in *Healey v. Butler*, 66 Wis. 12,

by copy left with particular persons,¹ the return must show unequivocally that the service was made in compliance with all of such provisions or with such as are in force in a particular state.

(b) **Construction — Equivalent Terms.** — The requirement of a showing of strict compliance with the statute does not absolutely preclude the court from construing terms used in the return as equivalent to those used in the statute. It is sufficient if the plain and obvious meaning of the words used in the return imports a full compliance with the statute. Thus, to show a service at the defendant's residence it is sufficient to return that service was made at his usual place of abode.² But a return showing a serv-

it was held that a return of service "at his last and usual place of abode in said Clark county" did not admit of the hypothesis that the defendant had a "usual place of abode" in some other county of the state; that the plain and obvious meaning of the language was that the service was made at the defendant's last and usual place of abode, and that such abode was then in Clark county; and that the words "last and" before the words "usual place of abode" were mere surplusage. The court *distinguished* *Sanborn v. Stickney*, 69 Me. 343, and *Ames v. Winsor*, 19 Pick. (Mass.) 248, in that in each of these cases the residence of the defendant was stated in the writ to be in one county and the return to the writ showed a service thereof in another county, and it was held that the presumption was that the defendant was at the time dwelling in the county specified in the writ, and that, therefore, service at his last and usual place of abode in another county failed to meet the requirement of the statute that service should be made at the "place of last and usual abode." See also *Ingraham v. McGraw*, 3 Kan. 521.

A return that the officer had served the process by leaving it "at the Hardin House, * * * the usual place of abode of the within-named H. B. Allen prior to the time he left this state and became a nonresident, or where the said H. B. Allen and family boarded," was held to be insufficient because it failed to show a service at the usual place of abode, but on the contrary showed that the process was left at a place which was not at the time of the service the party's usual place of abode, but had been his usual place of abode before he became a non-

resident of the state. *Allen v. Singer Mfg. Co.*, 72 Mo. 326. See also *Brown v. Langlois*, 70 Mo. 226.

Contradicting Return. — When the sheriff returns a substituted service by leaving the writ at the most usual and notorious place of abode of the defendant, the latter may overcome this return, on a motion to set aside the judgment, by proof that it was not his place of abode. *Wotton v. Parsons*, 4 McCord L. (S. Car.) 368.

1. *Tompkins v. Wiltberger*, 56 Ill. 385; *Mack v. Brown*, 73 Ill. 295; *Hessler v. Wright*, 8 Ill. App. 229; *Sperry v. Reynolds*, 65 N. Y. 179; *Vandiver v. Roberts*, 4 W. Va. 493; *Pollard v. Wegener*, 13 Wis. 569.

2. *Du Val v. Johnson*, 39 Ark. 182; *Pigg v. Pigg*, 43 Ind. 117; *North-Western Bldg., etc., Assoc. v. Moulter*, 5 Mo. App. 587; *Smithson v. Briggs*, 33 Gratt. (Va.) 180. But see *Lewis v. Botkin*, 4 W. Va. 533.

Home is good for "usual place of abode." *Fowler v. Mosher*, 85 Va. 421.

House. — But a return that service was made by going to the defendant's "house" and leaving a copy, etc., was held not to show sufficiently that the copy was left at the defendant's dwelling house or place of abode. *Blanton v. Jamison*, 3 Mo. 52. To the same effect see *Matthews v. Gordy*, 2 Houst. (Del.) 573.

Conversely, where the statute provides that if the defendant is not found he may be served by a copy left at his usual place of residence, and that in such event the return must show at whose "house" and the name of the person with whom it was left, it is sufficient if the officer states that it was left at the usual place of residence of the defendant. If served at a place other

ice at the defendant's store is not sufficient unless it also shows that the store was the defendant's usual place of residence.¹

(c) **Name of Person with Whom Copy Left.** — It has been held that a return, in order to be entirely accurate, must show the name of the person with whom the copy was left in perfecting a substituted service;² but on the other hand it is also held that if the return shows service by leaving the process with a member of the defendant's family, and is otherwise in accordance with the provisions of the statute, it is not bad because it omits to name the member with whom the copy was left.³

(d) **Substituted Service upon Several.** — Where the officer attempts to make substituted service upon several the return must show a good substituted service upon each.⁴

(4) **Constructive Service — Mailing, Posting, or Publishing Notice or Process.** — When constructive service of process or notice is permitted by posting, publishing, or mailing a copy of such process or notice, the return purporting to show this character of service must sufficiently show the existence of conditions

than the defendant's usual residence, the objection to the above return might be valid, but in this case the words "residence" and "house" may be said to be synonymous. *Neally v. Redman*, 5 Iowa 387; *Farris v. Ingraham*, 34 Iowa 231.

1. *Winchester v. Cox*, 3 Greene (Iowa) 575; *Harris v. Wells*, 10 Iowa 587; *Lehman v. Broussard*, 45 La. Ann. 346.

By Appearance, such a defect is waived. *Winchester v. Cox*, 3 Greene (Iowa) 575.

Special Return of Facts. — When the statute speaks of a dwelling house "it means one in which the defendant then resides, and from which he is only temporarily absent, and to which he intends to return to reside, and in which there is a family of which he is a resident member, not merely a member by relationship;" and "when an officer is in any doubt about the propriety of the return he should make, his only safe and proper course is to make a special return, according to the facts as he knows them to be, and leave it to the law to decide upon its sufficiency." *Johnson v. Aylesworth*, 3 Pittsb. (Pa.) 238.

2. *Montgomery v. Brown*, 7 Ill. 581; *Tavenor v. Reed*, 10 Iowa 416; *Davis v. Burr*, 7 Iowa 56; *Converse v. Warren*, 4 Iowa 158; *Clark v. Little*, 41 Iowa 497; *Lehman v. Broussard*, 45 La. Ann. 346.

3. *Robison v. Miller*, 57 Miss. 237; *Vaule v. Miller*, 64 Minn. 485; *Shea v.*

Plains Tp., 7 Kulp (Pa.) 554. See also *Tremper v. Wright*, 2 Cal. (N. Y.) 101.

Omission of the Christian Name of the person with whom a copy was left, as that it was left with "Mr. Roby," is immaterial. *Morehead v. Chaffe*, 52 Miss. 161.

So a return of service upon one Call by leaving a copy with "Mrs. Call, she being a member of the family," is sufficient. *Wilson v. Call*, 49 Iowa 463.

4. *Rape v. Heaton*, 9 Wis. 328; *Gamble v. Warner*, 16 Ohio 371; *Dawson v. State Bank*, 3 Ark. 505, wherein the officer returned that he had executed the process upon persons named "by delivering them a true copy of the same at their places of residence, and leaving the same with a person over the years of 15 of age," etc., and this was construed to mean that the process was executed by leaving a true copy at the respective places of residence of the parties named, though the return was held bad for failing to show that the person with whom the copies were left was a member of the family.

In *Elliott v. Plattor*, 43 Ohio St. 198, a return on the summons against two persons, husband and wife, was as follows: "Served the same by leaving at each of the within-named defendants' * * * usual place of residence a certified copy of the within summons. * * * Sheriff's fees: service, 45; copies, 50," etc. This was held to show a good service upon each.

upon which it depends and a compliance with the statute in the manner of perfecting it.¹

5. Double Return. — If an officer makes two returns or certificates of service as to the same process they may be read together,

1. California. — *Hogs Back Consol. Min. Co. v. New Basil Consol. Min. Co.*, 63 Cal. 121.

Posting. — Where a statute requires one copy of the summons to be posted "for three weeks at the court house door of the county, and two copies in public places in the township where the land is situate," and the return indorsed on the summons fails to show that any copy of the summons was posted at the door of the court house, or even on the court house, "for three weeks" or for a single day, and also fails to show that two copies were posted in the township for any specific period of time, it is bad. A posting of a copy "on the court house" elsewhere than at the door, even for the period of three weeks, would have been a substantial and material departure from the requirement of the statute. *Pioneer Land Co. v. Maddux*, 109 Cal. 633.

Where the statute provided that the writ of attachment on real estate should be executed by posting a copy in a conspicuous place on the property attached, and the sheriff returned the execution of the writ by posting a copy of the writ on the premises, it was held that the return was *prima facie* sufficient, the sheriff testifying on the trial that the papers were posted on the building on the place. *Davis v. Baker*, 72 Cal. 494.

Illinois. — Under a statute requiring a notice in attachment proceedings to be delivered to the constable, who should post three copies thereof at three public places in the neighborhood of the justice at least ten days before the day set for trial, it was held that although the garnishee could attack the attachment proceedings where they were void, a return of the notice in such attachment proceedings that the notice was served by posting three copies thereof at three public places in the neighborhood of the justice was merely defective in failing to state the place where the notices were posted, but the omission was not of sufficient importance to render a judgment absolutely void. *Pomeroy v. Rand*, 157 Ill. 184.

Michigan. — *Proof of Service by Mail* must show the existence of all the conditions upon which the validity of such service depends. *Clark v. Adams*, 33 Mich. 159.

New York. — *Chalmers v. Wright*, 5 Robt. (N. Y.) 713.

Texas — *Publication.* — *Wilson v. Palmer*, 18 Tex. 596, holding that the sheriff must return the fact of his giving notice by publication with all the circumstantiality and certainty required of him by law in making his returns of service of process generally, and a return merely that he ordered a notice to be published as directed by filing a copy with the editor was held to be insufficient, there being no return that there was a publication, and the judgment upon such a return was held to be void; *Burns v. Batey*, 1 Tex. App. Civ. Cas., § 419, holding that, the law requiring the officer executing a citation by publication to return the manner of such execution and dispensing with the affidavit of the newspaper publisher, such an affidavit cannot cure defects in an insufficient return; *Chaf-fee v. Bryan*, 1 Tex. App. Civ. Cas., § 770; *O'Leary v. Durant*, 70 Tex. 409.

West Virginia. — *Lewis v. Botkin*, 4 W. Va. 533, holding, under a statute providing that where service cannot be made in other designated modes it may be made by "leaving such copy posted at the front door of said place of abode," that a return of service "by posting an office copy hereof on the front door" does not show a compliance with the requirement that the copy shall be served "by leaving a copy posted at the front door," because the statute does not merely require the copy of the process to be posted, but it must be left posted at the place designated, and the posting and leaving of such copy posted must be shown to have been at the defendant's "usual place of abode;" and in this last connection it has been held that "dwelling house" is not sufficient to import "usual place of abode." See also *Capehart v. Cunningham*, 12 W. Va. 750.

Wisconsin — *Affidavit of Service.* — Under a statute requiring that where

and omissions in one may be thus supplied from the other so as to show a good service.¹

Good Return Qualified by Defective Return. — But where a return which otherwise would be good is followed by another attempting to show the manner of service, but in itself defective, the returns qualify each other and show a defective service.²

6. Return Not Executed — Non Est, Nihil Est, etc. — *a.* IN GENERAL. — Where the mandate of a return cannot be executed the officer should return the fact, as upon a summons or scire facias, that the defendant was not to be found, *non est inventus, nihil est*, or *nihil habet*.³

the service of a paper is by mail the paper shall be properly inclosed in a postpaid wrapper, addressed to the person upon whom it is to be served, at his proper post-office address, "without any direction to the postal officers, upon the wrapper, for the return thereof in case of nondelivery to the person addressed," and that it "be deposited in the post-office and left there to be carried," it was held that sufficient compliance with the statute was shown by an affidavit by an attorney that he instructed his clerk to serve a notice upon the adverse party by mail by inclosing a certified copy in a postpaid envelope addressed to the attorney of such party at his proper post-office address, with no direction on the envelope to the postal officers to return the same in case of its nondelivery, and to place it in the post office and to leave it there to be carried; accompanied by the affidavit of such clerk that he had served such notice at the time and believed that he had observed all the attorney's directions, and that the paper was never returned. *Stacy v. Jefferson County*, 69 Wis. 215.

Proof of Publication. — See article PUBLICATION, vol. 17, p. 26.

1. *Norton v. Meader*, 4 Sawy. (U. S.) 603, wherein the officer made one certificate of service of a copy of summons and complaint that he had served "a true — of this writ, attached to a certified copy of complaint," and another that he had served "a true — of the complaint, attached to a true copy of the summons," and it was held that the omission in one was supplied by the statement in the other; *Brown v. Miner*, 21 Ill. App. 60, holding that several returns as to separate defendants might be taken together and defects in the statement of service as to one supplied from the statement as to another.

Return Showing Constructive and Personal Service. — In *Knowl v. Woelken*, 13 Mo. App. 275, two returns of the same date on a summons, one crossed out by blue pencil showing constructive service, and the other showing a personal service, were held to be consistent.

Extraneous Return. — Where there was not a proper return on a writ of attachment which was executed by garnishment, it was held that the notice of garnishment was not a judicial writ and that a return thereon could not be imported into a return on the attachment and thus utilized to supply the fatal omissions of the latter. *Gregor Grocer Co. v. Carlson*, 67 Mo. App. 184; *Todd v. Missouri Pac. R. Co.*, 33 Mo. App. 110. See also *Hackett v. Gihl*, 63 Mo. App. 453.

2. *Pillow v. Sentelle*, 39 Ark. 61.

3. *Chase v. People*, 2 Colo. 528; *Chickering v. Failes*, 26 Ill. 507; *Chicago Dock, etc., Co. v. Kinzie*, 93 Ill. 415; *Macklot v. Hart*, 12 Iowa 428; *Kibbe v. Deering*, 1 Litt. (Ky.) 244; *Clarke v. Redman*, 5 J. J. Marsh. (Ky.) 31; *Isabelle v. Iron Cliffs Co.*, 57 Mich. 120; *Brundred v. Egbert*, 164 Pa. St. 621; *Sherer v. Easton Bank*, 33 Pa. St. 134.

Propriety of Particular Returns. — *Nihil Est* is the proper return upon the non-service of process, being tantamount to an averment that the defendant has nothing in the bailiwick — no dwelling house, no family, no personal presence. *Sherer v. Easton Bank*, 33 Pa. St. 139.

Non Est Inventus is said to be properly applicable to a *capias* only. *Toolan v. Morrison*, 2 Lack. Jur. (Pa.) 77; *Sherer v. Easton Bank*, 33 Pa. St. 139.

Nihil Habet is a more comprehensive return than *non est* and is the appropriate return to a writ of *scire facias*, but

A Return upon an Execution, to be sufficient, must first show upon its face either that the command of the writ has been fully complied with, or, if not, the existence of such a state of facts as without fault or negligence on the part of the officer prevented a compliance therewith,¹ or that no property could be found upon

non est is a proper return to a writ of summons. *Brundred v. Egbert*, 164 Pa. St. 621; *Sherer v. Easton Bank*, 33 Pa. St. 134. And *non est* to a scire facias will not be treated as a nullity except at the instance of the defendant, and the irregularity is one which is capable of amendment on motion. *Brundred v. Egbert*, 164 Pa. St. 621. See also article SCIRE FACIAS.

In *Chase v. People*, 2 Colo. 528, it was insisted that a return of "not found" is not equivalent to a return *nihil*, or "that he hath nothing in my bailiwick," but the court said: "The object in suing out the writ of scire facias is to compel the defendants to show cause, if any, why execution should not be awarded against them. The object of the writ is not to ascertain whether goods or chattels can be found in the bailiwick out of which to satisfy the penalty of the recognizance, but to reach the person and notify him that unless he show cause an execution shall issue. It would seem that the proper return would be 'not found.'" See also *Kearns v. State*, 3 Blackf. (Ind.) 334; *Hichcox v. Eastman*, 8 Blackf. (Ind.) 387; *Lynch v. Sanders*, 9 Dana (Ky.) 59.

*Two Nihil*s are considered equivalent to a garnishment, a service of the writ of scire facias, or a return of scire facias by the sheriff. *Warder v. Tainter*, 4 Watts (Pa.) 273, citing *Barcock v. Thompson*, Style 281; *Bromley v. Littleton*, Yelv. 113.

Not Found is not sufficiently returned by the words "not found and not to be found," so as to justify service by publication. *Greenup v. Bacon*, 1 T. B. Mon. (Ky.) 108. But under a statute authorizing a judicial attachment upon a return that the defendant is "not to be found within his county," a return "not found in my county" is held insufficient, as it does not import a diligent search at the residence of the defendant and elsewhere and that he is not to be found by reason of his absence and concealment, as is implied by the language of the statute. *Welch v. Robinson*, 10 Humph. (Tenn.) 264.

But "I hereby certify and return

that after diligent search and inquiry I am unable to find the within-named defendant * * * within my bailiwick, and cannot have his body as I am within commanded," was held a sufficient return that the defendant could not be found in the county. *Lichfelt v. Kopp*, 38 Mich. 312.

The defendant "not being by me found" has been held a sufficient statement of that fact without saying that the defendant could not be found. *Wilson v. Call*, 49 Iowa 463.

No Inhabitant.—A return of "not found" as to one in an action *ex contractu* against two does not authorize the plaintiff to proceed to judgment, under an act authorizing a plaintiff to proceed to judgment against one of two defendants as to whom a return of "no inhabitant of the county" is made. *Morris v. Knight*, 1 Blackf. (Ind.) 106.

And a return that a defendant is "no inhabitant of my bailiwick" has been held not equivalent to a return that he is no inhabitant of the county. *Gully v. Sanders*, Litt. Sel. Cas. (Ky.) 424.

1. *McKinney, J.*, in *Union Bank v. Barnes*, 10 Humph. (Tenn.) 244, wherein a delivery bond was returned by the sheriff and indorsed "forfeited," and it was held that this was not a sufficient return of the execution, as it is necessary that the return on the execution itself should show a compliance with the law without extraneous aid; *Eaken v. Boyd*, 5 Sneed (Tenn.) 206. See also *Carney v. Marsalis*, 77 Tex. 62, holding that where a bond was executed by a claimant to property seized under an execution, for the purpose of trying the right of property, an indorsement on the bond instead of on the execution of the name of the court to which the bond was returnable, as is required by the statute, is immaterial if the claimant actually finds the court and defends the suit.

"*Stopped by Order of the Plaintiff*" is sufficient. *State v. McDonald*, 9 Humph. (Tenn.) 606.

"*Stayed by Injunction*" is sufficient. *Patton v. Marr*, Busb. L. (N. Car.) 379; *Tagert v. Hill*, Conf. Rep. (N. Car.) 164.

which to levy an execution, as where the return must show an exhaustion of personalty before a levy upon real estate, or where it must show that the execution is unsatisfied as a condition precedent to further proceedings.¹

"Enjoined" is held to be as good as "stayed by injunction." *Patton v. Marr*, Busb. L. (N. Car.) 379.

Execution Against the Body. — "No goods" is not sufficient when the writ commands the officer to take the body of the defendant. *Daniel v. Buss*, 4 Whart. (Pa.) 56.

Rescue. — A return on mesne process of the arrest and a subsequent rescue is a good return, though in an arrest on execution it is otherwise, as in such case the officer is bound to call to his aid the *posse comitatus*. *Buckminster v. Applebee*, 8 N. H. 546.

1. *Hopkins v. Burch*, 3 Ga. 222; *Russell v. Chicago Trust, etc.*, Bank, 139 Ill. 538; *Carey Lumber Co. v. Neal*, 3 Kan. App. 399; *Hoyt v. Bunker*, 50 Kan. 574; *Beers v. Bunker*, 6 Kan. App. 697; *Matthews v. Miller*, 47 N. J. L. 414; *Jennings v. Lancaster*, (N. Y. City Ct. Gen. T.) 15 Misc. (N. Y.) 444.

Upon an execution on a judgment in replevin in favor of the defendant, the officer may return that the property could not be had and that the execution is unsatisfied, and upon evidence showing the truth of such a return the court has no authority to order an amendment thereon. *Irvin v. Smith*, 68 Wis. 220.

Sufficiency of Return. — It has been held that a return stating that a sum named had been made of goods and chattels, lands and tenements generally, and certifying that the defendant had no other goods or chattels, and that the whole sum levied was insufficient to satisfy the execution, sufficiently showed that lands and tenements were sold for want of goods and chattels. *Jackson v. Sternbergh*, 1 Johns. Cas. (N. Y.) 153.

A return upon a distress warrant that it was levied upon land is *prima facie* evidence that the levy was not irregular by reason of the existence of goods and chattels subject to the process. *Den v. Hoboken Land, etc., Co.*, 18 How. (U. S.) 272.

So a return by an officer that "after diligent search and inquiry, as required by law, I could find no personal property of the defendant whereby this ex-

ecution could be satisfied, in whole or in part, and I therefore made an indorsement on said execution to that effect, to wit, 'No personal property found,'" was held to be a sufficient compliance with a statute requiring that if no personal property could be found an indorsement to that effect on the writ should be made before levying on real property. *Deadwood First Nat. Bank v. Black Hills Fair Assoc.*, 2 S. Dak. 145.

"*Wholly Unsatisfied*" — *Judgment Against Executors.* — After an absolute judgment against executors the proper return to an execution thereon is "no goods or chattels of the testator to be found," and a return "wholly unsatisfied" was held to be insufficient because it did not conclusively appear thereby that no goods of the testator were to be found. *McDowell v. Clark*, 68 N. Car. 118.

"*No Property*" is sufficient and includes the entry of no personal property. *Carmichael v. Strawn*, 27 Ga. 341.

"*I Know of No Property*" is a good return of *nulla bona* in a collateral proceeding. *Gunn v. Howell*, 35 Ala. 144.

"*No Money Made.*" — The indorsement on an execution "no money made" was held to be unauthorized by law. If property can be found it is the duty of the sheriff to levy the execution and make the money and so to indorse the fact, and if nothing can be found whereon to levy, that fact should be indorsed; but it is not sufficient to say that the officer has not made the money, without saying wherefore. *Harman v. Childress*, 3 Yerg. (Tenn.) 329.

Not Found. — "Not to be found" is sufficiently shown by a return on an execution "not found," but the former would be better. *Hill v. Hinton*, 2 Head. (Tenn.) 124; *Frogg v. Haggard*, 2 Yerg. (Tenn.) 577. See also to the same effect *Newman v. Van Duyne*, 42 N. J. Eq. 485; *Dumas v. Matthews*, 51 N. J. L. 562; *Poineer v. Bagnall*, 49 N. J. L. 226, in which cases a return that no property was found whereon to levy was held to be a sufficient statement

Where the Defendant Is Known to Be Dead, the officer should not return *nihil*. The proper return in such a case is *mortuus est*, though the irregularity in returning in the first instead of in the latter form is amendable.¹

b. NOT EXECUTED AS TO SEVERAL DEFENDANTS. — Where a summons directed against several defendants is returned “not found” as to all the defendants, the return is construed to mean that neither of the defendants could be found.²

Execution Against Several. — A return to an execution against

that the officer could not find any personal property of the defendant upon which to levy. *Disapproving* Matthews v. Miller, 47 N. J. L. 414.

But where the return expressly shows that there were some unexempted goods within the officer's county whereon to levy and on which no levy had been made, this is not sufficient showing that the officer could not find any personal property of the defendant whereon to levy. Thus a return “I could not find sufficient goods and chattels,” etc., is of such a nature. *Freichnecht v. Meyer*, 39 N. J. Eq. 557. See also *Tasto v. Kloppling*, 43 N. J. L. 448. And in *Hoyt v. Bunker*, 50 Kan. 574, the sheriff made the following return: “No property found whereon to levy this execution sufficient to make the amount of the within judgment.” In discussing this return the court said: “This proceeding not only did not exhaust the property of the corporation, but the return was so indefinite that it does not appear how much might have been made on each of the executions of the said defendants so returned. So far as the returns show, the bulk of each of such executions might have been made out of the corporate property.”

On the other hand, it is held not to be necessary that the return should negative the existence of any property whatever, even a single dollar, but it will be sufficient if in the absence of any further showing it may be regarded as a fair and substantial return of *nulla bona*. *Marks v. Hardy*, 86 Mo. 237.

A recital by the officer in his return that he had demanded money or other property to satisfy the execution and that neither had been received, and that no property was found in the county, was held sufficient, as the presumption would be indulged that the officer made the demand in time and had made the necessary exertion to

find the property. *Horton v. Brown*, 45 Ill. App. 171.

Not Levied “for Want of Sufficient Goods and Chattels.” — In an action on a constable's bond for failure to levy as commanded by the writ it was held that a return of not levied “for want of sufficient goods and chattels” is not a nullity, but is *prima facie* sufficient. *State v. Steel*, 11 Mo. 553.

“Finding No Property Whereon to Levy to make the amount of this execution, I now return this writ,” was held to be insufficient as a return *nulla bona*. *Beers v. Bunker*, 6 Kan. App. 697.

Nulla Bona. — Under a provision that when judgment shall be recovered by the assignee or indorsee of any assigned or indorsed note, bond, etc., and a writ of fieri facias shall be returned “no property found,” the assignee or indorsee may commence an action against the assignor or indorser, etc., it is held that the term *nulla bona* is not of sufficiently extensive meaning to respond to the mandate of the execution, as it imports that the defendant in execution had “no goods,” which may be true and yet the defendant may have in his possession or own real estate from the sale of which satisfaction could have been obtained. *Woodward v. Harbin*, 1 Ala. 104.

1. *Burr v. Dougherty*, 14 Phila. (Pa.). 6, 37 Leg. Int. (Pa.) 50; *Warder v. Tainter*, 4 Watts (Pa.) 273.

Arrest on Execution. — If the defendant is taken in execution and thereafter dies, *cepi mortuus est* is the proper return, without adding *in persona*. *Christie v. Goldsborough*, 1 Har. & M. (Md.) 540.

2. *Blinn v. Chessman*, 49 Minn. 140; *Hitchcock v. Hahn*, 60 Mich. 459; *Chicago Dock, etc., Co. v. Kinzie*, 93 Ill. 415.

Ambiguity. — But where the return was ambiguous as to which of two defendants was not found, being, “I have

several defendants that they had no goods, chattels, etc., out of which the execution could be made, without stating that neither of the defendants had such property, is sufficient to show that the execution could not be collected out of the joint property of the defendants or the separate property of either of them.¹

c. PRESUMPTION OF DILIGENCE. — As a general rule, the officer need not state the degree of diligence used in his attempt to find the defendant or to execute the process, and a return of "not found" imports that such diligence was exercised as the law requires.² The officer need not certify that he was unable to find the defendant during the whole time when the writ was in his hands, but a return of "not found" properly made on the return day refers to the whole period of the life of the writ.³

d. PRESUMPTION OF RESIDENCE IN COUNTY. — A simple return of "not found" imports that the defendant is a resident of the county and is not found in the county of his residence.⁴

V. RETURN TIME — 1. **In General.** — The time to return process is fixed by statute⁵ and is the limit of the life of the writ, after

duly served the within by reading the same to the within-named John C. Bruce and John H. Langley not found in my county, as I am therein commanded," it was held that it should not be received. *Langley v. Grill*, 1 Colo. 71.

1. *Winchester v. Crandall*, Clarke (N. Y.) 373; *Austin v. Figueira*, 7 Paige (N. Y.) 56.

But an officer cannot screen himself from liability by returning that one of several defendants has no property subject to execution. To protect himself his return must show that the money could not have been made out of either defendant. *Hassell v. Southern Bank*, 2 Head (Tenn.) 383.

2. *Horton v. Brown*, 45 Ill. App. 173; *Neally v. Redman*, 5 Iowa 387; *State v. Finn*, 87 Mo. 310, 11 Mo. App. 400; *Livar v. State*, 26 Tex. App. 115; *Suydam v. Beals*, 4 McLean (U. S.) 12.

"After Diligent Inquiry" is sufficient to show the diligence required before authorizing service by publication, as the statute does not contemplate a search in the sense that the sheriff must make a tour of the entire county. *Horton v. Monroe*, 98 Mich. 195.

Presumption Overcome by Return. — In an action against several a return of service as to two and "not found" as to two others, but further stating that the officer, by order of the plaintiff's attorney, did not go to the house of one of those not found, was held to be a bad return of "not found" as to the lat-

ter. *Lodge v. State Bank*, 6 Blackf. (Ind.) 557.

To a Subpoena in a Criminal Case it has been held that the officer should not merely state that the witness was not found, but should show what diligence was used. *Neyland v. State*, 13 Tex. App. 536; *State v. Boitreaux*, 31 La. Ann. 188.

3. *Chickering v. Failles*, 26 Ill. 517; *Hitchcock v. Hahn*, 60 Mich. 459.

4. *Macklot v. Hart*, 12 Iowa 428; *Slatton v. Jonson*, 4 Hayw. (Tenn.) 200. So also as to "not to be found in my county." *Carlisle v. Cowan*, 85 Tenn. 165.

Proper Only as to Residents. — *Non est inventus* is proper only when the defendant is a resident of the county. *Sneed v. Wiester*, 2 A. K. Marsh. (Ky.) 281; *Greenup v. Bacon*, 1 T. B. Mon. (Ky.) 108; *Kibbe v. Deering*, 1 Litt. (Ky.) 244. See also *Vicksburg Bank v. Jennings*, 5 How. (Miss.) 425.

No Inhabitant of State. — A sheriff's return of "no inhabitant" shows that the defendant is not an inhabitant of the sheriff's county, but not that he is a nonresident of the state or is absent from the state, as this is a fact which the sheriff cannot officially certify. *Lynch v. Sanders*, 9 Dana (Ky.) 59.

5. See article SUMMONS AND PROCESS.

The "return of the writ" is the day when the sheriff is required to make return to the clerk of the court. *State Bank v. Torre*, 2 Spears L. (S. Car.) 501.

which the power of the officer to execute it is gone.¹

2. Return on Return Day.—Process should regularly be returned on the return day,² and if the defendant in a summons is not found a return of the fact on the return day is sufficient to show inability to make service at any time during the life of the writ.³ The officer may return process at any reasonable hour of the last day upon which the process is returnable,⁴ but if an hour is fixed by statute for making a return, and the return at such hour is jurisdictional, the return must be made according to the requirement of the statute.⁵

3. Not Found on Summons Before Return Day.—On the other hand, a return showing nonexecution of the summons, as that the defendant was not found, should not be made before the regular return day.⁶

1. See articles' EXECUTIONS AGAINST PROPERTY, vol. 8, p. 493; SERVICE OF PROCESS.

A Return Showing Service After the Return Day is not sufficient. *Philadelphia v. Newkumet*, 11 Pa. Co. Ct. 504; *Blodgett v. Brattleboro*, 28 Vt. 695. See *supra*, IV. 4. *h. Time*.

2. *Bull v. Clarke*, 2 Met. (Mass.) 587; *Wallis v. Bourg*, 16 La. Ann. 176.

Before Return Day.—If a writ has been properly executed it may be returned before the return day, as when a summons has been properly served. *Miller v. Forbes*, 6 Kan. App. 619.

If Satisfied an execution may be returned at once. *Whitehead v. Hellen*, 74 N. Car. 682.

3. *Chickering v. Failes*, 26 Ill. 507.

4. *Homan v. Liswell*, 6 Cow. (N. Y.) 659; *Bull v. Clarke*, 2 Met. (Mass.) 587, holding that evidence of the general hours during which the clerk's office is open for business is *prima facie* evidence of such reasonable and convenient time.

All Days of Return Term.—The sheriff is allowed all the days of the return term to return a *feri facias*, unless he is ruled upon motion and cause shown to return it to some intermediate day. *Ledbetter v. Arledge*, 8 Jones L. (N. Car.) 475; *Person v. Newsom*, 87 N. Car. 142.

But it is the duty of a sheriff having original process to serve it on all the defendants, if possible, even on the day of return, when the service can be made before the return day has passed and before actual return to the clerk's office. *Thompson v. Morris*, 2 B. Mon. (Ky.) 36. But see *Hinman v. Borden*, 10 Wend. (N. Y.) 367.

Dies Non.—Where a writ is return-

able on a day in which the court is precluded from transacting business, the return may be made on the first day thereafter in which the court may legally transact business. *Ostertag v. Galbraith*, 23 Neb. 730; *Williams v. State*, 5 Ind. 235.

Fi. Fa. Expiring in Vacation.—When a *fi. fa.* runs out in vacation it is held that the sheriff need not return it until the first day of the ensuing term, and he has the whole of that day. *Rex v. Sheriff*, 5 East 386.

5. *Brown v. Carroll*, 16 R. I. 604, holding that a summons in a justice's court returnable at ten o'clock must be returned not later than eleven o'clock in order to confer jurisdiction.

6. Insufficient to Show Due Diligence.—Such a return made before the return day is not sufficient to show due diligence during the life of the writ. *Palmer v. Cowdrey*, 2 Colo. 1; *Cbmbs v. Warner*, 8 Dana (Ky.) 87; *Isabelle v. Iron Cliffs Co.*, 57 Mich. 120; *Johnson v. Zweighaft*, 21 Pa. Co. Ct. 297, 7 Pa. Dist. 467.

But in a Suit by Attachment and Summons it was held that while the sheriff should not return the writ until the return day, to the end that the defendant may be summoned if found in the meantime, yet if he returns "not found" before the return day, the court is justified in proceeding to judgment after the return day and the defendant must pursue his remedy against the sheriff if he has suffered any injury thereby. *Glover v. Rawson*, 3 Chand. (Wis.) 249, 3 Pin. (Wis.) 226. To the same point see *Dunlap v. McFarland*, 25 Kan. 488, in which case, however, there was an appearance.

In *Walker v. Birdwell*, 21 Tex. 92, it

4. Non Est and Nulla Bona Before Return Day. — It is held that a ca. sa. may be returned *non est inventus* before the return day;¹ and likewise that when further proceedings depend upon the return of an execution *nulla bona*, the officer is not required to hold the writ during the whole period of its life, but may make such return at any time before the expiration of such period.² But the authorities are not uniform upon this last proposition, it being held by many cases that when further proceedings on behalf of a creditor depend upon a return of *nulla bona*, such return cannot be made before the time fixed for the expiration of the writ. The cases are, however, reconcilable to some extent in that some of those holding that the return may be made before the return day were decided under statutes providing that return shall be made within a certain number of days, while in the cases wherein a return before the return day is held not allowable the return day was fixed.³

was held that while there may possibly be legal force in the position that the citation preliminary to the issue of a judicial attachment should not be returned until the first day of the term after its issuance, yet if the original citation was returned with the certificate of the sheriff that the defendant was not to be found in the county, the plaintiff might have sued out a writ of judicial attachment, and there was no necessity for an alias citation; and upon that ground there can be no objection to the return of the alias prior to the day at which, in any event, it must by law be returned.

1. To Fix Bail it is held that the officer is not legally bound to defer the return of the execution until the expiration of its term, and the bail can take no advantage of an earlier return unless he can show that he was actually prejudiced thereby. The reason of this is that the inquiry in such a case is not whether there was not so much time after the return that the officer might have safely held the execution longer and then have had time to return it, but has the principal avoided, and has the bail had a reasonable time to have surrendered up the principal before the return of the execution? *Hall v. White*, 27 Conn. 496; *Collins v. Cook*, 4 Day (Conn.) 1; *Fitch v. Loveland, Kirby* (Conn.) 384.

And in order to fix bail the sheriff may be instructed to return a ca. sa. *non est inventus*, notwithstanding he might have served it on the defendant; but if the defendant is actually in custody such a return cannot be made. *Van*

Winkle v. Alling, 17 N. J. L. 447; *Hunt v. Cox*, 3 Burr. 1360; *Forsyth v. Marriott*, 1 B. & P. N. R. 251; *Burks v. Maine*, 16 East 2.

But when it appears that there has not been a reasonable effort on the part of the creditor or officer to levy the execution on the estate or person of the debtor, but rather an intention to avoid doing so, in order to charge the bail, or if the bail renders the body of the debtor, or if he renders himself to the officer, to be taken by the execution at any time before the return day, the bail ought to be exonerated. *Newell v. Hoadley*, 8 Conn. 388.

Delivery of Principal After Return. — The return of an execution *non est inventus* before the expiration of the time allowed for its return, but after waiting a reasonable time, is but *prima facie* evidence of an avoidance; and if the principal be in fact rendered to the officer before the return day, though after return made, the bail will be discharged. *Edwards v. Gunn*, 3 Conn. 318.

2. Esselman v. Wells, 8 Humph. (Tenn.) 482; *Ward v. Whitfield*, 64 Miss. 754; *Whitehead v. Hellen*, 74 N. Car. 682.

3. Where Return Day Is Fixed. — *Roberts v. Knight*, 48 Me. 171; *Schermerhorn v. Conner*, 41 Mich. 374; *Mauch Chunk First Nat. Bank v. Dwight*, 83 Mich. 189; *Steward v. Stevens, Harr. (Mich.)* 169; *Thayer v. Swift, Harr. (Mich.)* 430; *Beach v. White, Walk. (Mich.)* 495; *Marks v. Hardy*, 86 Mo. 232; *Huhn v. Lang*, 122 Mo. 600; *Dillon v. Rash*, 27 Mo. 243.

Compelling Return Before Expiration of Time. — It has been held that where an execution is returnable within a certain number of days the court may compel the officer to make his return before

And it is held that such a return is not sufficient even if the creditor's bill founded thereon is filed after the return day. *Stafford v. Hulbert*, Harr. (Mich.) 435; *Smith v. Thompson*, Walk. (Mich.) 1.

When Returnable Within a Fixed Number of Days, it is held that the sheriff is not required to hold the execution for its whole life, but that he may return it upon his own volition at any time within the number of days during which he is permitted to hold it. *Illinois Malleable Iron Co. v. Graham*, 55 Ill. App. 266; *Sioux City First Nat. Bank v. Gage*, 79 Ill. 207; *Bowen v. Parkhurst*, 24 Ill. 259; *Scheubert v. Honel*, 50 Ill. App. 597; *Wilcox v. Ratliff*, 5 Blackf. (Ind.) 561; *Dana v. Banks*, 6 J. J. Marsh. (Ky.) 220; *Guerney v. Moore*, 131 Mo. 650; *Newlon v. Wade*, 43 W. Va. 283; *Buist v. Citizens' Sav. Bank*, 4 Kan. App. 700. *Contra*, *Adams v. Cumiskey*, 4 Cush. (Mass.) 420, holding that when an execution is returnable within a certain number of days this means that it is returnable at the end of such number of days.

In *New York*, under a statute making an execution returnable a certain number of days after its receipt by the officer, it was held that a return before the expiration of such time could not be objected to in the creditor's bill, but that the chancery court could only make the creditor wait until the return time had passed before filing his creditor's bill. *Cassidy v. Meacham*, 3 Paige (N. Y.) 311; *Williams v. Hogeboom*, 8 Paige (N. Y.) 469; *Platt v. Cadwell*, 9 Paige (N. Y.) 386. See also *Suydam v. Beals*, 4 McLean (U. S.) 12.

But in *Knauth v. Bassett*, 34 Barb. (N. Y.) 40, it was held that under the statute making an execution returnable within sixty days a return of *nulla bona* could be made at any time within sixty days and the creditor could proceed immediately upon such a return, the court saying that *Cassidy v. Meacham*, 3 Paige (N. Y.) 311, and *Williams v. Hogeboom*, 8 Paige (N. Y.) 469, showed only a rule of practice of the former court of chancery, not applicable to the system now in vogue. To the same point see *Tyler v. Willis*, 33 Barb. (N. Y.) 327; *Livingston v.*

Cleaveland, (Supm. Ct. Gen. T.) 5 How. Pr. (N. Y.) 396; *High Rock Knitting Co. v. Bronner*, (Supm. Ct. Spec. T.) 18 Misc. (N. Y.) 631; *National Exch. Bank v. Burkhalter*, 22 Civ. Pro. (N. Y.) 414; *Renaud v. O'Brien*, 35 N. Y. 99.

Time Between Two Executions. — So it is held unnecessary that sixty days, the time allowed for the return of an execution, should elapse before the issuance of another execution, but it is sufficient if the first has been actually returned. *Fake v. Edgerton*, 5 Duer (N. Y.) 681.

Return by Direction. — But it is held that the return must be the act of the sheriff upon his own responsibility, and not by direction of the plaintiff in the writ unless after demand. *Illinois Malleable Iron Co. v. Graham*, 55 Ill. App. 266; *Scheubert v. Honel*, 152 Ill. 313; *Spencer v. Cuyler*, (Supm. Ct. Gen. T.) 17 How. Pr. (N. Y.) 157. But see *Wheeling Pottery Co. v. Levi*, 48 La. Ann. 777.

But the mere return of an execution inside of the sixty days fixed by law, even though made at the suggestion or request of the plaintiff's attorney, does not invalidate or vitiate such return. In order to accomplish the latter result, there must be present some other element, such as collusion between the plaintiff and the sheriff, or intentional omission to attempt to collect such execution. *High Rock Knitting Co. v. Bronner*, (Supm. Ct. Spec. T.) 18 Misc. (N. Y.) 631 [citing *Forbes v. Waller*, 25 N. Y. 430; *Renaud v. O'Brien*, 35 N. Y. 99; *Pudney v. Griffiths*, (Supm. Ct.) 15 How. Pr. (N. Y.) 410]; *Huntington v. Metzger*, 158 Ill. 272.

Where Return on Writ Sufficient Without Return into Court. — Under a statute permitting a creditor of a corporation to recover from a stockholder on a judgment against the corporation, and after an execution thereon upon which the officer has made a return that it is unsatisfied, it was held that the officer has a right to make such return on any day during the life of the execution, and that he may or may not return the execution to court on the day when he makes such return, as the latter act is not necessary in order to perfect the creditor's right to take the next step

the expiration of the statutory time if it becomes apparent that no property can be found and that a return before the expiration of such a period is necessary in order to protect the rights of the plaintiff in the action.¹

5. Return After Return Day. — While a return is necessary as the proper evidence of service upon which to base a judgment,² yet it is held that the mere fact that the return into court is not made until after the return day is not jurisdictional, and a judgment after such a return is not void when there was in fact proper service.³

A Writ of Execution, final process as distinguishable from mesne process, does not require a return to give vitality to it, and a return to such process may be made at any time, even long after the return day; and when made it is of equal effect and of equal verity as if it had been made prior to the return day.⁴ It has

for enforcing his claim against the stockholder; that the right of the creditor is complete when the officer makes the required return upon the execution, that act alone, and not the return of the execution to court, being the necessary prerequisite for taking the next step in the process. *Lovegrove v. Brown*, 60 Me. 592. To the same effect is *Thornton v. Lane*, 11 Ga. 524, wherein it was said that "the legal inference in this case is that the sheriff, after making the entry of 'no property,' put the execution in his pocket and kept it until the proper return day."

1. *National Exch. Bank v. Burkhalter*, 22 Civ. Pro. (N. Y.) 414. See also *Person v. Newsom*, 87 N. Car. 142. *Contra*, *Spencer v. Cuyler*, (Supm. Ct. Gen. T.) 17 How. Pr. (N. Y.) 157.

2. See *supra*, II. *Necessity of Return*.

3. *Miller v. Forbes*, 6 Kan. App. 617; *Smith v. Payton*, 13 Kan. 366; *Lindsay v. Tansley*, (Supm. Ct. Gen. T.) 13 N. Y. Supp. 317. See *infra*, VI. *Amendment of Return*.

After Judgment. — The return to a summons personally served, though made after judgment, is good if the service has in fact been made. *Kneeland v. Cowles*, 3 Pin. (Wis.) 320.

Summons and Attachment. — Where a summons (with warrant of attachment) was returned "not to be found," etc., after the return day thereof, it was held that the plaintiff might be allowed a continuance because by accident due advertisement had not been made. The issuance of the summons being for the purpose of laying a foundation for the attachment and to ascertain

with certainty whether the defendant could be found in the county, so that if he could be found he might have the benefit of personal service, the substantial process, if he is not found, is the advertisement, and such advertisement could be made upon the return of the summons after the return day. *Church v. Furniss*, 64 N. Car. 659.

Jurisdictional. — But it has been held that a writ in a justice's court which is returnable at ten o'clock may be returned at any time between ten o'clock and eleven o'clock, but that if returned after eleven o'clock the court acquires no jurisdiction. *Brown v. Carroll*, 16 R. I. 604.

In Vacation. — In *Johnson v. Wilmington*, etc., *Electric R. Co.*, (Del. 1897) 39 Atl. Rep. 777, it was held that where a summons is returnable in term time the sheriff cannot wait until after the adjournment of the court and then make his return in vacation; but the court, upon sustaining a motion to set aside the return because so made, entertained a motion by the plaintiff to allow the sheriff to make his return at that time, it being the first term after that to which the return should have been made.

4. *Toby v. Reed*, 9 Conn. 216; *Pratt v. Pond*, 45 Conn. 386; *True v. Emery*, 67 Me. 28; *Emerson v. Towle*, 5 Me. 197; *Welsh v. Joy*, 13 Pick. (Mass.) 477; *Sanford v. Durfee*, 19 Pick. (Mass.) 485; *Ingersoll v. Sawyer*, 2 Pick. (Mass.) 276; *Firth v. Haskell*, 148 Mass. 501; *Phillips v. Schiffer*, 64 Barb. (N. Y.) 548; *Rich v. Henry*, 4 Mackey (D. C.) 155. See also article **SHERIFFS' SALES**.

been held, however, that a return made after the return day cannot be shown by an officer who is liable under statute for a failure to return an execution within a certain time.¹

VI. AMENDMENT OF RETURN — 1. **General Rule.** — It may be stated as a general rule that a return which is incorrect or erroneous as to the facts may always be amended so as to conform to truth, on application to the court for that purpose by the officer who made the return.²

Where Land Is Levied On and Sold it has been held that a return is necessary before the introduction of the record in evidence. *Firth v. Haskell*, 148 Mass. 501; *Walsh v. Anderson*, 135 Mass. 65. But it need not be made before the return day. *Firth v. Haskell*, 148 Mass. 501; *Walsh v. Anderson*, 135 Mass. 65; *Prescott v. Pettee*, 3 Pick. (Mass.) 331; *Welsh v. Joy*, 13 Pick. (Mass.) 477; *Ingersoll v. Sawyer*, 2 Pick. (Mass.) 276; *Emerson v. Towle*, 5 Me. 197. *Contra*, *Hall v. Hall*, 5 Vt. 304; *Russell v. Brooks*, 27 Vt. 640; *Burton v. Pond*, 5 Day (Conn.) 162; *Coe v. Stow*, 8 Conn. 536.

An Execution Against the Person may be returned sixty-one days after it was issued where the only provision as to the return of such execution requires them to be returned in not less than fifteen days. *Stimmel v. Swan*, (Supm. Ct. App. T.) 17 Misc. (N. Y.) 354.

Non Est to Charge Bail. — A return of *non est inventus* after an execution has run out, with a view to charge bail on mesne process, is held bad. *Cooper v. Ingalls*, 5 Vt. 508.

Sale After Return Term. — If property, real or personal, is seized under a fieri facias before the return day of the writ, the marshal may proceed to sell, at any time afterwards, without new process from the court. And as a special return on the fieri facias is one of the modes of proving the sale and securing the title of the purchaser, the marshal must be authorized to make the indorsement after the regular return term, in cases when the sale was made afterwards. *Remington v. Linthicum*, 14 Pet. (U. S.) 84. See article **SHERIFFS' SALES**.

1. *Caskey v. Nitcher*, 8 Ala. 622, holding that where it is required that a writ shall be returned three days before the term to which it is returnable, a return two days before the return term, without a sufficient excuse, is no return.

2. *Alabama.* — *McArthur v. Carrie*, 32 Ala. 75; *Woodward v. Harbin*, 4 Ala. 534, 37 Am. Dec. 753.

Arkansas. — *Clayton v. State*, 24 Ark. 16.

California. — *Allison v. Thomas*, 72 Cal. 562.

Colorado. — *Golden Paper Co. v. Clark*, 3 Colo. 321.

Delaware. — *Johnson v. Wilmington, etc., Electric R. Co.*, (Del. 1897) 39 Atl. Rep. 777.

Georgia. — *Telford v. Coggins*, 76 Ga. 683; *Primrose v. Browning*, 59 Ga. 69; *Williams v. Moore*, 68 Ga. 585.

Illinois. — *Tewalt v. Irwin*, 164 Ill. 592; *O'Conner v. Wilson*, 57 Ill. 226; *Chicago Planing Mill Co. v. Merchant's Nat. Bank*, 86 Ill. 587; *Thriffs v. Fritz*, 101 Ill. 457; *Tennent-Stribbling Shoe Co. v. Hargardine-McKittrick Dry Goods Co.*, 58 Ill. App. 368; *Major v. People*, 40 Ill. App. 323; *Smith v. Clinton Bridge Co.*, 13 Ill. App. 572; *Dunn v. Rodgers*, 43 Ill. 260.

Indiana. — *Jackson v. Ohio, etc., R. Co.*, 15 Ind. 192; *De Armond v. Adams*, 25 Ind. 455.

Iowa. — *Jeffries v. Rudloff*, 73 Iowa 60.

Kansas. — *Jordan v. Johnson*, 1 Kan. App. 656; *Wilkins v. Tourtellott*, 28 Kan. 825; *Kirkwood v. Reedy*, 10 Kan. 453.

Kentucky. — *Russell v. Durham*, (Ky. 1895) 29 S. W. Rep. 16, 16 Ky. L. Rep. 516; *Boyer v. Lincoln*, 3 Ky. L. Rep. 537; *Malone v. Samuel*, 3 A. K. Marsh. (Ky.) 350; *Mason v. Anderson*, 3 T. B. Mon. (Ky.) 294; *Thompson v. Morris*, 2 B. Mon. (Ky.) 36; *Vaughn v. Mills*, 18 B. Mon. (Ky.) 633; *Scanlon v. Forstadt*, (Ky. 1896) 37 S. W. Rep. 681; *Newton v. Prather*, 1 Duv. (Ky.) 103.

Maine. — *Hobart v. Bennett*, 77 Me. 401; *Chase v. Williams*, 71 Me. 190.

Maryland. — *Main v. Lynch*, 54 Md. 658; *Berry v. Griffith*, 2 Har. & G. (Md.) 337, 18 Am. Dec. 309; *Boyd v. Chesapeake, etc., Canal Co.*, 17 Md. 209.

Facts at Time of Return. — It is the facts as they really were at the time of the return that he will be permitted to state by way of alteration or correction of the return. Circumstances taking place after the return could have no effect to change and will not be allowed to alter it. So that if leave has been given to an officer to alter his return, he cannot alter it to conform with facts that did not exist until after it was made.¹

2. Limitation of General Rule — Rights of Innocent Third Persons.

— This rule, however, is subject to the general limitation that an amendment of the return will operate only against parties or persons who are affected with notice and will not be allowed to defeat intervening rights of innocent strangers.²

Massachusetts. — *Sawyer v. Harmon*, 136 Mass. 414; *Chase v. Merrimack Bank*, 19 Pick. (Mass.) 564, 31 Am. Dec. 163.

Michigan. — *Watson v. Toms*, 42 Mich. 561; *Calender v. Olcott*, 1 Mich. 344; *Kidd v. Dougherty*, 59 Mich. 240.

Minnesota. — *Hutchins v. Carver County*, 16 Minn. 13.

Mississippi. — *Cole v. Dugger*, 41 Miss. 557; *Howard v. Priestly*, 58 Miss. 21.

Missouri. — *Cassidy v. Estey*, 1 Mo. App. Rep. 506; *Maze v. Griffin*, 65 Mo. App. 377; *Phillips v. Evans*, 64 Mo. 17, *Gregor Grocer Co. v. Carlson*, 67 Mo. App. 179; *Thornton v. Miskimmon*, 48 Mo. 219.

Nebraska. — *Shufeldt v. Barlass*, 33 Neb. 785.

Nevada. — *Elder v. Frevert*, 18 Nev. 278.

New Hampshire. — *Mathes v. Dover Nat. Bank*, 62 N. H. 491; *Mahurin v. Brackett*, 5 N. H. 9.

New York. — *Perry v. Tynen*, 22 Barb. (N. Y.) 137.

North Carolina. — *Luttrell v. Martin*, 112 N. Car. 593; *Stealman v. Greenwood*, 113 N. Car. 355; *Grady v. Richmond*, etc., R. Co., 116 N. Car. 952; *Turner v. Holden*, 109 N. Car. 182; *Manning v. Roanoke*, etc., R. Co., 122 N. Car. 824; *Williams v. Weaver*, 101 N. Car. 1; *Walters v. Moore*, 90 N. Car. 41.

North Dakota. — *Mills v. Howland*, 2 N. Dak. 30.

Oregon. — *Weaver v. Southern Oregon Co.*, 30 Oregon 348.

Pennsylvania. — *Keely v. Shanley*, 5 Montg. Co. Rep. (Pa.) 27; *Burr v. Dougherty*, 14 Phila. (Pa.) 6, 37 Leg. Int. (Pa.) 50; *Shamburg v. Noble*, 80 Pa. St. 160; *Brundred v. Egbert*, 164 Pa. St. 621.

Texas. — *Canadian*, etc., *Mortg.*, etc., Co. v. *Kyser*, 7 Tex. Civ. App. 475.

Vermont. — *Taylor v. Moore*, 63 Vt. 60. *Virginia.* — *Shenandoah Valley R. Co. v. Ashby*, 86 Va. 232; *Stotz v. Collins*, 83 Va. 423; *Commercial Union Assur. Co. v. Everhart*, 88 Va. 952; *Walker v. Com.*, 18 Gratt. (Va.) 51; *Stone v. Wilson*, 10 Gratt. (Va.) 529.

West Virginia. — *State v. Martin*, 38 W. Va. 568; *Trimble v. Patton*, 5 W. Va. 432; *Hoopes v. Devaughn*, 43 W. Va. 447.

Wisconsin. — *Northrup v. Shephard*, 23 Wis. 513.

United States. — *Poweshiek County v. Durant*, 9 Wall. (U. S.) 736; *Dobyns v. U. S.*, 3 Cranch (U. S.) 241; *Tilton v. Cofield*, 93 U. S. 163.

Canada. — *Lee v. Neilson*, 14 U. C. Q. B. 606.

Indorsement of Authority of Officer. — Where the authority of a special officer to serve a process depends upon a prior indorsement by the sheriff authorizing such service, the indorsement cannot be supplied by amendment. *Thompson v. Moore*, 91 Ky. 80; *Barry v. Hovey*, 30 Ohio St. 344.

An Irregularity, as a return of *non est* on a writ of scire facias, instead of *nihil habet*, is capable of amendment on motion. *Brundred v. Egbert*, 164 Pa. St. 621. See also *Warder v. Tainter*, 4 Watts (Pa.) 273; *Burr v. Dougherty*, 14 Phila. (Pa.) 6, 37 Leg. Int. (Pa.) 50.

1. *Major v. People*, 40 Ill. App. 323; *Bibb v. Collins*, 51 Ala. 450.

2. *Delaware.* — *Johnson v. Wilming ton*, etc., *Electric R. Co.*, (Del. 1897) 39 Atl. Rep. 777.

Illinois. — *Tewalt v. Irwin*, 164 Ill. 592.

Maine. — *Bessey v. Vose*, 73 Me.

3. Scope and Character of Amendment. — No Definite Rule as to the propriety of amendments can be laid down as governing all cases. The most that can be said is that in furtherance of justice an officer should always be permitted to amend his return according to the facts, unless by the allowance of the amendment manifest injustice will be done.¹ But when an amendment is allowed

217; *Glidden v. Philbrick*, 56 Me. 222; *Milliken v. Bailey*, 61 Me. 316; *Berry v. Spear*, 13 Me. 187; *Williamson v. Wright*, 75 Me. 35.

Maryland. — *Main v. Lynch*, 54 Md. 664.

Massachusetts. — *Emerson v. Upton*, 9 Pick. (Mass.) 157.

Mississippi. — *Howard v. Priestley*, 58 Miss. 21.

Missouri. — *Scruggs v. Scruggs*, 46 Mo. 271.

Ohio. — *Barry v. Hovey*, 30 Ohio St. 344.

Oregon. — *Hass v. Sedlak*, 9 Oregon 462.

Vermont. — *Taylor v. Moore*, 63 Vt. 60.

United States. — *Rickards v. Ladd*, 6 Sawy. (U. S.) 40.

Notice — Sufficiency Without Technical Accuracy in Return. — But while some fact which technical rules of law require should affirmatively appear may not be directly stated, enough may appear to give reasonable notice to third persons that the law in this respect has been complied with. In such a case, or where the party has notice, an amendment may be made notwithstanding intervening rights, and will operate against persons claiming such rights. *Bessey v. Vose*, 73 Me. 219; *Knight v. Taylor*, 67 Me. 591; *Williamson v. Wright*, 75 Me. 35; *Glidden v. Philbrick*, 56 Me. 222; *Whittier v. Vaughan*, 27 Me. 307; *Johnson v. Day*, 17 Pick. (Mass.) 106; *Haven v. Snow*, 14 Pick. (Mass.) 28; *Avery v. Bowman*, 39 N. H. 393. See also *Bancroft v. Sinclair*, 12 Rich. L. (S. Car.) 617.

After Assignment for Benefit of Creditors. — An amendment of a return of an attachment has been permitted though subsequent to the attachment the defendant made a voluntary assignment for the benefit of creditors, the assignee taking the estate subject to all equities. *Pond v. Campbell*, 56 Vt. 674.

After Conveyance by Quitclaim Deed. — Where the judgment debtor, after judgment and sale of land under an execution, conveyed the land so sold by quitclaim deed, it was held that an

amendment showing service of a copy of the complaint upon the judgment debtor would operate against the grantee in the quitclaim deed, as the grantee in such a deed necessarily takes only such title as the grantor then had, subject to all the defects and equities which could then have been asserted against the grantor. *Allison v. Thomas*, 72 Cal. 562.

1. *Clayton v. State*, 24 Ark. 16.

The Manner of Execution, when not sufficiently shown, may be shown by an amendment of the return, when the process was in fact executed. *Allison v. Thomas*, 72 Cal. 562; *Golden Paper Co. v. Clark*, 3 Colo. 321; *Jackson v. Ohio*, etc., R. Co., 15 Ind. 192; *De Armond v. Adams*, 25 Ind. 455; *Wilkins v. Tourtellott*, 28 Kan. 825; *Howard v. Priestly*, 58 Miss. 21; *Northrup v. Shepard*, 23 Wis. 513.

Justice not only to the officer but to the parties requires that if a ministerial officer has committed a misprision he should have an opportunity to correct it. *Golden Paper Co. v. Clark*, 3 Colo. 321; *Telford v. Coggins*, 76 Ga. 683.

Where a return was set aside because it was made at a wrong time, it was held that the court should permit an amendment by allowing the return to be filed *nunc pro tunc* upon the proper application. *Johnson v. Wilmington*, etc. Electric R. Co. (Del. 1897) 39 Atl. Rep. 777.

So the court may allow a return on an execution to be stricken out and *nulla bona* substituted therefor. *Smith v. Daniel*, 3 Murph. (N. Car.) 128; *Clayton v. State*, 24 Ark. 16. But see *Griffith v. Short*, 14 Neb. 259.

And it may permit the amendment of a return on a second writ so as to show that property seized under a prior writ was discharged before it was seized under the second writ. *McArthur v. Carrie*, 32 Ala. 75.

Place of Service. — Where a return of service upon a corporation through a certain agent does not sufficiently show the place of service, it may be perfected by an amendment. *Weaver v. Southern Oregon Co.*, 30 Oregon 348; *Shen-*

to make the return conform to the true state of facts it must show the whole truth.¹

Time. — When the date of a service or return is omitted, or is incorrectly stated, the return may be amended in this regard.²

Name. — So where a party's name is incorrectly stated,³ or where the return fails to show properly upon whom service was made, the court may permit an amendment in accordance with the facts.⁴

Signature. — While, as has been shown, only that which an officer signs can operate as a return, an omission to sign what was made as and intended to be the official return may be cured by an amendment allowing the signature to be added.⁵

andoah Valley R. Co. v. Ashby, 86 Va. 232; *Hopkins v. Baltimore, etc.*, R. Co., 42 W. Va. 536.

Affidavit. — An amendment is proper for the purpose of allowing the special deputy to swear to his return. *Tewalt v. Irwin*, 164 Ill. 592.

1. Whole Truth Must Be Shown. — *Wolcott v. Ely*, 2 Allen (Mass.) 338, wherein it was held that it was not competent for a court to allow one amendment to a return necessary to make the levy valid where there was another error in the return which, if corrected, would show that the levy was invalid. The court, by Hoar, J., said: "But we do not think it within the proper limits of judicial discretion to allow an officer to amend a formal defect in his return when facts are untruly stated in another part of the return, and when, if the whole return were amended to conform to the truth, the amendment would be ineffectual and useless. If any amendment is allowed it must show the whole truth." See also *infra*, VI. 6. *Effecting Amendment*.

2. *Cobb v. Newcomb*, 7 Iowa 43; *Johnson v. Day*, 17 Pick. (Mass.) 106; *Haven v. Snow*, 14 Pick. (Mass.) 28; *Heymes v. Champlin*, 52 Mich. 26; *Kidd v. Dougherty*, 59 Mich. 240; *Snyder v. Schram*, (County Ct.) 59 How. Pr. (N. Y.) 404; *Williams v. Weaver*, 101 N. Car. 1; *White v. Ladd*, (Oregon 1899) 56 Pac. Rep. 515.

3. *Marsh v. Phillips*, 77 Ga. 436; *Alford v. Hoag*, (Kan. App. 1898) 54 Pac. Rep. 1105; *Frost v. Paine*, 12 Me. 111, holding that a mistake in the name of a defendant in the return to an attachment does not invalidate the judgment where the property can be sufficiently identified by striking out such name; *Cleveland v. Pollard*, 37 Ala. 556, hold-

ing that where a defendant in an original bill was described as Charles T. Cleveland, and the return showed service upon Charles H. Cleveland, an amendment of the bill by substituting the initial of the middle name H. for T. was proper. See also *McKane v. Democratic Gen. Committee*, (Supm. Ct. Spec. T.) 21 Abb. N. Cas. (N. Y.) 89, 14 Civ. Pro. (N. Y.) 126.

Where an Execution Against One Was Levied upon Property Claimed by His Wife, and the plaintiff showed that at the time of the levy the husband and wife were living together upon the land levied on, and that the sheriff served notice of the levy upon the husband as being in possession, the court directed the sheriff to amend his return upon drawing from him the fact as to the person upon whom he actually served the notice of levy. *Primrose v. Brown*, 59 Ga. 69.

Insertion of Different Person. — But it is held that the court cannot acquire jurisdiction over one person by substituting his name for that of another, and where a return shows service upon a corporation of a certain name, an amendment substituting another corporate name will not confer jurisdiction upon the corporation bearing the latter name. *Union Pac., etc.*, R. Co. v. *Perkins*, 7 Colo. App. 184.

4. *Wilkins v. Tourtellott*, 28 Kan. 825; *Louisville, etc.*, R. Co. v. *Com.*, (Ky. 1898) 46 S. W. Rep. 207; *Phillips v. Evans*, 64 Mo. 17; *Gaff v. Spellmeyer*, 13 Ill. App. 294, 112 Ill. 29.

5. *Ex p. State Bank*, 7 Ark. 9; *Wilkins v. Tourtellott*, 28 Kan. 825; *Louisville, etc.*, R. Co. v. *Com.*, (Ky. 1898) 46 S. W. Rep. 207; *Briggs v. Hodgdon*, 78 Me. 518; *Wilton Mfg. Co. v. Butler*, 34 Me. 432; *Adams v. Robinson*, 1 Pick. (Mass.) 461; *Luttrell v. Martin*,

Dual Capacity of Officer. — Where the same person occupies a dual capacity he cannot be permitted in one capacity to amend a return made by him upon a writ issued by him in his other capacity.¹

4. Before Filing — Amendment Without Leave. — Until the process with the return thereon is actually filed in the proper office and the return thus completed, the latter is under the control of the officer and may be amended by him without leave of court.²

5. After Filing — Discretion of Court — Notice — *a.* IN GENERAL. — After perfecting a return by filing it in the proper office the officer has no further control over it, and an amendment must then be effected by an application to the court. Leave to amend is then generally a matter resting in the sound discretion of the court, which is exercised with great liberality.³

112 N. Car. 593. See *supra*, IV. 2. *b.*
Necessity of Signature.

Where the Signature to the Return Is Irregular it may be amended by the officer, as where the return is not signed officially. *Russell v. Durham*, (Ky. 1895) 29 S. W. Rep. 18, 16 Ky. L. Rep. 516.

So where a return to an execution was signed by a deputy who added to his signature the letters "D. S.," without adding the name of his principal, it was held that this did not render the act of the deputy void, and proof might be introduced or the return amended to conform to the facts where the validity of the official acts of the deputy was brought in question. *Humphrey v. Wade*, 84 Ky. 398. See also *Manning v. Roanoke*, etc., R. Co., 122 N. Car. 824.

Order of Court. — But where the officer, upon affidavit of service of the writ, amended his return after service of citation in error, and without any authority from the appellate court, it was held that his acts in this regard could not be taken as any part of the proceedings in the case, and that judgment should be reversed because of the insufficiency of the service. *Thomas v. Goodman*, 25 Tex. Supp. 446.

1. *Mitchell v. Shaw*, 53 Mo. App. 652, wherein it was held that, a special constable having no power to serve any other process than the ordinary summons, where such special constable was at the same time town marshal he could not execute a writ of replevin directed to him as special constable, and that a return made by him as special constable could not be amended so as to show an execution by the

town marshal, although the town marshal might have had the power to execute the process, as such an amendment would not be in conformity with the truth. See also *Anthanissen v. Brunswick*, etc., Steam Towing, etc., Co., 92 Ga. 409, holding that under the statute in *Georgia* the special bailiff of the County Court is authorized to serve a summons of garnishment upon the sheriff of the county, and that when such bailiff had made an entry of service as bailiff, although it was error to allow the return to be so amended as to make it appear that the officer was an "acting constable," the error was harmless, as the facts showed good service.

2. *Nelson v. Cook*, 19 Ill. 440; *Wilcox v. Moudy*, 89 Ind. 234; *Welsh v. Joy*, 13 Pick. (Mass.) 477; *Watson v. Toms*, 42 Mich. 561; *Dixon v. White Sewing Mach. Co.*, 128 Pa. St. 407.

3. *California*. — *Gavitt v. Doub*, 23 Cal. 81; *People v. Goldenson*, 76 Cal. 328.

Illinois. — *Major v. People*, 40 Ill. App. 323.

Indiana. — *Wilcox v. Moudy*, 89 Ind. 232.

Iowa. — *Jeffries v. Rudloff*, 73 Iowa 60.

Kansas. — *Stetson v. Freeman*, 35 Kan. 531.

Kentucky. — *Miller v. Shackelford*, 4 Dana (Ky.) 264.

Maine. — *Rowell v. Small*, 30 Me. 30; *Bessey v. Vose*, 73 Me. 220.

Massachusetts. — *Thatcher v. Miller*, 13 Mass. 271; *Sawyer v. Harmon*, 136 Mass. 414; *Johnson v. Day*, 17 Pick. (Mass.) 106.

Missouri. — *Cassidy v. Estey*, 1 Mo. App. Rep. 506.

Notice. — In some cases the discretion to permit an amendment of a return upon a proper showing is exercised after notice to the parties interested;¹ and while in some cases it has been held that an amendment may be permitted as a matter of course and without notice,² it seems that the better practice requires notice or dispenses with it only under such circumstances that no

Nebraska. — *Shufeldt v. Barlass*, 33 Neb. 785; *Wittstruck v. Temple*, (Neb. 1899) 78 N. W. Rep. 456.

New Hampshire. — *Baker v. Davis*, 22 N. H. 27; *Mahurin v. Brackett*, 5 N. H. 91.

North Carolina. — *Campbell v. Smith*, 115 N. Car. 498; *Edwards v. Tipton*, 77 N. Car. 222.

North Dakota. — *Mills v. Howland*, 2 N. Dak. 30.

Oregon. — *Weaver v. Southern Oregon Co.*, 30 Oregon 348.

Pennsylvania. — *Deacle v. Deacle*, 160 Pa. St. 206.

Texas. — *Thomas v. Goodman*, 25 Tex. Supp. 446; *Austin v. Jordan*, 5 Tex. 130.

West Virginia. — *White v. Sydenstricker*, 6 W. Va. 46.

United States. — *Pierce v. Strickland*, 2 Story (U. S.) 292; *Rickards v. Ladd*, 6 Sawy. (U. S.) 40.

But see *Spencer v. Fuller*, 68 Ga. 73; *Hopkins v. Burch*, 3 Ga. 225.

Where Justice Requires Amendment. — But it has been held that on an appeal from a justice's court it is error to dismiss the action in the Circuit Court upon the ground that there was no service, when in fact there was such service, but a defective return, and the plaintiff asks that the officer, who is present, be allowed to amend his return so as properly to show service. *Jackson v. Ohio*, etc., R. Co. 15 Ind. 192; *Kirkwood v. Reedy*, 10 Kan. 453.

The sheriff may amend his return, and the parties are entitled to have him do it, at any time during the trial and before the jury retires, so as to make it conform to the fact and certify all that it was his duty to certify, unless perchance the rights of third parties have meanwhile attached rendering it unreasonable to permit the amendment. *Main v. Lynch*, 54 Md. 658.

Refusal Not in Exercise of Discretion. — Where the court does not place its decision upon the exercise of its discretion, but upon the ground that it has no right to grant the amendment, its action may be reviewed. *Avery v.*

Bowman, 39 N. H. 393; *Gaff v. Spellmeyer*, 13 Ill. App. 299.

Caution in Exercise of Discretion. — Amendments to officer's returns by which the title to property is to be affected should be allowed with great caution, and in no case should such an amendment be allowed unless the court can see clearly that it will be in furtherance of justice. Thus where a return on an execution showed that the officer had given the required notice of sale, it was held that an amendment would not be in furtherance of justice if it would defeat the title of the purchaser under such a sale, whether such purchaser were the judgment creditor or a stranger, and vest it in one who purchased of the debtor pending a suit against him in which the property was attached. *Hobart v. Bennett*, 77 Me. 401.

Whether an Alteration was made before or after the return was filed is a question for the trial court. *Deacle v. Deacle*, 160 Pa. St. 206.

In Vacation. — A judge has the right to grant leave to a sheriff to amend his return in vacation as incidental to the right expressly given to hear and determine a motion to quash in vacation. *Walker v. Com.*, 18 Gratt. (Va.) 51.

Ratification of Amendment. — By ratifying and approving an amendment of a return the court exercises nothing more than a power to permit the amendment, and in no sense transcends such power. *Brown v. Robertson*, 123 Ill. 631.

1. *Jeffries v. Rudloff*, 73 Iowa 60; *Phoenix Ins. Co. v. King*, 52 Neb. 562; *Shufeldt v. Barlass*, 33 Neb. 785; *Wittstruck v. Temple*, (Neb. 1899) 78 N. W. Rep. 456; *Mills v. Howland*, 2 N. Dak. 30.

2. *Brown v. Hill*, 5 Ark. 78; *Lungren v. Harris*, 6 Ark. 474; *Bizzell v. Stone*, 8 Ark. 478; *Morris v. School Trustees*, 15 Ill. 269; *Moore v. Purple*, 8 Ill. 149; *Kitchen v. Reinsky*, 42 Mo. 427; *Rickards v. Ladd*, 6 Sawy. (U. S.) 40. See also *Barker v. Binninger*, 14 N. Y. 278.

In *Golden Paper Co. v. Clark*, 3

substantial rights can be prejudiced. Thus, if a long time has elapsed since the original return was made, or if the term to which the process was returnable has passed, or if new rights have intervened, notice to those interested is required.¹

And Where the Record Does Not Itself Furnish the Data for the amendment, but an extraneous showing is necessary, notice should be given to the parties interested.²

Jurisdictional Matters. — It has been held that an amendment in matters affecting jurisdiction cannot be allowed in the absence of notice.³

Waiver of Objection for Want of Notice. — Where a defendant has subsequent notice and a full opportunity to have the truth of the matter of the amendment ascertained and to cause the order permitting the amendment to be vacated if erroneously entered, but instead merely objects to the return and the amendment as insufficient, without controverting any fact stated therein or ask-

Colo. 323, it was held to be unnecessary to decide whether the party was entitled to notice in that particular case, as it appeared that no injustice had been done by the amendment.

1. *Stetson v. Freeman*, 35 Kan. 531; *Barlow v. Standford*, 82 Ill. 298; *Williams v. Oppelt*, 1 Smed. & M. (Miss.) 559; *Shenandoah Valley R. Co. v. Ashby*, 86 Va. 232.

At the Return Term leave to amend has been held to be as a matter of course. *Moore v. Purple*, 8 Ill. 149; *O'Conner v. Wilson*, 57 Ill. 226; *Morris v. School Trustees*, 15 Ill. 266; *Toledo, etc., R. Co. v. Butler*, 53 Ill. 323; *Barlow v. Standford*, 82 Ill. 298; *La Salle County v. Milligan*, 143 Ill. 321. But this is held to apply only to the return term or the term at which judgment is rendered, and after the expiration of such term notice is necessary. *La Salle County v. Milligan*, 143 Ill. 321; *O'Conner v. Wilson*, 57 Ill. 226, modifying former decisions in *Illinois* which held that the amendment was a matter of course without reference to the term; *Massachusetts Mut. L. Ins. Co. v. Kellogg*, 82 Ill. 614; *Thriffs v. Fritz*, 101 Ill. 457; *Williams v. Oppelt*, 1 Smed. & M. (Miss.) 559. And this rule is held to apply even though the parties whose rights may be affected by the amendment are not parties to the suit being tried and in which it is sought to have the amendment made. *Thriffs v. Fritz*, 101 Ill. 457.

A Party in Court when leave to amend is granted is sufficiently notified. *National Ins. Co. v. Chamber of Com-*

merce, 69 Ill. 22. See also *Herman v. Santee*, 103 Cal. 519.

Amendment Restoring Liability. — Where the return on an execution shows a satisfaction thereof, an amendment without notice to the defendant for the benefit of the sheriff, having the effect of restoring the defendant's liability, is void. *Coopwood v. Morgan*, 34 Miss. 368.

One Who at the Time of the Amendment Has No Interest in the proceedings under the execution or the property sold cannot complain of a want of notice to another party of an amendment to the return of such execution. *Stetson v. Freeman*, 35 Kan. 531.

If New Rights Have Intervened it is proper and necessary that notice to those interested should be given. *Stetson v. Freeman*, 35 Kan. 531; *Chase v. Williams*, 71 Me. 190; *Howard v. Priestly*, 58 Miss. 21; *Montgomery v. Merrill*, 36 Mich. 97; *Rickards v. Ladd*, 6 Sawy. (U. S.) 40.

After the Death of a Sheriff his return cannot be amended unless his representatives have notice. *Jefferson County Sav. Bank v. McDermott*, 99 Ala. 79.

2. *Cochrane v. Johnson*, 95 Mich. 67; *Montgomery v. Merrill*, 36 Mich. 97. See also *Thatcher v. Miller*, 13 Mass. 271; *Hovey v. Wait*, 17 Pick. (Mass.) 197; *Dobynes v. U. S.*, 3 Cranch (U. S.) 241.

3. *Green v. Kindy*, 43 Mich. 279; *Haynes v. Knowles*, 36 Mich. 407; *King v. Bates*, 80 Mich. 367; *Denison v. Smith*, 33 Mich. 155; *Clark v. McGregor*, 55 Mich. 412.

ing to have the order allowing the amendment vacated, the want of previous notice will not be material.¹

b. LAPSE OF TIME NO BAR. — Lapse of time is not, *per se*, a bar to the allowance of the amendment of a return, but it is to be considered with other circumstances bearing upon the question of laches or the weight of evidence in properly guiding the court in the exercise of its discretion.²

c. AFTER JUDGMENT. — The court may permit an officer to amend his return after as well as before judgment, where justice is subserved by making the return conform to the true state of facts,³ and even after a judgment by default, where the amend-

1. Woodward v. Brown, 119 Cal. 283.

2. Alabama. — Woodward v. Harbin,

4 Ala. 534.

Illinois. — Gaff v. Spellmeyer, 13 Ill.

App. 294, affirmed 112 Ill. 29.

Iowa. — Jeffries v. Rudloff, 73 Iowa 60.

Kansas. — Kirkwood v. Reedy, 10 Kan. 453.

Maine. — Gilman v. Stetson, 16 Me.

124; Wilton Mfg. Co. v. Butler, 34 Me.

432.

Missouri. — Scruggs v. Scruggs, 46

Mo. 271; Cassidy v. Estey, 1 Mo. App.

Rep. 506.

Nebraska. — O'Brien v. Gaslin, 20

Neb. 347.

New Hampshire. — Avery v. Bow-

man, 39 N. H. 393.

Ohio. — Fowble v. Rayberg, 4 Ohio 60.

Virginia. — Rucker v. Harrison, 6

Munf. (Va.) 181; Shenandoah Valley

R. Co. v. Ashby, 86 Va. 232.

Refusal Is Exercise of Discretion. —

Though the courts have refused to permit amendments after a long lapse of time, and where there is nothing in the record by which to amend and the officer depends merely upon his memory, yet it seems that in such cases they have merely exercised their discretion and have not announced any rule of law that an amendment under such circumstances could not be made. Thus, in Thatcher v. Miller, 13 Mass. 271, it was held that a deputy sheriff should not be permitted to amend his return after the lapse of a period of six years, when there was nothing by which to amend except the memory of the officer. And in O'Conner v. Wilson, 57 Ill. 226, which was a case on appeal in equity to set aside an amendment to a return allowed by the County Court after the lapse of nearly twelve years, the relief asked was granted upon the ground that the amendment had been allowed without notice, the

deputy who had attempted to serve the writ having died, leaving no memorandum of what he had done in that behalf except the return in question, and the affidavit in support of the motion having been made by the sheriff without personal knowledge of the facts and under the impulse of pecuniary interest. In this case the court said: "While we do not undertake to fix the period within which such an application shall be made, we are prepared to hold that such an amendment cannot be made after the lapse of time that intervened in this case," and cited Thatcher v. Miller, 13 Mass. 271, *supra*.

In Gaff v. Spellmeyer, 13 Ill. App. 300, the court, in referring to the case last above cited from Massachusetts, said: "When it first came before the Supreme Court it was continued for the express purpose of affording opportunity for an application to the court to which the return was made to allow the amendment. Thus the power of that court to allow it after six years, if in its discretion it should see fit, was fully recognized."

Statute of Limitations Inapplicable. —

A motion to amend or vacate a return is not an action within the meaning of the statute of limitations. Noyes v. Kingman, 40 Ill. App. 187.

3. California. — Woodward v. Brown, 119 Cal. 283; Allison v. Thomas, 72 Cal. 562; Herman v. Santee, 103 Cal. 519.

Georgia. — Freeman v. Carhart, 17 Ga. 349.

Kansas. — Kirkwood v. Reedy, 10 Kan. 453.

Kentucky. — Thompson v. Moore, 91 Ky. 80; Mason v. Anderson, 3 T. B. Mon. (Ky.) 294.

Illinois. — Chicago Planing Mill Co. v. Merchants' Nat. Bank, 86 Ill. 587;

ment is to show a proper service of process in accordance with the facts.¹

d. PENDING APPEAL OR ERROR. — A return to a summons may be amended after appeal or pending writ of error, as in the appellate court upon appeal,² or in a trial court pending writ of error, in which case the amendment is shown by a supplemental record.³

e. AFTER ACTION AGAINST OFFICER. — It is not too late for an officer to amend a return even after he is proceeded against by a motion or action to enforce a liability against him in rela-

Johnson v. Donnell, 15 Ill. 97; *La Salle County v. Milligan*, 143 Ill. 321; *Toledo, etc., R. Co. v. Butler*, 53 Ill. 323.

Missouri. — *Kitchen v. Reinsky*, 42 Mo. 427; *McClure v. Wells*, 46 Mo. 311.

New York. — *Snyder v. Schram*, (County Ct.) 59 How. Pr. (N. Y.) 404.

Virginia. — *Commercial Union Assur. Co. v. Everhart*, 88 Va. 952; *Stotz v. Collins*, 83 Va. 423; *Shenandoah Valley R. Co. v. Ashby*, 86 Va. 232.

West Virginia. — *Capehart v. Cunningham*, 12 W. Va. 750.

Wisconsin. — *Bacon v. Bassett*, 19 Wis. 45.

Amendment of Levy After Sale. — *Allison v. Thomas*, 72 Cal. 562; *McLeod v. Brooks Lumber Co.*, 98 Ga. 253; *Adams v. Higgins*, 23 Fla. 13; *Briggs v. Hodgdon*, 78 Me. 514; *Kitchen v. Reinsky*, 42 Mo. 427; *O'Brien v. Gaslin*, 20 Neb. 347; *Holmes v. Buckner*, 67 Tex. 107; *Flaniken v. Neal*, 67 Tex. 629.

1. *Ex p.* *State Bank*, 7 Ark. 9; *Allison v. Thomas*, 72 Cal. 562; *Smith v. Clinton Bridge Co.*, 13 Ill. App. 572; *Wilcox v. Sweet*, 24 Mich. 355; *Mills v. Howland*, 2 N. Dak. 30; *Capehart v. Cunningham*, 12 W. Va. 750; *Anderson v. Doolittle*, 38 W. Va. 633.

Failure to Show Legal Service. — But it is held that where a return fails in an essential particular to show a legal service, such omission cannot be supplied by an amendment after judgment, and that at this stage amendments in matters of form only are permissible. *Rose v. Ford*, 2 Ark. 26; *Mohr v. Marks*, 39 La. Ann. 575; *Denison v. Smith*, 33 Mich. 155; *Continental Ins. Co. v. Milliken*, 64 Tex. 48; *Thomason v. Bishop*, 24 Tex. 302.

No Amendment on Mesne Process. —

And in some cases it seem that on mesne process no amendment can be made after judgment. *Planters Bank v. Walker*, 3 Smed. & M. (Miss.) 409; *Dorsey v. Peirce*, 5 How. (Miss.) 173; *Hughes v. Lapice*, 5 Smed. & M. (Miss.) 451; *State v. Reed*, 50 La. Ann. 170.

In Affirmance of Judgment. — In *Chicago Planing Mill Co. v. Merchants' Nat. Bank*, 97 Ill. 294, it was held that the statute allowing amendments after judgment did not permit an amendment which would cause a reversal of the judgment, but allowed only such amendments as supported the judgment.

2. **On Appeal from the Justice's Judgment,** the return may be amended in the Circuit Court. *Hopkins v. Baltimore, etc., R. Co.*, 42 W. Va. 535. See also *Snyder v. Schram*, (County Ct.) 59 How. Pr. (N. Y.) 404.

3. *Brown v. Hill*, 5 Ark. 78; *Bizzell v. Stone*, 8 Ark. 478; *Loveland v. Sears*, 1 Colo. 433; *Tennent-Stribbling Shoe Co. v. Hargardine-McKittrick Dry Goods Co.*, 58 Ill. App. 368; *Terry v. Eureka College*, 70 Ill. 236; *Hawes v. Hawes*, 33 Ill. 286; *Toledo, etc., R. Co. v. Butler*, 53 Ill. 323; *Morris v. School Trustees*, 15 Ill. 269; *Moore v. Purple*, 8 Ill. 149; *Irvine v. Scobee*, 5 Litt. (Ky.) 70; *Shamburg v. Noble*, 80 Pa. St. 160.

But After Appeal it is held that the defendant is not in the trial court, and a return cannot be amended in that court at that stage. *Jenkins v. Crofton*, (Ky. 1888) 9 S. W. Rep. 406. See also *Thomas v. Goodman*, 25 Tex. Supp. 446.

Where a Cause Is Remanded the court may permit an officer to make a sufficient return upon which to base a judgment. *McClure v. Wells*, 46 Mo. 311; *Harper v. Lexington, etc., R. Co.*, 2 Dana (Ky.) 227.

tion to such return, and the court may in its discretion permit an amendment even at this stage when justice requires it.¹

Not a Matter of Right. — The allowance of such an amendment rests entirely within the discretion of the court, and the officer is not entitled to it as a matter of absolute right.²

f. AFTER EXPIRATION OF TERM OF OFFICE. — An officer may, by leave of court, amend his return even after the expiration of his term of office, when it appears that the ends of justice require such an amendment,³ as such an amendment is not the

1. *Alabama.* — *Nioli v. Hamner*, 22 Ala. 578; *Hodges v. Laird*, 10 Ala. 678; *Governor v. Bancroft*, 16 Ala. 614, holding that the court might in such a case impose terms upon the officer and should do so where justice requires it, and where the officer is at fault in not having discharged his duty with more exactness he should indemnify the plaintiff for all costs accrued up to the time of the amendment.

Iowa. — *Jeffries v. Rudloff*, 73 Iowa 60.

Maine. — *Wilton Mfg. Co. v. Butler*, 34 Me. 432.

Mississippi. — *Trotter v. Parker*, 38 Miss. 473.

Missouri. — *Corby v. Burns*, 36 Mo. 194.

New York. — *People v. Ames*, 35 N. Y. 482.

North Carolina. — *Swain v. Burden*, 124 N. Car. 16; *Steelman v. Greenwood*, 113 N. Car. 355.

Tennessee. — *Hill v. Hinton*, 2 Head (Tenn.) 124.

Texas. — *Thomas v. Browder*, 33 Tex. 783.

Virginia. — *Shenandoah Valley R. Co. v. Ashby*, 86 Va. 232; *Stotz v. Collins*, 83 Va. 423; *Stone v. Wilson*, 10 Gratt. (Va.) 529; *Wardsworth v. Miller*, 4 Gratt. (Va.) 99.

Contra. — *Howard v. Union Bank*, 7 Humph. (Tenn.) 26; *Mullins v. Johnson*, 3 Humph. (Tenn.) 396.

In *Arkansas* it was said that an amendment to a return might be made at any time before an action against the officer for false return. *Clayton v. State*, 24 Ark. 16; *Brinkley v. Mooney*, 9 Ark. 445. But in these cases the question whether the amendment could be made after such action brought did not arise.

Only to Show Facts, Not to Cure False Return. — Where an officer is liable under statute for making a false return, he cannot by amendment strike out the false statement and escape liability. *State v. Case*, 77 Mo. 252, *distinguishing*

Corby v. Burns, 36 Mo. 194, on the ground that in that case the officer was sued for failing to return an execution in time, and after suit brought he was allowed to amend his return in accordance with the facts.

Sheriff Out of Office. — It has been held that the sheriff out of office cannot amend his return after an action against him for trespass committed under the writ. *McElrath v. Kintzing*, 5 Pa. St. 336. But this rule does not apply where the sheriff is merely the legal plaintiff in the action solely for the benefit of lien creditors entitled to the fund. *Peck v. Whitaker*, 103 Pa. St. 297.

After Judgment Against a Sheriff and his sureties upon a return the sheriff will not be allowed to amend so as to relieve the sureties of liability. *Carr v. Meade*, 77 Va. 142.

In *Mullins v. Johnson*, 3 Humph. (Tenn.) 396, the motion to amend the return was made after judgment rendered against the sheriff, and it was under this state of facts that the court held that "an officer cannot be permitted to amend his return so as to avoid a motion pending against him for not having made a return."

Ex Parte Amendment. — But where the sheriff is sued for misconduct in office he cannot, pending his trial, manufacture *ex parte* evidence for himself. *Haynes v. Knowles*, 36 Mich. 409. 2. *Campbell v. Smith*, 115 N. Car. 498.

Conversely, by bringing an action against an officer for a false return the plaintiff does not acquire such a right to the penalty that it may not be defeated by an amendment of the return. *Steelman v. Greenwood*, 113 N. Car. 355.

3. *Connecticut.* — *Palmer v. Thayer*, 28 Conn. 237.

Georgia. — *Beutell v. Oliver*, 89 Ga. 246.

Illinois. — *La Salle County v. Milli-*
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doing of a new act by one who is not an officer, but is merely furnishing the evidence of an act done by him at the time he was in office.¹

6. Effecting Amendment — a. IN GENERAL. — An amendment is usually effected by an ordinary motion addressed to the discretion of the court and is not a formal proceeding in which the issues are to be tried by a jury.²

gan, 143 Ill. 321; *Morris v. School Trustees*, 15 Ill. 266; *Howell v. Albany City Ins. Co.*, 62 Ill. 50; *Johnson v. Donnell*, 15 Ill. 97.

Indiana. — *Dwiggins v. Cook*, 71 Ind. 579.

Iowa. — *Jeffries v. Rudloff*, 73 Iowa 60.

Kansas. — *Alford v. Hoag*, (Kan. App. 1898) 54 Pac. Rep. 1105.

Kentucky. — *Louisville, etc., R. Co. v. Com.*, (Ky. 1898) 46 S. W. Rep. 207; *McBurnie v. Overstreet*, 8 B. Mon. (Ky.) 302; *Newton v. Prather*, 1 Duv. (Ky.) 103; *Gay v. Caldwell*, Hard. (Ky.) 68.

Maine. — *Keen v. Briggs*, 46 Me. 467; *Gilman v. Stetson*, 16 Me. 124.

Massachusetts. — *Adams v. Robinson*, 1 Pick. (Mass.) 461.

Missouri. — *Scruggs v. Scruggs*, 46 Mo. 271.

New Hampshire. — *Avery v. Bowman*, 39 N. H. 393.

Pennsylvania. — *Mangan v. McMonegal*, 2 Kulp (Pa.) 310.

Rhode Island. — *Lake's Petition*, 15 R. I. 628.

United States. — *Ex p. Worley*, 19 Fed. Rep. 586.

Contra. — *Cole v. Dugger*, 41 Miss. 557; *Jessup v. Gragg*, 12 Ga. 261, as to constables.

A Deputy cannot make an amendment after the expiration of his term of office. *Shores v. Whitworth*, 8 Lea (Tenn.) 662.

A deputy sheriff should not be allowed to amend a return, in the absence of a showing by affidavit, after the expiration of the term of office of the sheriff who appointed him. *Arnold v. Nye*, 23 Mich. 286.

An Order of Court is necessary to an amendment after the expiration of the officer's term. *Beutell v. Oliver*, 89 Ga. 246.

Where Sheriff Has No Interest. — In *Pennsylvania*, under a statute providing that an amendment of a sheriff's return should be permitted only when equity and justice required it, it was held that a sheriff could not effect such an amendment unless he had an interest therein, and that where the application

was made by a sheriff whose term of office had expired, to have his return on an execution amended so as to show that property not mentioned in the return was sold, such an amendment should be refused, it appearing that the object of the application was for the purpose of affecting the position of another party and not that of the sheriff. *Lowenstein v. Krell*, 162 Pa. St. 267.

1. *Morris v. School Trustees*, 15 Ill. 266; *Armstrong v. Easton*, 1 B. Mon. (Ky.) 68, holding that the levy must have been made while the officer was in office and that such fact must appear.

2. *Wilcox v. Moudy*, 89 Ind. 232; *Morrill v. Fitzgerald*, 36 Tex. 275.

Proof. — When new material facts are sought to be introduced into a return by amendment, there should be proof of the truth of such facts. *Bayley, Petitioner*, 132 Mass. 457.

Parol Testimony is admissible. *Spellmyer v. Gaff*, 112 Ill. 29. But after a great lapse of time the court will not grant leave to amend merely upon the memory of the officer. *Gregor Grocer Co. v. Carlson*, 67 Mo. App. 179.

Opposing Affidavits. — In the absence of circumstances exciting suspicion of the good faith of the sheriff the court should make no previous inquiry as to the truth of the proposed amendment to the extent of receiving affidavits denying the truth of such amendment. *World's Columbian Exposition v. Scala*, 55 Ill. App. 209. But see *Fisk v. Hunt*, (Oregon 1898) 54 Pac. Rep. 660.

Regular Return — Error Must Be Shown. — "When an officer makes a return upon process, it is, to say the least, as against him *prima facie* correct, and he should not be permitted to amend it until he makes it clear that it was erroneous. This, true in all cases, is especially true when the effect of the return as first made fixes a liability upon him, and the amendment would operate to relieve him from lia-

Necessity of Actual Amendment. — When leave is granted to amend a return the amendment should be made in fact, and it has been held that the permission to amend is not equivalent to an actual amendment.¹

b. BY WHOM MADE — (1) *In General.* — The officer who made the original return is the proper party to ask leave to amend such return and to make an amendment.² And the sheriff may make an amendment, as he may do other acts of his office, by his deputy.³

bility. And still more true when the party in whose favor the return was made, resting upon the faith of the return, would suffer loss by the amendment." *Per* Brewer, J., in *Smith v. Martin*, 20 Kan. 572.

Ineffectual Amendment. — Where the amendment, if allowed, would still leave the return insufficient to give jurisdiction to the court, it is not error in the court to overrule the motion for leave to the sheriff to amend his return. *Youngstown Bridge Co. v. White*, (Ky. 1899) 49 S. W. Rep. 36.

1. *Wittstruck v. Temple*, (Neb. 1899) 78 N. W. Rep. 456. But see *Briggs v. Hodgdon*, 78 Me. 518.

But where the officer omitted to sign his return officially and the plaintiff asked permission to have the return amended in that particular, it was held that as the trial court did not permit the amendment to be made, the offer to amend would be treated as an actual amendment. *Russell v. Durham*, (Ky. 1895) 29 S. W. Rep. 16, 16 Ky. L. Rep. 516.

Affidavits of Persons Who Did Not Make Service. — Where an officer serves a summons, the usual and perhaps only proper way of proving service is by the return of the officer himself or the written acknowledgment of the party served, and an attempt to amend service of summons by the affidavits of persons who did not make the service is a doubtful practice. When such persons do not pretend to have been present when the service was made or to know that the sheriff made the service, it is an improper practice. *Brown v. Gaston, etc., Gold, etc., Min. Co.*, 1 Mont. 57.

Correction by Officer as Witness. — But it is held to be competent for the officer as a witness in the action to correct in his evidence a statement in his return. *Liston v. Central Iowa R. Co.*, 70 Iowa 717. But see *Pearson v. Pierce*, 40 Ohio St. 231. See also *infra*, VII. 17.

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Explanation of Return — Evidence in Support of Return After Impeachment.

Amendment Without Appearance in Court. — A sheriff may be permitted to amend his return without appearing before the court and making the amendment under the direction of the court. *Montgomery v. Brown*, 7 Ill. 581.

Agreement of Parties. — Where the parties agreed that the return should be treated as amended so as to show the manner of service to have been legal, and the officer swore to such manner of service, it was held that the amendment would be regarded as actually made. *Eyster v. Eyster*, 14 Ill. 369.

2. *Gaff v. Spellmeyer*, 13 Ill. App. 294; *O'Conner v. Wilson*, 57 Ill. 226; *La Salle County v. Milligan*, 143 Ill. 321; *Carroll County Bank v. Goodall*, 41 N. H. 81. But see *Stone v. Wilson*, 10 Gratt. (Va.) 529, holding that an amended return may be made by a deputy sheriff who did not make the original return.

3. **Amendment by Deputy.** — *Stone v. Wilson*, 10 Gratt. (Va.) 533.

After the Expiration of the Officer's Term of Office an amendment may be made and should be made by the officer who made the original return. *La Salle County v. Milligan*, 143 Ill. 321.

In *Tennessee* it was held that after the expiration of his term of office a deputy sheriff cannot amend a return. *Shores v. Whitworth*, 8 Lea (Tenn.) 662.

Where a Sheriff Is Incompetent to Serve a Writ he is incompetent to amend a return made by his deputy. *O'Conner v. Wilson*, 57 Ill. 234.

By Sheriff for Deceased Deputy. — A sheriff may make an amendment of a return which was made by his deputy, since deceased, even after the expiration of the sheriff's term of office. *Avery v. Bowman*, 39 N. H. 393. See also *Ingersoll v. Sawyer*, 2 Pick. (Mass.) 276.

But Where the Deputy Left No Memo-
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(2) *Application by Officer or Party.* — An amendment to the return can be made, however, upon the application of a party or purchaser under an execution as well as upon the application of the officer himself.¹

(3) *Compelling Amendment.* — While a court may compel an officer to complete an imperfect return, it cannot compel him to amend a return in respect of the facts. In making a return the officer acts under an official responsibility, and he must be at liberty to make his own return subject to that responsibility.²

c. IN WHAT COURT — (1) *In General.* — One court cannot authorize an amendment to the return of an officer made upon a writ issued out of and returned to another and different tribunal in a suit between other parties which has been finally disposed of in the latter tribunal.³

random from which the amendment could be made, and the sheriff had no personal knowledge of the facts, it was held that the latter could not be permitted to amend. This, however, was in connection with other matters operating against the propriety of allowing the sheriff to amend a return made by his deputy. *O'Conner v. Wilson*, 57 Ill. 226.

Interest of Officer. — Under a statute in *Pennsylvania*, providing that an amendment of the return on an execution should be permitted only when justice and equity required it, it was held that the sheriff could not effect an amendment of such a return unless he had an interest in having the amendment allowed. *Lowenstein v. Krell*, 162 Pa. St. 267.

1. *Beutell v. Oliver*, 89 Ga. 246; *Stetson v. Freeman*, 35 Kan. 531; *Youngstown Bridge Co. v. White*, (Ky. 1899) 49 S. W. Rep. 36; *Johnson v. Wilmington, etc., Electric R. Co.*, (Del. 1897) 39 Atl. Rep. 777. See also *De Armond v. Adams*, 25 Ind. 455.

2. *Humphries v. Lawson*, 7 Ark. 341; *Hewell v. Lane*, 53 Cal. 217; *Wilcox v. Moudy*, 89 Ind. 232; *Sawyer v. Curtis*, 2 Ashm. (Pa.) 127; *Washington Mill Co. v. Kinnear*, 1 Wash. Ter. 99; *Smith v. Gaines*, 93 U. S. 343. But see *Matter of Dawson*, (Supm. Ct. Gen. T.) 20 Abb. N. Cas. (N. Y.) 188.

"The sheriff as the executive officer of the court is charged with the duty of making return to the mandates of its writs, but what return he shall make is within his own control. The court cannot dictate what it shall be. *Vastine v. Fury*, 2 S. & R. (Pa.) 426; *Maris v. Schermerhorn*, 3 Whart. (Pa.) 13. It can only require that it shall

be in form appropriate to the writ and as matter of law sufficient." *Dixon v. White Sewing Mach. Co.*, 128 Pa. St. 407. See also *World's Columbian Exposition v. Scala*, 55 Ill. App. 207.

Falsification of Return. — An attempted amendment of the return by order of the court without the action or knowledge of the sheriff is without warrant of law or precedent, and the return of the sheriff is thereby falsified. *Blodgett v. Schaffer*, 94 Mo. 671, the court adding: "Such attempts to heal errors and to cure mistakes cannot be tolerated; if they were, no man's title would be safe, where it depends upon a sheriff's return remaining intact until amended by that officer, with the permission of the court, and in accordance with the facts."

Description of Land in Levy. — In *Smith v. Hudson*, 1 Cow. (N. Y.) 430, the sheriff, having sold three parcels of land under an execution, certified the sale of but two parcels, and the court ordered him to amend by inserting in his return the omitted tract. See also *Ringgold v. Brown*, 4 Har. & M. (Md.) 498.

So where a deed could not be made properly until a marshal whose term had expired should furnish a more complete description of the land sold by him, it was held that the process could be regarded as still in the marshal's hands unexecuted, and that he might be directed by the court to amend his return so as to furnish information to the marshal then in office by which the latter might perfect the purchaser's title by making a proper deed. *Ex p. Worley*, 19 Fed. Rep. 586.

3. *Ledford v. Weber*, 7 Ill. App. 91;

(2) *After Removal — Change of Venue.* — After the removal of a cause by a change of venue the court from which the cause was removed has no authority to permit an amendment to the return on the original process.¹

7. *Retroactive Effect.* — An amendment of the return relates back to the original return and operates from that time, where the rights of innocent third persons are not affected.²

VII. EFFECT OF AND OBJECTIONS TO RETURN — 1. Evidence of Facts Returned — a. IN GENERAL. — An official return is the best evidence of the doings of the officer under the mandates of the writ or process, and is sufficient as proof of the facts which the officer is authorized and required to certify.³

Bunton v. Adams, 65 Mo. App. 6; *Mendelson v. Paschen*, 71 Wis. 591.

1. *State v. Rayburn*, 31 Mo. App. 824.

385. *North Dakota.* — *Mills v. Howland*, 2 N. Dak. 30.

Rhode Island. — *Lake's Petition*, 15 R. I. 628.

Texas. — *Hill v. Cunningham*, 25 Tex. 25.

Virginia. — *Shenandoah Valley R. Co. v. Ashby*, 86 Va. 232; *Stotz v. Collins*, 83 Va. 423.

West Virginia. — *Capehart v. Cunningham*, 12 W. Va. 750; *Hoopes v. Devaughn*, 43 W. Va. 447.

3. *California.* — *McCoy v. Van Ness*, 98 Cal. 675.

Connecticut. — *Jones v. Gilbert*, 13 Conn. 507, holding that a return upon a writ of attachment, "I also left a true and attested copy with the within-named defendants, according to law, with my indorsement," tended to prove the fact that a copy of the writ and return describing the goods attached was left with the defendant and was admissible for that purpose; *Allen v. Gray*, 11 Conn. 95.

Illinois. — *Smith v. Clinton Bridge Co.*, 13 Ill. App. 572.

Indiana. — *Splahn v. Gillespie*, 48 Ind. 397; *Taylor v. Taylor*, 64 Ind. 356; *Foster v. Dryfus*, 16 Ind. 158; *White v. Webster*, 58 Ind. 233.

Iowa. — *Bridges v. Arnold*, 37 Iowa 221.

Kentucky. — *Morgan v. Hart*, 9 B. Mon. (Ky.) 81; *Bean v. Haffendorfer*, 84 Ky. 685; *Williams v. Herndon*, 12 B. Mon. (Ky.) 484.

New York. — *Wheeler v. New York*, etc., R. Co., 24 Barb. (N. Y.) 414; *Boynton v. Keeseville Electric Light, etc., Co.*, (County Ct.) 5 Misc. (N. Y.) 118; *Henderson v. Cairns*, 14 Barb. (N. Y.) 15.

North Carolina. — *Luttrell v. Martin*, 112 N. Car. 593; *Grady v. Richmond*,

Even When Not Conclusive, an official return must be regarded as very strong evidence of the facts which the law requires the officer to certify.¹

b. LOST RETURN. — The best evidence of service is the return of the officer; but if this cannot be had, because of the loss or destruction thereof, secondary evidence is admissible to prove the fact, either by the testimony of the officer who made the service² or by docket entries made in the case.³

Ohio. — *Pearson v. Pierce*, 40 Ohio St. 231.

Tennessee. — *Posey v. Eaton*, 9 Lea (Tenn.) 505.

Vermont. — *Wilson v. Spear*, 68 Vt. 145; *Gilson v. Parkhurst*, 53 Vt. 384, citing *Eastman v. Curtis*, 4 Vt. 616; *Swift v. Cobb*, 10 Vt. 282.

See also *supra*, III. *Affidavit of Service* — *Return under Oath*.

Proof of Signature. — The return of a sheriff in the court in which he is an officer is acted upon without proof of his signature. *McDonald v. Carson*, 94 N. Car. 497.

In an Action of Trover by an Officer against a stranger for chattels seized on execution, it was held that the officer might prove the seizure by parol evidence and was not restricted to a return on the execution to show the seizure. *Hovey v. Lovell*, 9 Pick. (Mass.) 68.

Second Use as Evidence. — A certificate of service does not lose its force by reason of the fact that it was used upon the entry of a judgment which was subsequently vacated, but it may be used a second time upon a motion for judgment and affidavit of no answer. *Brien v. Casey*, (C. Pl. Gen. T.) 2 Abb. Pr. (N. Y.) 416.

Proof in Absence of Original. — Executions with a return thereon are records and constitute primary evidence; they cannot be proved by parol without first accounting for the original. *Williams v. Case*, 14 Ind. 253; *Harlan v. Harris*, 17 Ind. 328. See also *infra*, VII. 1. *b. Lost Return; supra*, IV. 4. *u. Must Show Legal Execution*.

Where the Original Return Has Been Altered by some person unauthorized and unknown, and the time of service becomes material as showing when the action was brought, upon an objection that it was prematurely begun, parol evidence is permissible to show whether service was made on or after the date named in the return. *McComb v. Council Bluffs Ins. Co.*, 83 Iowa 249.

Where the Truth of a Return Must Be Established by proof *ab extra*, the evidence must show such an execution of the process as is certified in the return. In a search and seizure process, the truth of a return showing that the officer to whom it was directed entered "the within-named premises and therein searched for intoxicating liquors and found and seized the following described liquors," etc., is completely negated by evidence showing that such search or seizure was made not by the officer who made the return, but by strangers to the officer; and such evidence cannot establish the truth of the return. *State v. Kenniston*, 67 Me. 558.

1. *Wyland v. Frost*, 75 Iowa 209; *Hoitt v. Skinner*, 99 Iowa 361. See *infra*, VII. 16. *Sufficiency of Evidence to Impeach Return*.

2. *Bridges v. Arnold*, 37 Iowa 221; *McComb v. Council Bluffs Ins. Co.*, 83 Iowa 247.

Insufficient Foundation. — Where the only proof that the summons purporting to have been lost or destroyed was ever served upon the defendant, who was in default, consisted of an affidavit by the plaintiff that said summons was served upon the plaintiff by another person more than seven years prior to the making of the affidavit, and there was nothing in the record or in the affidavit to show the affiant's means of knowledge, or relative to the particulars of the loss or destruction of the summons, or excusing the delay in making a return or explaining why proof of service was not made by the affidavit of the party who served the summons, it was held that the proof was insufficient to establish service. *Brettell v. Deffebach*, 6 S. Dak. 21.

3. *Doty v. Deposit Bldg., etc., Assoc.*, (Ky. 1898) 46 S. W. Rep. 219; *Posey v. Eaton*, 9 Lea (Tenn.) 506; *Stunkle v. Holland*, 4 Kan. App. 478. See also *Wilson v. Sanders*, 4 Ky. L.

2. Presumption. — The general rule is that every presumption is indulged in favor of the legality of official acts as evidenced by the officer's return, as well as in favor of the truth thereof.¹

3. Conclusiveness of Return — *a.* **ABSOLUTE VERITY AS BETWEEN PARTIES AND PRIVIES.** — Under the Strict Rule of the Common Law, which is found broadly stated and adopted in many American cases, an officer's return, as between the parties to a suit and their privies, imports absolute verity and cannot be contradicted in the suit, as in the case of original process, or otherwise than by a direct attack,² unless relief against the return is

Rep. 612; *Lemmings v. Mullins*, 6 Ky. L. Rep. 523.

In *Georgia*, in a suit to cancel a sheriff's deed made in pursuance of a levy and sale under a fi. fa. from a justice's court on a judgment against the plaintiff, upon the ground that he was not served with a copy of the summons issued by the justice, it was held that a docket entry of the justice showing an entry of service of process by the proper officer, it appearing that the original summons was lost, was admissible in evidence over the objection that the original summons or an exemplified copy was the highest proof of service. *Battle v. Braswell*, (Ga. 1899) 32 S. E. Rep. 838. But in *Gray v. McNeal*, 12 Ga. 425, it was held that the docket of the justice of the peace in whose court the judgment is rendered ought to furnish the evidence of service of the summons on the defendant as required by the statute, but the next best evidence is the production of the summons, if that can be found, and if not, then parol evidence of service is admissible.

Evidence to Impeach Entry. — The presumption of the validity of the service as shown by the appearance docket cannot be overthrown except by evidence which is of greater force than merely to cast doubt upon the service of the return. *Stunkle v. Holland*, 4 Kan. App. 478; *Posey v. Eaton*, 9 Lea (Tenn.) 500; *Harris v. McClanahan*, 11 Lea (Tenn.) 181. See also *Lemmings v. Mullins*, 6 Ky. L. Rep. 523.

1. This is illustrated in the preceding sections in this article. See also *Fears v. Thompson*, 82 Ala. 294; *Whittlesey v. Starr*, 8 Conn. 134; *Rives v. Kumlir*, 27 Ill. 291; *Baltimore, etc., R. Co. v. Brant*, 132 Ind. 37; *Cobb v. Newcomb*, 7 Iowa 43; *Ketchum v. White*, 72 Iowa 193; *Ingraham v. McGraw*, 3 Kan. 521; *Fleece v. Goodrum*,

1 Duv. (Ky.) 307; *Webber v. Webber*, 1 Met. (Ky.) 21; *Thomas v. Mahone*, 9 Bush (Ky.) 119; *Stigers v. Brent*, 50 Md. 214; *Abell v. Simon*, 49 Md. 318; *Sarlouis v. Firemen's Ins. Co.*, 45 Md. 241; *Windwart v. Allen*, 13 Md. 196; *State v. Still*, 11 Mo. App. 283; *Foster v. Berry*, 14 R. I. 601; *San Antonio, etc., R. Co. v. Wells*, 3 Tex. Civ. App. 307.

2. *Arkansas.* — *Ex p.* St. Louis, etc., R. Co., 40 Ark. 141; *Chapline v. Robertson*, 44 Ark. 202; *May v. Jameson*, 11 Ark. 368.

Illinois. — *Waggoner v. Green*, 40 Ill. App. 648; *Leitch v. Colson*, 8 Ill. App. 458.

Indiana. — *Hite v. Fisher*, 76 Ind. 234; *Smith v. Noe*, 30 Ind. 117; *Johnston Harvester Co. v. Bartley*, 81 Ind. 406.

Maine. — *Stinson v. Snow*, 10 Me. 263; *Gray v. Fessenden*, 21 Me. 34.

Maryland. — *State v. Lawson*, 2 Gill (Md.) 62.

Michigan. — *Zimmerman v. Merchant's Nat. Bank*, 1 Mich. N. P. 14.

Minnesota. — *Tullis v. Brawley*, 3 Minn. 277; *Frasier v. Williams*, 15 Minn. 288.

Missouri. — *Delinger v. Higgins*, 26 Mo. 180; *Stewart v. Stringer*, 41 Mo. 400; *Hallowell v. Page*, 24 Mo. 590; *Heath v. Missouri, etc., R. Co.*, 83 Mo. 617; *Shanklin v. Francis*, 59 Mo. App. 178.

New Hampshire. — *Smith v. Burnham*, 58 N. H. 205; *Bolles v. Bowen*, 45 N. H. 124.

New York. — *Columbia Ins. Co. v. Force*, (Supm. Ct. Gen. T.) 8 How. Pr. (N. Y.) 353, where it is said, however, that in proper cases the court will always give to a party an opportunity to be heard upon the merits where the default has been taken, but that beyond this the remedy should be against the officer.

sought upon the ground of fraud, as that a false return was induced by one of the parties to the action.¹ Fraud and mistake are sometimes by statute made the exclusive grounds for attacking an official return,² and if the case does not fall within such

Pennsylvania. — *Smith v. Hooton*, 3 Pa. Dist. 250; *Hess v. Weingartner*, 5 Pa. Dist. 451; *Benwood Ironworks v. Hutchinson*, 101 Pa. St. 359; *Carter v. Shindel*, 7 Pa. Dist. 308; *Bennethum v. Bowers*, 133 Pa. St. 332, holding that a return showing service of a true and attested copy cannot be contradicted by showing that the copy served was not a true and attested copy; *MacGeorge v. Harrison Chemical Mfg. Co.*, 141 Pa. St. 575.

Rhode Island. — *Angell v. Bowler*, 3 R. I. 77.

Tennessee. — *Hutton v. Campbell*, 10 Lea (Tenn.) 172 [citing *Nichol v. Ridley*, 5 Yerg. (Tenn.) 63; *Love v. Smith*, 4 Yerg. (Tenn.) 117; *McBee v. State*, Meigs (Tenn.) 122; *Pratt v. Phillips*, 1 Sneed (Tenn.) 543].

Vermont. — *Hawks v. Baldwin*, Brayt. (Vt.) 85.

West Virginia. — *Stewart v. Stewart*, 27 W. Va. 167; *Rader v. Adamson*, 37 W. Va. 582.

England. — *Rex v. Elkins*, 4 Burr. 2129.

Perfect Return Without Extraneous Evidence. — See *supra*, IV. 4. *a. Must Show Legal Execution.*

Rule of State Court Applied in Federal Court. — The general rule of the state court will apply to the return of a United States marshal, and where it is held that an officer's return in the state court cannot be contradicted by extraneous evidence, but the party is left to his remedy against the officer for a false return, the federal court will adopt the same rule. *Trimble v. Erie Electric Motor Co.*, 89 Fed. Rep. 51.

Proposed Amendment. — Upon the principle of the conclusiveness of an officer's return between parties, evidence will not be received to contradict a proposed amendment. *Phillips v. Evans*, 64 Mo. 17.

Nulla Bona. — A return of *nulla bona* is conclusive evidence that the party against whom the return is made has no property upon which the execution can be levied. *Baines v. Babcock*, 95 Cal. 581; *Hunt v. Winner*, 39 Ark. 70.

In Replevin. — A return on a writ of replevin that the officer had made diligent search but could not find the prop-

erty described in the writ was held to be conclusive so as to preclude the defendant from testifying that the officer actually took a part of the property from him. *Rowell v. Klein*, 44 Ind. 290; *Irvin v. Smith*, 66 Wis. 113.

On a Motion to Quash an Execution the defendant has no right to contradict the sheriff's return by showing that the lands attached did not belong to him. *Magrew v. Foster*, 54 Mo. 258.

1. *Trigg v. Lewis*, 3 Litt. (Ky.) 129; *Shoffet v. Menifee*, 4 Dana (Ky.) 150. See *infra*, VII. 5. *Relief in Equity.*

2. **By Statute.** — It is provided by Stat. Ky. (1894), § 3760, that, unless in a direct proceeding against the officer or his sureties, no fact officially stated by such officer in respect of a matter about which he is by law required to make a statement in writing shall be called in question except upon the allegation of fraud in the party benefited thereby or mistake on the part of the officer. *Thomas v. Ireland*, 88 Ky. 581; *Lock v. Slusher*, (Ky. 1897) 43 S. W. Rep. 472. But see *Barbour v. Newkirk*, 83 Ky. 529.

In *Bramlett v. McVey*, 91 Ky. 151, it was held that a return of service which is false may be attacked and the collection of the judgment by default based thereon enjoined upon an allegation that the false return was made by mistake of the officer. But it is held that where a judgment in favor of the state for a fine is rendered which requires imprisonment upon the nonpayment of the fine, independently of mistake, the defendant should not be required to look alone to the official bond of the officer for redress, but may call in question the return of the officer and show the fact that the judgment was rendered without notice to him.

Not Confined to Collateral Proceeding. — Under this statute it is held that a return cannot be contradicted for the purpose of defeating the jurisdiction of the court, upon a motion to set aside a judgment, and the statute is not confined to attacks in "a collateral proceeding." *Doty v. Deposit Bldg., etc., Assoc.*, (Ky. 1898) 46 S. W. Rep. 219; *Thomas v. Ireland*, 88 Ky. 581. But it seems that in the absence of a restrict-

statute it is held that the remedy of the party injured must be by an action to recover damages against the officer for the wrong.¹

Action Against Officer for False Return. — The direct attack to which the parties are restricted is an action against the officer for a false return.²

b. COLLATERAL ATTACK. — The general rule is that parties to a suit and their privies cannot falsify the record thereof except in a direct proceeding to vacate or annul it; the return of an officer cannot be collaterally attacked by them and is conclusive as to all the facts which the officer is authorized to certify.³

ing statute the return may be contradicted before judgment by motion. *Barbour v. Newkirk*, 83 Ky. 529.

1. *Thomas v. Ireland*, 88 Ky. 581.

2. *Arkansas*. — *Ex p. St. Louis*, etc., R. Co., 40 Ark. 141; *Hunt v. Weiner*, 39 Ark. 70.

Indiana. — *Stockton v. Stockton*, 59 Ind. 574; *Rowell v. Klein*, 44 Ind. 290.

Maine. — *Hotchkiss v. Hunt*, 56 Me. 252; *Stinson v. Snow*, 10 Me. 263.

Massachusetts. — *Lowery v. Caldwell*, 139 Mass. 88; *Eastman v. Perkins*, 10 Cush. (Mass.) 249; *Niles v. Hancock*, 3 Met. (Mass.) 568; *Collins v. Douglass*, 1 Gray (Mass.) 167; *Davis v. Putnam*, 5 Gray (Mass.) 321; *Henshaw v. Savil*, 114 Mass. 74; *Taylor v. Clarke*, 121 Mass. 319.

Minnesota. — *Tullis v. Brawley*, 3 Minn. 277.

Missouri. — *McDonald v. Leewright*, 31 Mo. 29; *Hallowell v. Page*, 24 Mo. 590; *Stewart v. Stringer*, 41 Mo. 400; *Heath v. Missouri*, etc., R. Co., 83 Mo. 617.

New Hampshire. — *Clough v. Monroe*, 34 N. H. 381; *Bolles v. Bowen*, 45 N. H. 124.

Pennsylvania. — *Knowles v. Lord*, 4 Whart. (Pa.) 500; *MacGeorge v. Harrison Chemical Mfg. Co.*, 141 Pa. St. 575; *Smith v. Hooton*, 3 Pa. Dist. 250.

Tennessee. — *McBee v. State*, Meigs (Tenn.) 122.

Vermont. — *Hawks v. Baldwin*, Brayt. (Vt.) 85.

Breach of Duty. — But it is held that the party may not be restricted to an action for a false return as an exclusive remedy; he may bring an action upon the facts of the case as for a breach of official duty. *Raker v. Bucher*, 100 Cal. 216.

3. *Connecticut*. — *Metcalf v. Gillet*, 5 Conn. 400; *Benjamin v. Hathaway*, 3 Conn. 528.

Illinois. — *Major v. People*, 40 Ill.

App. 323; *Scrafield v. Sheeler*, 18 Ill. App. 507; *Barnett v. Wolf*, 70 Ill. 76; *Hunter v. Stoneburner*, 92 Ill. 75; *Hibbard v. Ryan*, 46 Ill. App. 313; *Harrison v. Hart*, 21 Ill. App. 348.

Indiana. — *Stockton v. Stockton*, 59 Ind. 574; *Johnson v. Patterson*, 59 Ind. 239; *Krug v. Davis*, 85 Ind. 311; *State v. Davis*, 73 Ind. 359; *Hume v. Conduitt*, 76 Ind. 598; *Hamilton v. Matlock*, 5 Blackf. (Ind.) 421; *Burger v. Becket*, 6 Blackf. (Ind.) 61; *Remington v. Henry*, 6 Blackf. (Ind.) 63; *Clark v. Shaw*, 79 Ind. 164.

Kansas. — *Goddard v. Harbour*, 56 Kan. 744; *Starkweather v. Morgan*, 15 Kan. 274.

Kentucky. — *Shoffet v. Menifee*, 4 Dana (Ky.) 150; *Trigg v. Lewis*, 3 Litt. (Ky.) 129; *McConnell v. Bowdry*, 4 T. B. Mon. (Ky.) 399; *Smith v. Hornback*, 3 A. K. Marsh. (Ky.) 393; *Small v. Hodgen*, 1 Litt. (Ky.) 17; *Tribble v. Frame*, 3 T. B. Mon. (Ky.) 52.

Maine. — *Hotchkiss v. Hunt*, 56 Me. 252.

Massachusetts. — *Bott v. Burnell*, 9 Mass. 96; *Sawyer v. Harmon*, 136 Mass. 414.

Michigan. — *Green v. Kindy*, 43 Mich. 279; *Goodrow v. Buckley*, 70 Mich. 513; *Johnson v. Mead*, 73 Mich. 326; *William Wright Co. v. Wayne Circuit Judge*, 109 Mich. 139; *Albany City Bank v. Dorr*, Walk. (Mich.) 317; *Michels v. Stork*, 52 Mich. 260; *Ripley v. Evans*, 87 Mich. 218; *Corning v. Burton*, 102 Mich. 86.

Minnesota. — *Stewart v. Duncan*, 47 Minn. 285; *State v. Penner*, 27 Minn. 269.

Missouri. — *Sams v. Armstrong*, 8 Mo. App. 573; *Shanklin v. Francis*, 59 Mo. App. 178; *Decker v. Armstrong*, 87 Mo. 316; *Jeffries v. Wright*, 51 Mo. 215; *Hallowell v. Page*, 24 Mo. 590; *McDonald v. Leewright*, 31 Mo. 29; *Anthony v. Bartholow*, 69 Mo. 186,

Defective Return. — It is also held that the return is sufficient evidence of jurisdiction of the person to support a judgment by default on a collateral attack, even if such return is defective to the extent that it might have been successfully attacked in the proceeding, being merely voidable and not void.¹ The sheriff will

holding that in an action on a bond of indemnity executed by the plaintiff in an execution to the sheriff, for the seizure and sale under the execution of property claimed by a third party, the official return is conclusive upon the plaintiff in the execution upon the fact of a levy.

New Hampshire. — *Brown v. Davis*, 9 N. H. 76; *Clough v. Monroe*, 34 N. H. 381.

New York. — *Cozine v. Walter*, 55 N. Y. 304.

North Carolina. — *Isley v. Boon*, 113 N. Car. 249.

Oregon. — *White v. Johnson*, 27 Oregon 282.

Pennsylvania. — *Levan v. Millholland*, 114 Pa. St. 49; *Ruth's Appeal*, (Pa. 1887) 10 Atl. Rep. 886.

Rhode Island. — *Estes v. Cooke*, 12 R. I. 6.

South Carolina. — *Genobles v. West*, 23 S. Car. 166.

Tennessee. — *Love v. Smith*, 4 Yerg. (Tenn.) 117; *McBee v. State*, Meigs (Tenn.) 122; *Posey v. Eaton*, 9 Lea (Tenn.) 500.

Texas. — *Holt v. Hunt*, 18 Tex. Civ. App. 363 [*citing Schneider v. Ferguson*, 77 Tex. 572; *Flaniken v. Neal*, 67 Tex. 631].

Vermont. — *White River Bank v. Downer*, 29 Vt. 332.

United States. — *Brown v. Kennedy*, 15 Wall. (U. S.) 591.

Foreign Judgments. — See article JURISDICTION, vol. 12, p. 216 *et seq.*

Nulla Bona. — In a scire facias to have an execution against real estate on a transcript of a justice's judgment, the defendant cannot question the truth of the constable's return "no property" to the execution. *Hamilton v. Matlock*, 5 Blackf. (Ind.) 421. To the same effect see *Moyer v. Moyer*, 7 N. Y. App. Div. 523; *Ripley v. Evans*, 87 Mich. 218; *William Wright Co. v. Wayne Circuit Judge*, 109 Mich. 139; *Albany City Bank v. Dorr*, Walk. (Mich.) 317, wherein it was said that while a return of *nulla bona* cannot be contradicted in a creditor's suit founded thereon, the defendant might move in the main case to set it aside.

The return upon an execution that the officer could find no property of the principal debtor and that he levied upon the property of the surety cannot be impeached collaterally. *Mueller v. Bates*, 2 Disney (Ohio) 318. Compare *Perry v. Hardison*, 99 N. Car. 21.

Return Long After Time. — A return on an execution showing "debt and costs paid" which is made two years out of time and not less than a year after the commencement of a suit founded upon a promise by the defendant that in case the plaintiff would forbear to proceed in an execution issued by him on the goods of a son of the defendant, the defendant would pay the plaintiff, is not conclusive upon the plaintiff. *Weidman v. Weitelt*, 13 S. & R. (Pa.) 96. See also *Williams v. Carr*, 1 Rawle (Pa.) 420.

Marshal's Return. — A judgment of the Circuit Court of the United States sitting in a particular state is to be treated as a domestic judgment in that state, and the return of service of process by the marshal is to be put upon the same footing as the service of the proper officer in the state court. In *Kansas* the rule as to the sheriff that matters within his personal knowledge will be conclusively evidenced by the return, and matters not within his personal knowledge may be contradicted, is applied to the return of a marshal. *Thomas v. Owen*, 58 Kan. 313.

Liability of Indorser of Writ. — Where the liability of one as the indorser of a writ is by statute made to depend upon certain facts to be evidenced by an official return thereof, such return, being made conclusive, fixes the liability of such indorser and cannot be contradicted. *Chesley v. Perry*, 78 Me. 164; *Craig v. Fessenden*, 21 Me. 34.

1. *Tewalt v. Irwin*, 164 Ill. 592; *Cavanaugh v. Smith*, 84 Ind. 380; *Baker v. Jamison*, 73 Iowa 698; *Friend v. Green*, 43 Kan. 167; *Loughridge v. Bowland*, 52 Miss. 546; *Smith v. Bradley*, 6 Smed. & M. (Miss.) 485; *Gandy v. Jolly*, 35 Neb. 711, cited in *Campbell Printing Press, etc., Co. v. Marder*, 50 Neb. 287. See also *Sargeant v. Mead*, (Supm. Ct. Gen. T.) 1 N. Y. Supp. 589; *Isley*

not be permitted to give evidence which will tend to falsify it.¹

4. Relaxation of Strict Common-law Rule as to Conclusiveness. —

As will be seen from the following sections, the general tendency of the modern decisions is to allow an official return to be impeached by affidavit, plea, motion, or other direct proceeding to vacate it, any evils or inconvenience which might result from such a course being considered greatly outweighed by the injustice which would often result from an adherence to the strict common-law rule.²

v. Boon, 113 N. Car. 249; *Strong v. Barnhart*, 6 Oregon 93. See *supra*, VI. *Amendment of Return*.

Determination of Sufficiency Conclusiveness.

— If the service of original notice is in part imperfect, but it appears that the trial court determined its sufficiency, it cannot be attacked in a collateral proceeding. *Schneitman v. Noble*, 75 Iowa 120; *Shawhan v. Loffer*, 24 Iowa 226; *Myers v. Davis*, 47 Iowa 328; *Shea v. Quintin*, 30 Iowa 58; *Ketchum v. White*, 72 Iowa 193; *Baker v. Jamison*, 73 Iowa 698.

1. *Martin v. Barney*, 20 Ala. 369; *Benjamin v. Hathaway*, 3 Conn. 528. But see *supra*, VI. *Amendment of Return*.

2. *Crosby v. Farmer*, 39 Minn. 305; *Union Nat. Bank v. Centreville First Nat. Bank*, 90 Ill. 56.

Jurisdiction.— A return may be contradicted when the question of the jurisdiction of the party arises, and it may be shown that jurisdiction was never in fact obtained. *Toepfer v. Lampert*, (Wis. 1899) 78 N. W. Rep. 779 [citing *Rape v. Heaton*, 9 Wis. 328; *Pollard v. Wegener*, 13 Wis. 569; *St. Sure v. Lindesfelt*, 82 Wis. 346].

In *Nebraska* it is held that extrinsic evidence is admissible in a collateral proceeding for the purpose of impeaching an officer's return. *Campbell Printing Press, etc., Co. v. Marder*, 50 Neb. 287; *Holliday v. Brown*, 33 Neb. 657; *Wilson v. Shipman*, 34 Neb. 573.

In *Indiana* it was held that upon an action for a judgment for alimony the defendant might plead and show the falsity of a return showing service of process. *Cavanaugh v. Smith*, 84 Ind. 380.

In *Illinois* it seems that the propriety of permitting impeachment of the return is made to depend largely upon whether only the parties to the original record are affected, or the rights of interested third parties have intervened, it being held proper in the former case

to resort to parol evidence for the purpose of impeaching the return. *Davis v. Dresback*, 81 Ill. 393, a case where a bill was brought to set aside a sale under decree of foreclosure rendered upon a return of the service of process shown to have been false.

Under Particular Statutes the return upon certain kinds of process may not be conclusive. Thus, in *Rust v. Vancaster*, 9 W. Va. 600, it was held that whatever might have been the common-law rule as to the conclusiveness of the officer's return upon a writ of habeas corpus, it was not conclusive under the statute in that state which provided that the court or judge, after hearing the matter, "both upon the return and upon any other evidence, shall," etc., under which the return may be contradicted in whole or in part.

Reason of Rule and Relaxation Thereof.

—"The reason usually given for the rule [at common law] is that it is necessary to secure the rights of parties and give validity and effect to the acts of ministerial officers. In England process could only be served by the sheriff, who was the only ministerial officer known to the courts for that purpose. Moreover, under the common-law practice which obtained there, it was almost impossible for judgment to be rendered against a party without actual personal notice to him. Under such a system the rule might be convenient, and without much danger of working injustice. But under the practice which obtains in this and other states, most of the old safeguards have been removed, and the necessity for modifying the rule and adapting it to the changed condition of the law has been often felt and frequently acted upon, especially in the case of original process by which the court acquires jurisdiction." *Crosby v. Farmer*, 39 Minn. 307.

The injustice of adhering strictly to the old rule in some cases is illustrated

5. Relief in Equity. — If a sheriff makes a false return fraudulently, in collusion with a party, or by mistake, a court of equity has unquestioned jurisdiction to interpose and give appropriate relief, and to give effect to this remedy the party should be permitted to aver against the truth of the return and show it to be false though it be a matter of record.¹ Under a strict adherence to the common-law rule as to the verity of an official return, the mere falsity of a return showing service of process is held not to be sufficient ground for the interposition of the court of equity in the absence of an allegation of fraud,² but in many other cases equity will grant relief by means of its injunctive process against the enforcement of a judgment based upon a false return of the service of process, for the purpose of which such a return is not conclusive.³

in *Gary v. State*, 11 Tex. App. 534, wherein the court said: "To remit the party to his action of damages against the sheriff in a great many instances would be fruitless. The sheriff may be insolvent, and so may be his sureties. Let us suppose a case. A sues B on a claim to which B has a good defense. The sheriff or constable returns that he has served B, when in fact he has not. A gets judgment against B by default; execution issues against him, whereupon he, B, seeks to set aside the judgment upon the ground that he has had no notice of the suit. Must he be told by a court of justice that he cannot and will not be heard, and to pay the money and look to the sheriff or constable? This appears to us to be in violation of that principle which will not permit a citizen's property to be taken without due course of law. No principle can be just which deprives a person of his property without giving him a hearing."

1. *Ridgeway v. State Bank*, 11 Humph. (Tenn.) 523; *Word v. Chilcoat*, 1 Coldw. (Tenn.) 423; *Phillips v. Evans*, 64 Mo. 17.

2. *Preston v. Kindrick*, 94 Va. 760; *Knox County v. Harshman*, 133 U. S. 152; *Walker v. Robbins*, 14 How. (U. S.) 584.

3. *Martin v. Barney*, 20 Ala. 369; *Rivard v. Gardner*, 39 Ill. 125; *Jones v. Neely*, 82 Ill. 71; *Hickey v. Stone*, 60 Ill. 459; *Allen v. Hickey*, 53 Ill. App. 441 [citing *Owens v. Ranstead*, 22 Ill. 161; *Davis v. Dresback*, 81 Ill. 393; *Cairo, etc., R. Co. v. Holbrook*, 92 Ill. 297; *Colson v. Leitch*, 110 Ill. 504]; *Duncan v. Gerdine*, 59 Miss. 550; *Ridgeway v. State Bank*, 11 Humph.

(Tenn.) 523; *Bell v. Williams*, 1 Head (Tenn.) 229; *Wood v. Chilcoat*, 1 Coldw. (Tenn.) 423.

See further for equitable relief against judgments, *infra*, VII. 6. *Motion or Action to Set Aside Default Judgment*; and article JUDGMENTS, vol. 11, p. 1168.

Confined to Contradiction by Record. — In *Hunter v. Stoneburner*, 92 Ill. 75, a bill was filed to set aside a sale upon the ground that the complainant in the bill was not served with process in the proceedings in which the sale was had. The court held in this case that the return showing service was binding upon the complainant, adding: "It is in rare cases only that the return of the officer can be contradicted, except in a direct proceeding by suit against the officer for a false return. In all other cases, almost without an exception, the return is held to be conclusive. An exception to the rule is where some other portion of the record in the same case contradicts the return, but it cannot be done by evidence *dehors* the record."

Direct Attack. — A bill to enjoin a judgment upon the ground of falsity of the return showing service of process has been considered in some cases as a direct attack. *Duncan v. Gerdine*, 59 Miss. 550; *McNeill v. Edie*, 24 Kan. 108.

And an action in equity which seeks to annul a judgment has been held to be a direct attack though it seeks relief beyond the setting aside of the former action. *Genobles v. West*, 23 S. Car. 154.

But from the cases cited to the proposition that upon a collateral attack the return is conclusive upon the parties

6. Motion or Action to Set Aside Default Judgment. — While the strict rule as to the conclusiveness of an officer's return applies to all stages of the proceeding, whether before or after judgment,¹ unless the return was procured or induced by the plaintiff or he can be connected with the deception in some way,² it seems that the better rule is that a false return of service of process may be contradicted upon a motion to set aside a judgment by default,³ or in the statutory action to set aside such a judg-

and their privies (*supra*, VII. 3. *b. Collateral Attack*), it will appear that a bill to enjoin a judgment is considered of this character. This seems to be the general rule, as will also appear from the cases cited in the article JURISDICTION, vol. 12, p. 196, in support of the rule against the collateral attack on judgments of courts of general jurisdiction. And in *Nebraska*, upon holding that a return might be contradicted upon collateral attack, the earlier ruling that a suit in equity would not lie to set aside a judgment founded upon a false return because this was a collateral attack was overruled. *Campbell Printing Press, etc., Co. v. Marder*, 50 Neb. 287.

1. *Rader v. Adamson*, 37 W. Va. 582; *Stewart v. Stewart*, 27 W. Va. 167.
2. *Ramsburg v. Kline*, 96 Va. 465; *Wohlford v. Trinkle*, 90 Va. 227.

Suit to Annul Judgment. — In *Kempner v. Jordan*, 7 Tex. Civ. App. 275, it was held that in a suit to annul a judgment a return in the former suit may be impeached by showing that the plaintiff has procured or connived at its falsity. The court said that the question had never before been decided in *Texas*.

3. *California*. — *People v. Dodge*, 104 Cal. 487.

Colorado. — *Du Bois v. Clark*, (Colo. App. 1898) 55 Pac. Rep. 750.

Georgia. — *Dasher v. Dasher*, 47 Ga. 320; *Davant v. Carlton*, 53 Ga. 491.

Illinois. — *Brown v. Brown*, 59 Ill. 315.

Iowa. — *Browning v. Gosnell*, 91 Iowa 448; *Hoitt v. Skinner*, 99 Iowa 361.

Maryland. — *Coulbourn v. Fleming*, 78 Md. 210, holding that the return is to be taken as *prima facie* true. See also *Abell v. Simon*, 49 Md. 324.

Michigan. — *Zimmerman v. Merchant's Nat. Bank*, 1 Mich. N. P. 14.

Minnesota. — *Gray v. Hays*, 41 Minn. 12; *Allen v. McIntyre*, 56 Minn. 351; *Burton v. Schenck*, 40 Minn. 52; *Jensen v. Crevier*, 33 Minn. 372; *Crosby*

v. Farmer, 39 Minn. 307, overruling *Tullis v. Brawley*, 3 Minn. 277.

Mississippi. — *Meridian v. Trussell*, 52 Miss. 711; *Meyer v. Whitehead*, 62 Miss. 389, citing an express statute permitting the falsity of a return of service to be shown by either party to the action.

New York. — *Van Rensselaer v. Chadwick*, (Supm. Ct. Gen. T.) 7 How. Pr. (N. Y.) 297; *Wallis v. Lott*, (Supm. Ct.) 15 How. Pr. (N. Y.) 567.

North Carolina. — *Chadbourn v. Johnston*, 119 N. Car. 282; *Godwin v. Monds*, 106 N. Car. 448.

South Dakota. — *Brettell v. Deffenbach*, 6 S. Dak. 21.

Defendant Misled by Service of Incorrect Copy. — Where a return of an officer shows service of a true copy of the original notice, it may be shown that the copy served notified the defendant to appear at a wrong date, whereby a judgment by default was suffered. *Browning v. Gosnell*, 91 Iowa 448.

Issue to Jury. — Upon motion to set aside the judgment it is competent for the court to direct an issue to try the question of the alleged falsity of the return of the officer as to the service of the summons. *Meyer v. Whitehead*, 62 Miss. 387.

After a Decree Pro Confesso the defendant may file a petition for a writ of error *coram nobis* and ask that it operate as a supersedeas to restrain and stay proceedings under a void decree. *Leftwick v. Hamilton*, 9 Heisk. (Tenn.) 310, wherein the court further said that the decisions in that state to the end that the return of an officer of the service of original process cannot be contradicted were made in suits at law in proceedings in cases of certiorari and supersedeas, and that the rule had been adhered to in obedience to precedent rather than from a conviction of its original correctness, but that the entire court concurred in the opinion that such an issue could be made and tried by proceedings in chancery.

ment,¹ even though the return is not subject to contradiction for the purpose of defeating the jurisdiction of the court, the motion or action to vacate or set aside a judgment being for the purpose of affording to the party an opportunity to appear and defend.²

1. *Iowa*. — Wyland v. Frost, 75 Iowa 209.

Minnesota. — Knutson v. Davies, 51 Minn. 363.

New York. — Dutton v. Smith, 23 N. Y. App. Div. 188, holding that the defendant was not confined to a motion to vacate a judgment, but might bring an action to set it aside. Formerly, in New York, if a defendant had no notice of suit before judgment, it was held under the code that his only remedy was by appeal, and that on such appeal the defendant could show by affidavit the want or defect of service. Waring v. McKinley, 62 Barb. (N. Y.) 621; Fitch v. Devlin, 15 Barb. (N. Y.) 47.

South Carolina. — Genobles v. West, 23 S. Car. 154.

Washington. — Johnson v. Gregory, 4 Wash. 109.

2. *Scrfield v. Sheeler*, 18 Ill. App. 507; *Brown v. Brown*, 59 Ill. 315; *Zimmerman v. Merchant's Nat. Bank*, 1 Mich. N. P. 14; *Trimble v. Erie Electric Motor Co.*, 89 Fed. Rep. 51.

In *Indiana* the doctrine has been stated to be that "for the purpose of affecting or questioning the fact and validity of the service and the jurisdiction of the court over the person of the party in the case wherein the summons was issued, the truth of the return may not be denied." *Hite v. Fisher*, 76 Ind. 231. But where the application is not to set aside the service and does not involve the jurisdiction of the court over the person, but its whole scope is to show that while in contemplation of law the defendant had been served with process he had no actual knowledge of the institution of the suit or proceedings against him, and is therefore excusable under the circumstances for neglecting to appear and make defense, it is proper. *Birch v. Frantz*, 77 Ind. 199; *Hite v. Fisher*, 76 Ind. 231; *Krug v. Davis*, 85 Ind. 311; *Nichols v. Nichols*, 96 Ind. 433; *Smith v. Noe*, 30 Ind. 117.

Later cases in this state in effect overrule the former doctrine that the defendant cannot have a judgment set aside by contradicting the return, holding that for the purpose of rendering an excuse for not appearing the de-

fendant may show that the summons was not in fact served upon him. *Nietert v. Trentman*, 104 Ind. 390; *Shepherd v. Marvel*, 16 Ind. App. 418. See also *Murrer v. Security Co.*, 131 Ind. 35.

But so far from expressly overruling the former decisions, in *Nietert v. Trentman*, 104 Ind. 390, the court refused to give so broad an application to them as was claimed on behalf of the party resisting the application, and placed its decision upon the ground that the object of the proceeding was neither to set aside the service of summons nor to question the jurisdiction which the court had acquired over the party in virtue of the sheriff's return, but simply to have a default set aside upon the ground that the defaulted party had at the time no actual notice of the pendency of the action, and hence his neglect for not appearing in time to make his defense was excusable.

But in *Cully v. Shirk*, 131 Ind. 76, it was held that a complaint, in an action to vacate and declare null and void a judgment and decree, alleging that the plaintiff "never had, at any time, any notice of any kind whatever of the filing of said complaint or the pendency of said action," and that the return of the sheriff on the summons was false, did not present an application under the statute to be relieved from a judgment obtained through the defendant's mistake, inadvertence, surprise, or excusable neglect, but was simply a suit to have a judgment set aside upon the ground that the return was false and that the court was without jurisdiction of the person of the defendant; and without an allegation of fraud in such a case the return could not be attacked.

In *Rhode Island* it was held that while it is true that an officer's return upon a writ is conclusive and cannot be controverted incidentally by motion or plea except in cases specially provided for by statute, yet as under the Judiciary Act the court has control over its decrees for the period of six months after the entry thereof, and may for cause shown set aside a decree

Effect of Setting Aside Judgment. — Upon setting aside a judgment on the ground of the falsity of the return of service of process the court should treat the case as a pending one and require the defendant to plead at once, so as to give to the plaintiff a trial and judgment if he should be found entitled to it.¹

7. Certiorari. — An official return cannot be contradicted upon a petition for certiorari or supersedeas as an excuse for failing to effect an appeal at the proper time.²

8. Plea in Abatement or Motion to Set Aside Return — *a.* IN GENERAL. — In some cases it is held that if the officer's return shows service of process the defendant may plead in abatement matter in contradiction thereof.³ Where this is allowed the plea

and reinstate the case or make new entry and take other proceedings with proper notice to parties, as it may by general rule or special order direct, it is within the power of the court to set aside a decree on the ground that the defendant had no notice of the pendency thereof; and this is no infringement of the rule stated as to the conclusiveness of the officer's return. *Locke v. Locke*, 18 R. I. 716.

In Case of Fraud. — In *Kentucky*, under a statute which provides that except in a direct proceeding against the officer or his sureties an official return cannot be contradicted unless upon an allegation of fraud in the party benefited thereby or mistake on the part of the officer, it is held that upon a judgment by default the defendant cannot move to set aside the judgment upon the ground of the falsity of the return merely for the purpose of defeating the jurisdiction of the court on that ground. *Doty v. Deposit Bldg., etc., Assoc.*, (Ky. 1898) 46 S. W. Rep. 219.

1. *Meyer v. Whitehead*, 62 Miss. 387. See also *Brown v. Brown*, 59 Ill. 315.

2. *Gardner v. Barger*, 4 Heisk. (Tenn.) 668; *Harris v. Gleghorn*, 12 Lea (Tenn.) 381; *Wilson v. Moss*, 7 Heisk. (Tenn.) 417. See also *Young v. Trunkley*, 22 Pa. Co. Ct. 127. But see *Stedman v. Bradford*, 3 Phila. (Pa.) 258, 15 Leg. Int. (Pa.) 357, and *Johnson v. Aylesworth*, 3 Pittsb. (Pa.) 237, where the return showed service by leaving a copy.

In *Fitzgerald v. Kimball*, 86 Ill. 396, wherein the defendant attempted to remove the record from the justice's court by certiorari, the court used this language: "The law does not permit a party, in such a case, to contradict

the official return of an officer. This return must be treated as absolutely true, and, if true, the appellant was guilty of negligence in not making his defense, if any he had, before the justice of the peace. He cannot be heard under such circumstances to allege that the judgment was not the result of negligence on his part, or to say (as an excuse for not taking an appeal in the ordinary way) that he was ignorant of the existence of the judgment. If in fact the summons was served on him on April 21, 1876, as stated in the return of the officer (and this must be taken as true), he had the means of knowing of the judgment, and it was his own fault if he did not know it. He fails to satisfy us that the judgment was not the result of his own negligence, and he fails to show that it was not in his power to take an appeal in the ordinary way."

3. *Buckingham v. Osborne*, 44 Conn. 133; *Sibert v. Thorp*, 77 Ill. 44; *Mineral Point R. Co. v. Keep*, 22 Ill. 15; *Callender v. Gates*, 45 Ill. App. 374; *Chicago Sectional Electric Underground Co. v. Congdon Brake Shoe Mfg. Co.*, 111 Ill. 309; *Union Nat. Bank v. Centreville First Nat. Bank*, 90 Ill. 56; *Ryan v. Lander*, 89 Ill. 554. See also *Carlisle v. Cowan*, 85 Tenn. 165.

Sufficiency of Plea. — A return that the officer was unable to find the president of a defendant corporation is not put in issue by an allegation in a plea in abatement that the president resided and was in the county; *non constat*, he may have been hid away where he could not have been found by any reasonable effort, and that, too, for the express purpose of avoiding service, and the issue tendered by such a plea is immaterial. In such a case the plea should not be stricken from the files,

in abatement is the exclusive remedy, and a motion to quash or set aside a return is improper except for defects appearing on the face thereof.¹ But in other cases a motion to quash or set aside a return, upon affidavit, has been held to be the proper remedy for the purpose of contradicting the return or showing no service.²

though open to a demurrer, but the action of the court in striking it from the files is not prejudicial, and is not sufficient to cause a reversal. *Chicago Sectional Electric Underground Co. v. Congdon Brake Shoe Mfg. Co.*, 111 Ill. 309.

In *Law v. Hall*, 2 Root (Conn.) 171, it was held that an absconding debtor could not plead in abatement that the person with whom the copy was left was not his agent, and that an officer's return must be traversed or it will be admitted to be true.

Plea Must Be Verified.—A plea in abatement attacking an officer's return must be verified by affidavit. *Ryan v. Lander*, 89 Ill. 554.

1. *Mayfield v. Barnard*, 43 Miss. 270; *Union Nat. Bank v. Centreville First Nat. Bank*, 90 Ill. 56; *Ryan v. Lander*, 89 Ill. 554; *Greer v. Young*, 120 Ill. 184; *Montana Columbian Club v. Ketcham*, 54 Ill. App. 334.

Defective Service.—Where a return upon a summons sufficiently shows actual service an objection that the service was defective can be raised only by plea in abatement. *Barksdale v. Neal*, 16 Gratt. (Va.) 314.

That the agent of a corporation returned to have been served for the corporation is not the local agent of the corporation upon whom service can be made must be put at issue by a sworn plea in abatement, and the question cannot be raised on motion. *Galveston, etc., R. Co. v. Gage*, 63 Tex. 568; *Mineral Point R. Co. v. Keep*, 22 Ill. 16.

2. *Kansas*.—*Bond v. Wilson*, 8 Kan. 228; *Ingraham v. McGraw*, 3 Kan. 521, wherein a motion was made to set aside a return showing service by leaving a copy at the defendant's usual place of residence, upon the ground that the place at which the copy was said to have been left was not the defendant's usual place of residence, as he resided at another place out of the county. It was said that the question whether or not an officer's return can be contradicted did not arise upon this motion, but that the real residence of the defendant was a collateral fact

about which there might be a controversy without calling in question the proof of the officer's return.

Kentucky.—*Barbour v. Newkirk*, 83 Ky. 529. See also *Newport News, etc., R. Co. v. Thomas*, 96 Ky. 613.

Michigan.—*Lane v. Jones*, 94 Mich. 540; *Michels v. Stork*, 52 Mich. 263, decided upon the principle that had the suit been against the officer for a false return the plaintiff would have been at liberty to show the falsity of the return by any evidence fairly tending to show it.

New York.—It was said in this state that the return of personal service cannot be assailed by a plea in the same cause nor in collateral proceedings; that this rule is perfectly just and wholesome and properly understood and applied; but that if process is defectively served or not served at all, the defendant cannot come into court and by plea or answer set up such defect or want of service to defeat the action. The issue to be joined and tried relates to the merits and not to the practice in the suit; but he may come in and by affidavit show the error and ask a dismissal of the proceedings. *Waring v. McKinley*, 62 Barb. (N. Y.) 620. In *Wheeler v. New York, etc., R. Co.*, 24 Barb. (N. Y.) 414, wherein the return upon a summons showed service upon one as freight agent of the defendant corporation, no person having been designated by the defendant upon whom process might be served in the county according to the provisions of the statute, and it was held that the defendant might show by affidavit, on a motion to quash the summons and dismiss the suit, that one of the directors of the company at the time of issuing the summons resided in the county. *Wheeler, etc., Mfg. Co. v. McLaughlin*, (Supm. Ct. Gen. T.) 8 N. Y. Supp. 95, wherein a motion to dismiss was held to be proper when based upon the ground that the summons had never been served upon the defendant though the officer's return showed personal service. See also *Boynton v. Keeseville*

b. DEFECTS APPARENT ON FACE OF RETURN. — A motion to quash or set aside a return is an appropriate remedy to reach defects which are apparent upon the face of the return.¹

c. OBJECTIONS IN LIMINE. — An objection to a return, whether made by a motion to quash or by a plea in abatement, must be taken *in limine*,² as by appearing to the action and pleading to the merits all such objections are waived.³ This rule,

Electric Light, etc., Co., (County Ct.) 5 Misc. (N. Y.) 118, *disapproving* Hubbard v. Chapin, (County Ct.) 28 How. Pr. (N. Y.) 407.

Ohio. — Service of an original summons will be set aside on motion if served on a wrong person or if the copy is not left at the right place. The existence of any fact showing that a service is not correct may be set up to vacate it. The motion should state the grounds upon which the party relies as showing the service bad. Grady v. Gosline, 48 Ohio St. 665.

Pennsylvania. — Where the return does not show the character of the agent of a foreign corporation upon whom service is returned to have been made, a rule to show cause why the service should not be set aside is proper, and upon such rule evidence may be admitted to show that the agent served was not such an agent as is authorized to receive service for the corporation. Fulton v. Commercial Travelers' Mut. Acc. Assoc., 172 Pa. St. 117; Hagerman v. Empire Slate Co., 97 Pa. St. 534; Bragdon v. Perkins-Campbell Co., 19 Pa. Co. Ct. 305.

After a Decree a motion to quash a summons is not proper. Baldwin v. Burt, 54 Neb. 287.

Return on Execution — Nulla Bona. — Where an officer made a return of *nulla bona* upon an execution and thereafter levied upon lands and tenements, upon a rule to show cause why the return should not be quashed it was held that under the practice settled in *Delaware* the defendant may, at the return term of the writ, move to quash the return upon the ground that it was false and that he had goods and chattels which were liable to be taken in execution, as under the statute his land could not be taken in execution without his consent until his goods were exhausted. Voshell v. Cavender, (Del. 1897) 39 Atl. Rep. 990. And see Albany City Bank v. Dorr, Walk. (Mich.) 317; Ripley v. Evans, 87 Mich. 218.

In Doe v. Kollock, 3 Houst. (Del.)

326, the defendant in an action in ejectment claimed title under a sheriff's deed. The *fi. fa.* was returned *nulla bona* and levied on lands. The plaintiff's contention was that the levy under the *fi. fa.* was void, for the reason, *inter alia*, that it did not include all of the land of the defendant in the writ. It was held that the objection came too late, though it might have been taken at the return term of the levy, and at that term the inquisition and condemnation would have been set aside upon its being shown to the court that all the lands had not been levied upon. See generally article EXECUTIONS AGAINST PROPERTY, vol. 8, p. 303.

When an Execution Has Been Satisfied, but the officer returns it unsatisfied, it is held that the judgment creditor may move to quash the return and compel a return in accordance with the fact. Matter of Dawson, (Supm. Ct. Gen. T.) 20 Abb. N. Cas. (N. Y.) 188.

1. Smith v. Hooton, 3 Pa. Dist. 250; U. S. v. American Bell Telephone Co., 29 Fed. Rep. 17.

The Process Itself Will Not Be Set Aside for a defective return; only the return will be set aside. Winrow v. Raymond, 4 Pa. St. 501; Street v. Keim, 4 Kulp (Pa.) 290; Noleman v. Weil, 72 Ill. 502.

2. **In the Absence of a Motion to Quash** the return the court will take no notice of the want of formality. Brown v. Brown, 10 Neb. 349.

3. See article APPEARANCE, vol. 2, p. 588; JURISDICTION, vol. 12, p. 114. See also Greer v. Young, 120 Ill. 184; Winchester v. Cox, 3 Greene (Iowa) 575; Phillebart v. Evans, 25 Mo. 323; State v. Bacon Club, 44 Mo. App. 86; Spencer v. Medder, 5 Mo. 458; Atwood v. Reyburn, 5 Mo. 533; Delinger v. Higgins, 26 Mo. 180; Murat v. Hutchinson, 16 N. J. L. 46; Cook v. Hendrickson, 2 N. J. L. 323; Shinn v. Earnest, 2 N. J. L. 144; Layton v. Cooper, 2 N. J. L. 59; Stediford v. Ferris, 4 N. J. L. 120.

however, must be considered in connection with the preceding section treating of the motion to set aside judgments by default.¹

9. Traverse — Statutory Practice in Georgia. — In Georgia it is expressly provided by statute that an official return may be contradicted, and the remedy prescribed is by traverse,² which must be filed within the time prescribed by statute,³ and to which

Appearance in Progress of Cause. — Where the record in a partition suit shows an appearance at the time when the report of sale was acted upon by the court, objections to the return of the summons are waived by such appearance. *McCarthy v. McCarthy*, 66 Ind. 132.

Plea to Merits Before Action on Motion to Quash. — If pending a motion to quash a return on the summons the defendant pleads, the motion is waived. *Newport News, etc., Co. v. Thomas*, 96 Ky. 613.

On Appeal. — It is too late to raise an objection to a return for the first time on appeal. *Martin v. Godwin*, 34 Ark. 682; *Brown v. Brown*, 10 Neb. 349; *Cunningham v. Mitchell*, 4 Rand. (Va.) 189; *Shenandoah Valley R. Co. v. Griffith*, 76 Va. 913. See also *Rose v. Peyton*, 2 Bibb (Ky.) 8.

Amendable Defect Not Reversible. — Under a statute providing that there shall be no reversal for an amendable defect in a return, a refusal to set aside a defective return will not be reversible where the cause is properly determined on the merits. *Supreme Council, etc. v. Boyle*, 10 Ind. App. 301.

1. See *supra*, VII. 6. *Motion or Action to Set Aside Default Judgments.*

Appearance After Reversal. — If a judgment is reversed on account of a defective return, another summons is not necessary, as the prosecution of the writ of error is a sufficient appearance. *Bustamente v. Bescher*, 43 Miss. 172.

2. *Sanford v. Bates*, 99 Ga. 145; *Harris v. Webb*, 101 Ga. 84; *Dozier v. Lamb*, 59 Ga. 462; *Davant v. Carlton*, 53 Ga. 491; *Elder v. Cozart*, 59 Ga. 199.

In the Absence of a Traverse the return is conclusive evidence. *Sanford v. Bates*, 99 Ga. 145; *Davant v. Carlton*, 53 Ga. 489; *Elder v. Cozart*, 59 Ga. 199.

But it is held that a return of service of process which bears date after such return need not be traversed, as such return is not evidence, and the defendant may prove that he was not served without traversing the return, even after the death of the officer. *Keaton v. Moore*, 59 Ga. 553.

Return by United States Marshal. — In *Sindall v. Thacker*, 56 Ga. 52, it was held that where a return by a United States marshal is introduced in a state court, it cannot be contradicted. At common law it would be conclusive, and could not be attacked at all; and under the statute providing for traverse of returns, it could be attacked only in the court which rendered the judgment, and on making the marshal a party to the proceeding.

Final Process. — But the returns of sheriffs and other levying officers upon final process in their hands are held to be still governed by the law as it stood before the code was adopted. As long as the entry of a sheriff reciting a sale at an amount more than that due on the execution stands upon the records unimpeached and unchallenged, such entry is conclusive upon the plaintiff in execution, and if the entry is false the officer making it is liable in damages to any one injured thereby, or if it is made fraudulently or collusively it may be attacked and set aside at the instance of any one who is the victim of such fraud or collusion. *Jinks v. American Mortg. Co.*, 102 Ga. 694. But it appears that the statute relating to the traverse of the official return applies to a final as well as to original process. *Davant v. Carlton*, 53 Ga. 491; *Sprinz v. Frank*, 81 Ga. 162. Under an earlier statute, however, making returns which were made under or by virtue of a rule or order of court, and under oath, traversable, it was held that a return on a ca. sa. or fi. fa. was not traversable. *Higgs v. Huson*, 8 Ga. 321.

3. *Harris v. Webb*, 101 Ga. 84, holding that a traverse should allege when the party first received notice of the return, and that he filed the traverse at the first term thereafter, and it should be shown upon the trial of the issues when the party received notice of the return, at least where it is not alleged in the traverse. And in the absence of such allegation a verdict sustaining a traverse without proof of the time when the party received notice of the

proceeding the officer making the return is a necessary party.¹

Return Conclusive in Any Other Attack.—When the question of service is raised otherwise than by this statutory traverse the return of the officer is conclusive.²

10. Unauthorized Return and Return of Facts Not Within Officer's Knowledge.—If the process is not returnable or is such that the officer is not required to certify his doings upon it, his return will not be evidence.³ So, if the officer includes in his return facts which he is not authorized or required to certify, the return will not be evidence of such facts; and if the facts returned are such as the officer must learn by inquiry and cannot certify from personal knowledge, his return thereof is not conclusive.⁴

return and that the traverse was filed at the first term thereafter will be set aside. See also *Dozier v. Lamb*, 59 Ga. 462; *Parker v. Rosenheim*, 97 Ga. 769; *Elder v. Cozart*, 59 Ga. 199.

1. *Southern R. Co. v. Cook*, 106 Ga. 450; *Sindall v. Thacker*, 56 Ga. 51; *Sanford v. Bates*, 99 Ga. 145.

In *Sprinz v. Frank*, 81 Ga. 162, it was held that when it becomes necessary to traverse a return of *nulla bona* the officer need not be made a party.

2. *O'Bryan v. Calhoun*, 68 Ga. 215, wherein it was held that an affidavit of illegality might raise the question of service, but if the party rested alone upon such affidavit and there appeared in evidence a proper return of service by the officer, such a return would be conclusive upon the defendant.

So, on a motion to set aside a judgment upon the ground that the defendant had not been served, it was held that the plaintiff could object to any traverse after the time had expired for making it and that the entry of service in such a case was conclusive. *Elder v. Cozart*, 59 Ga. 199.

3. *Utica City Bank v. Buell*, (Supm. Ct.) 9 Abb. Pr. (N. Y.) 385, holding that a certificate of service of the order in supplementary proceedings is not proof of service.

Acts Beyond Territorial Jurisdiction.—Proof by certificate of the sheriff of Westchester county of a service of summons in the city of New York is no evidence of the service, because the sheriff of Westchester county has no authority to do official acts out of his county. *Farmers' L. & T. Co. v. Dickson*, (Supm. Ct.) 9 Abb. Pr. (N. Y.) 61.

4. *California*.—*Mitchell v. Hockett*, 25 Cal. 538.

Illinois.—See also *Mineral Point R. Co. v. Keep*, 22 Ill. 15.

Indiana.—*Splahn v. Gillespie*, 48 Ind. 397.

Iowa.—*Charles City Plow, etc., Co. v. Jones*, 71 Iowa 234.

Kansas.—*McNeill v. Edie*, 24 Kan. 108; *Jones v. Marshall*, 3 Kan. App. 529.

Kentucky.—*Brown v. Com.*, 6 T. B. Mon. (Ky.) 621; *Foster v. Fletcher*, 7 T. B. Mon. (Ky.) 536; *Dupuy v. Johnson*, 1 Bibb (Ky.) 562; *Walker v. McKnight*, 15 B. Mon. (Ky.) 478; *Bruce v. Dyall*, 5 T. B. Mon. (Ky.) 126.

Massachusetts.—*Arnold v. Tourtellot*, 13 Pick. (Mass.) 172.

Minnesota.—*Crosby v. Farmer*, 39 Minn. 307.

New Hampshire.—*Brown v. Davis*, 9 N. H. 76; *Lewis v. Blair*, 1 N. H. 68.

Ohio.—*Root v. Columbus, etc., R. Co.*, 45 Ohio St. 222.

Oregon.—*Barr v. Combs*, 29 Oregon 399.

Rhode Island.—*Sheldon v. Comstock*, 3 R. I. 84.

Tennessee.—*Hutton v. Campbell*, 10 Lea (Tenn.) 173.

Texas.—*Pool v. Wedemeyer*, 56 Tex. 287.

Vermont.—*Johnson v. Murphy*, 42 Vt. 645.

Virginia.—*Shannon v. McMullin*, 25 Gratt. (Va.) 211.

Leaving Copy at "Usual Place of Residence."—The common-law rule by which official returns were held to be conclusive as between the parties to the action has been modified by many of the courts, especially as to those jurisdictional facts not supposed to be within the officer's own knowledge; and to this class of facts belongs the "usual place of residence" of a defendant, the only place where service of the summons can be effectuated by leaving a copy with another than the

Prima Facie Evidence. — But a return of facts which are not within the personal knowledge of the officer is not for this reason deprived of its force as *prima facie* evidence of such facts, for

defendant in person. *Walker v. Lutz*, 14 Neb. 274; *Walker v. Stevens*, 52 Neb. 653. To the same point see *Bond v. Wilson*, 8 Kan. 228; *Wendell v. Mugridge*, 19 N. H. 112; *Stouffer v. Beetem*, 18 Pa. Co. Ct. 605; *Johnson v. Aylesworth*, 3 Pittsb. (Pa.) 237; *Stedman v. Bradford*, 3 Phila. (Pa.) 258, 15 Leg. Int. (Pa.) 357.

In *Indiana* it is held that where the facts stated in the return are such as the law requires the officer to ascertain, his return showing a service as the law requires is conclusive in a collateral proceeding whether the facts are stated from personal knowledge or otherwise. *Splahn v. Gillespie*, 48 Ind. 397; *Cully v. Shirk*, 131 Ind. 76; *Joseph v. New Albany Steam Forge, etc., Co.*, 53 Fed. Rep. 180. And such a return has been held conclusive even upon a special appearance for the purpose of objecting to the jurisdiction. *Johnston Harvester Co. v. Bartley*, 81 Ind. 406.

In an action on a recognizance it was held that the defendant could not contradict the statement of the officer's return in the original suit that the notice was left at the debtor's last and usual place of abode, by showing that the debtor's last and usual place of abode was different from that set forth in the return. *Stewart v. Griswold*, 134 Mass. 391.

Not Contradiction of Return. — In *Lapiece v. Hughes*, 24 Miss. 75, a bill was filed to enjoin a judgment and for a new trial at law, alleging that the complainant in the bill had never received notice and that he was not served with process in the action at law. It was held that, the return of the officer upon the process in the action at law being a mere general return of "executed," it was proper to show that the service was made by leaving a copy of the writ at the complainant's place of business in his absence, and that he did not know of the pendency of the suit or the service of the writ until it was too late to defend or move for a new trial at law. By showing these facts the return of the officer is not contradicted, but on the trial is admitted to be true; for though true, the notice of the pendency of the suit which the law intended the plain-

tiff to have might not have been received, notwithstanding the return. "executed."

Service on Agent. — A return of service upon a corporation by serving a particular person as an agent of a certain company is impeachable as to the character of the agent. *Great West Min. Co. v. Woodmas of Alston Min. Co.*, 12 Colo. 46; *Schnack v. Boyd*, (Kan. 1898) 52 Pac. Rep. 874; *Chambers v. King Wrought Iron Bridge Manufactory*, 16 Kan. 270; *McNeill v. Edie*, 24 Kan. 108; *Galveston, etc., R. Co. v. Gage*, 63 Tex. 568; *Carr v. Commercial Bank*, 16 Wis. 50; *Forrest v. Union Pac. R. Co.*, 47 Fed. Rep. 1. But see *State v. O'Neill*, 4 Mo. App. 221; *Heath v. Missouri, etc., R. Co.*, 83 Mo. 624, citing *Magrew v. Foster*, 54 Mo. 258.

Where such a return is met by a plea in abatement objecting to the jurisdiction of the court over the person of the defendant, it seems that the contradiction is permitted, not upon the theory that the matter certified by the officer is not within his personal knowledge, but upon the principle that the officer's return is only *prima facie* evidence and may be attacked because the question involved is a want of jurisdiction. *Union Nat. Bank v. Centreville First Nat. Bank*, 90 Ill. 56.

An Immaterial Part of a sheriff's return on an execution may be contradicted by parol evidence. *Goodtitle v. Cummins*, 8 Blackf. (Ind.) 179.

Appraisement. — A return on an execution is the best evidence of what property was levied on, but the appraisement attached to the return is not evidence of the value of such property. *Flannigan v. Althouse*, 56 Iowa 513; *Coan v. Elliott*, 101 Ind. 277.

Execution "Satisfied" — Evidence of Payment. — A return on an execution that it was satisfied and that the money had been paid over to the plaintiff has been held not to be evidence of the fact of such payment. *Dupuy v. Johnson*, 1 Bibb (Ky.) 562; *Walker v. McKnight*, 15 B. Mon. (Ky.) 478; *Clossen v. Whitney*, 39 Minn. 50. But in *Morgan v. Hart*, 9 B. Mon. (Ky.) 81, a return on an execution that it was "satisfied" and that the money had been paid over

even in this case, in the absence of impeaching testimony, the return is sufficient evidence of the facts certified.¹

11. Matters Not Certified — Incomplete Return. — A return is not conclusive as to matters upon which it is silent.² And to clothe a return with the conclusive effect imputed to it by law, it is held that the facts which constitute lawful service must appear in the return with all reasonable certainty, otherwise it will be

to the plaintiff was held to be sufficient evidence that the plaintiff received the money, upon a rule to restore it to the defendant, though a return of "satisfied" without such statement of payment over to the plaintiff was held not to be sufficient evidence of such payment.

Part of Return Unauthorized. — If only a part of the return is such as the officer is not authorized to make, the part which he is authorized to make will be evidence of the facts stated therein. *Shannon v. McMullin*, 25 Gratt. (Va.) 211.

Return After Expiration of Term of Office. — Where the sheriff returned a levy made before he went out of office and a sale under the levy after he had gone out of office, it was held that the return was *prima facie* evidence of both the levy and the sale, but was subject to be impeached and falsified by extrinsic testimony. *McBurnie v. Overstreet*, 8 B. Mon. (Ky.) 302.

Unauthorized Insertion After Return. — It is held that evidence is admissible to show that a date inserted by the officer in his return of an execution was so inserted after making the return. *Henderson v. Henderson*, 133 Pa. St. 399.

1. Usual Place of Residence. — A return that a summons was served by leaving it at the usual place of residence of the defendant is *prima facie* evidence of such fact. *Walker v. Stevens*, 52 Neb. 653.

In *Pennsylvania* a return showing service on a limited partnership by delivering a copy of the summons to a "superintendent and agent" of the company was held to be conclusive. *MacGeorge v. Harrison Chemical Mfg. Co.*, 141 Pa. St. 575.

Service on Agent. — A return that persons served were certain officers of the defendant company is *prima facie* evidence of this fact, and in the absence of any showing to the contrary a judgment against the defendant will be good. *Rowe v. Table Mountain Water*

Co., 10 Cal. 441; *Meridian v. Trussell*, 52 Miss. 712; *San Antonio, etc., R. Co. v. Wells*, 3 Tex. Civ. App. 307; *Webster Wagon Co. v. Home Ins. Co.*, 27 W. Va. 314. See also *Washington, etc., R. Co. v. Brown*, 17 Wall. (U. S.) 445.

Contra. — In some cases it has been held that a return of service on a particular officer of a corporation is not even *prima facie* evidence that such person was the officer designated, but in order to justify a judgment by default there must be proof *aliunde* of the character of the agency of the person served. *St. John v. Tombeckbee Bank*, 3 Stew. (Ala.) 146; *Oxford Iron Co. v. Spradley*, 42 Ala. 24; *Planters', etc., Bank v. Walker*, Minor (Ala.) 391; *Montgomery, etc., R. Co. v. Hartwell*, 43 Ala. 508; *First Municipality v. Christ Church*, 3 La. Ann. 453; *Jacobs v. Sartorius*, 3 La. Ann. 9.

2. Property Taken under Attachment. — In an action for malicious prosecution in causing the plaintiff to be arrested on a charge of larceny, the alleged larceny consisting in taking from the possession of an officer goods which he had attached on a writ in favor of the defendant and against the plaintiff, it was held that the defendant might show by oral evidence that the officer had in fact attached the goods though they were not enumerated in his return. *Whiteside v. Lowney*, 171 Mass. 431. So in an action on an attachment bond. *Hensley v. Rose*, 76 Ala. 373.

Time — Hour of Service. — Where an officer's return showed service of a notice which fixed "Monday, sixth day of July current, by twelve o'clock noon," as the time when a tenant was required to vacate certain premises, it was held, in an action on the statute to recover possession of the tenement, that, as it was important for the plaintiff to show that the writ was not sued out and served before the time mentioned in the notice, it was competent for the officer to certify that he served

shorn of the conclusiveness which distinguishes official returns.¹

12. Excuse for Failure to Execute. — An officer cannot make his return evidence of anything by way of excusing him for not having performed the duty required.²

13. Effect of Return as Against Strangers. — The rule as to the conclusiveness of an officer's return does not apply to strangers, and one who is not a party or privy to the proceeding in which the return is made is not concluded by it from showing the real fact.³ So where the rights of third persons have intervened a

it in the evening of that day. *Wardell v. Etter*, 143 Mass. 19. See also *Garity v. Gigie*, 130 Mass. 184.

1. *Heath v. Missouri, etc., R. Co.*, 83 Mo. 617; *Watson v. Bondurant*, 21 Wall. (U. S.) 123.

So in cases holding that a return is conclusive between the parties in the action, the return must be sufficient and complete in itself, under the statute, to confer jurisdiction. *Carter v. Shindel*, 7 Pa. Dist. 308.

"Satisfied." — A return on an execution of "satisfied," without more, is not evidence that the money received in satisfaction was paid over to the plaintiff on a rule to restore it to the defendant. *Morgan v. Hart*, 9 B. Mon. (Ky.) 81.

2. *Splahn v. Gillespie*, 48 Ind. 397; *Bruce v. Dyal*, 5 T. B. Mon. (Ky.) 125; *Pollard v. Rogers*, 1 Bibb (Ky.) 473; *Holderman v. Brasfield*, Litt. Sel. Cas. (Ky.) 271; *Browning v. Hanford*, 5 Den. (N. Y.) 586; *Hutton v. Campbell*, 10 Lea (Tenn.) 173; *Shannon v. McMullin*, 25 Gratt. (Va.) 211.

Thus where a bill was filed by a surety to enjoin an execution upon the ground that the surety was discharged by a release of property of the principal after a levy, the court held that the return upon the execution that it had been held up and the property not sold by direction of the person entitled to the proceeds of the judgment was not evidence against such person, who was, of course, in privy with the judgment creditor. *Shannon v. McMullin*, 25 Gratt. (Va.) 211; *Hutton v. Campbell*, 10 Lea (Tenn.) 174.

3. *Connecticut*. — *Grant v. Shaw*, 1 Root (Conn.) 526.

Illinois. — *Owens v. Ranstead*, 22 Ill. 161.

Kentucky. — *Caldwells v. Harlan*, 3 T. B. Mon. (Ky.) 351; *Gray v. Gray*, 3 Litt. (Ky.) 466.

Massachusetts. — *Bott v. Burnell*, 9

Mass. 96; *American Bank v. Doolittle*, 14 Pick. (Mass.) 123.

Michigan. — *Michles v. Stork*, 52 Mich. 260; *Nall v. Granger*, 8 Mich. 450.

Minnesota. — *Stewart v. Duncan*, 47 Minn. 285.

Missouri. — *Burgert v. Borchert*, 59 Mo. 80; *Howell County v. Wheeler*, 108 Mo. 294.

New Hampshire. — *Brown v. Davis*, 9 N. H. 76.

Ohio. — *Root v. Columbus, etc., R. Co.*, 45 Ohio St. 222; *Phillips v. Elwell*, 14 Ohio St. 240.

Tennessee. — *Hutton v. Campbell*, 10 Lea (Tenn.) 170; *Mitchell v. Lipe*, 8 Yerg. (Tenn.) 179; *Bates v. Fuller*, 8 Lea (Tenn.) 644.

Texas. — *Holt v. Hunt*, 18 Tex. Civ. App. 363.

Wisconsin. — *Toepfer v. Lampert*, (Wis. 1899) 78 N. W. Rep. 779.

In Scire Facias Against Sureties on Bail Bond Return on Capias. — Under a code provision that if a party who has been held for bail to answer a charge of felony is arrested under a capias his second arrest shall operate as a release of his sureties, it is held that in a scire facias upon a bail bond the state may contradict the sheriff's return on the capias. The return on the capias is not a process in the scire facias on the original bond, but is independent, extraneous matter, upon the truth of which an issue can and rightfully should be found. *Gary v. State*, 11 Tex. App. 527. See also *Howell County v. Wheeler*, 108 Mo. 294.

Purchaser under Execution. — The purchaser of land under an execution may be permitted to vary the sheriff's return. *Holmes v. Buckner*, 67 Tex. 107.

In litigation between the purchaser under an execution and a stranger to the writ, a grantee of the defendant in the writ before any lien had attached,

return cannot be contradicted by a party to the action in which the judgment was rendered, though the return is false in fact.¹

14. Effect of Return as Against Officer — *a. CONTRADICTION IN FAVOR OF OFFICER.* — It is the general rule that when an officer's return comes in question in a proceeding wherein rights may be based thereon as against the officer, he may not be heard to contradict it, but shall be concluded by it.²

parol evidence was admitted to show that the recital in the sheriff's return was a mistake. *King v. Russell*, 40 Tex. 132.

In *New York* it was held that the objection that the defendant in a foreclosure suit had not been served with summons could not be raised by a purchaser at the foreclosure sale in an action to compel him to complete his purchase. *O'Connor v. Felix*, 87 Hun (N. Y.) 180, 147 N. Y. 614.

Interpleader. — Where one interpleads in an attachment suit it is held that the return of the sheriff showing the possession of the property at the time of the levy in a particular person is not conclusive upon the interpleader. *Burgert v. Borchert*, 59 Mo. 80.

1. *Rivard v. Gardner*, 39 Ill. 125; *Jones v. Neely*, 82 Ill. 71; *Kinney v. Knoebel*, 47 Ill. 417; *Brown v. Brown*, 59 Ill. 315; *Luton v. Sharp*, 94 Mich. 202; *Levan v. Millholland*, 114 Pa. St. 49; *Rutledge v. Mayfield*, (Tex. Civ. App. 1894) 26 S. W. Rep. 910. See also *Knutson v. Davies*, 51 Minn. 363; *supra*, VI. 2. *Limitation of General Rule* — *Rights of Innocent Third Persons.*

Execution Creditor as Purchaser. — But where the execution creditor becomes the purchaser at the execution sale, and where one takes an assignment of the sheriff's certificate in such a case with knowledge that the judgment was a fraud upon the rights of the complainant and that it was recovered in a suit in which the latter was not served with process and did not appear either in person or by attorney, the position of the purchaser is no better than that of the execution creditor, and he stands charged with notice of all defects in the record. *Jones v. Neely*, 82 Ill. 71.

In *Tennessee* it was held that a return was not conclusive against a judgment debtor as between him and a purchaser, and that a sheriff's return that land sold under an execution was advertised according to law might be impeached in an action of ejectment by showing that the land was either not

advertised at all or not as required by law, the statute in that state having the effect of making such a case an exception to the general rule as to the conclusiveness of the officer's return. *Loyd v. Anglin*, 7 Yerg. (Tenn.) 428.

But in *Pratt v. Phillips*, 1 Sneed (Tenn.) 547, it was held that parol evidence was not admissible to contradict an officer's return as to the date of levy after the official return had become the foundation of the title acquired under the levy and sale, for the purpose of either impeaching or sustaining the validity of the purchaser's title.

2. *Major v. People*, 40 Ill. App. 323; *Splahn v. Gillespie*, 48 Ind. 397; *State v. Ruff*, 6 Ind. App. 38; *Lines v. State*, 6 Blackf. (Ind.) 464; *Butler v. State*, 20 Ind. 169; *Purinton v. Loring*, 7 Mass. 388; *Tullis v. Brawley*, 3 Minn. 277; *State v. Penner*, 27 Minn. 269; *Boone County v. Lowry*, 9 Mo. 24; *Hustick v. Allen*, 1 N. J. L. 195; *Henry v. Stone*, 2 Rand. (Va.) 455. But see *Brydges v. Walford*, 6 M. & S. 42, wherein, in an action against a sheriff for not selling goods on a *venditioni exponas*, the court permitted him to show that the defendant had become a bankrupt before the judgment and that the plaintiffs knew it, although he had returned on the *fi. fa.* the levy and that part of the goods remained on hand for want of bidders.

Amendment Proper Remedy. — If the return is erroneous in respect to any matter of fact therein stated, the officer's remedy is to have it amended in accordance with the facts. *State v. Penner*, 27 Minn. 269.

Misfeasance of Deputy. — In an action against a sheriff for the misfeasance of his deputy the sheriff can give nothing in evidence which the deputy could not give were he the defendant, and evidence is not admissible to falsify or contradict the deputy's return. *Gardner v. Hosmer*, 6 Mass. 325. But compare *Jones v. Churchill*, 4 J. J. Marsh. (Ky.) 45, wherein the return was made by a deputy.

Limitation of Rule. — But it has been held that this rule should be confined to cases where the party against whom the return is sought to be impeached derives some interest from or under it; otherwise there is no reason for shutting out the truth of the matter.¹

Conclusive Without Other Proof. — An indorsement upon an execution of the day and hour of its receipt was held to be conclusive evidence of the fact that the execution was in the officer's possession at that time, and in an action on the case for a false return he could not compel the plaintiff to prove at the trial the identity of the execution, either by witnesses or by collateral testimony. *Williams v. Lowndes*, 1 Hall (N. Y.) 579.

Contradiction Without Objection — Further Examination. — Where the officer gave testimony in contradiction of his return without objection, it was held that he might be permitted to be further examined in explanation of such testimony. *State v. Caldwell*, 115 Ind. 6.

Where the Return Is Lost, parol testimony of the contents thereof may be shown. *Ferguson v. Tutt*, 8 Kan. 370. See also *supra*, VII. 1. *b. Lost Return*.

Excess in Officer's Hands as Shown by Return. — In an action against a sheriff to recover an excess shown by his return to have been received by him, he cannot set up any defense contradictory of such return. *Harvey v. Foster*, 64 Cal. 296; *State v. Ruff*, 6 Ind. App. 38.

1. *Nelson, C. J.*, in *Baker v. M'Duffie*, 23 Wend. (N. Y.) 291. See also *Baker v. Seavey*, 163 Mass. 522; *Lewis v. Blair*, 1 N. H. 68; *Halcomb v. Stubblefield*, 76 Tex. 310.

Line of Demarcation. — The limits within which the rule as to the conclusiveness of an officer's return is applicable are said to be marked by the reason and object of the rule, which is that the return cannot be called in question for the purpose of invalidating the sheriff's proceedings or defeating any rights acquired by means of them. *Lewis v. Blair*, 1 N. H. 68.

To Illustrate This Proposition the example is given of a return of an attachment without removing the property, leaving it in the hands of the debtor at his request, in which case, it was said, the attachment might be good for some purposes, as it would render the officer liable to the creditor and would authorize him afterwards to take possession

of the property, and therefore evidence to show that the officer did not in fact remove the property would not expressly contradict the return. And so it was said that in an action for assault and battery against an officer, a return of an arrest would not be conclusive evidence against the officer, because the debtor might have submitted to the arrest without the use of force, and the officer would be allowed to prove this fact in his defense. *Boynton v. Willard*, 10 Pick. (Mass.) 169.

So when it is sought to charge a sheriff as a trespasser in levying an execution, he may show title of the defendant in the execution in his hands, or want of ownership or fraudulent claim of the party seeking to charge him. *Bates v. Fuller*, 8 Lea (Tenn.) 644; *Stimson v. Farnham*, L. R. 7 Q. B. 175.

In a suit upon an official bond of an officer assigning as a breach that the defendant levied on certain property of the defendant in the execution, but failed and neglected to make sale of the property, it was held that the officer could not prove that the property did not belong to the defendant in the execution at the time of the levy. *Boone County v. Lowry*, 9 Mo. 24. In this case the court refused to follow *Fuller v. Holden*, 4 Mass. 498, wherein the action was on the case for damages alleged to have been sustained by reason of neglect on the part of the officer in failing to levy an execution upon property previously attached by him, the officer returning to the official process that the property attached had been rescued from his possession and upon the trial offering to prove that the property so attached was in fact the property of the persons who had rescued it. The action of the trial court in rejecting this testimony was reversed. But in *Decker v. Armstrong*, 87 Mo. 316, in which case the court cited *Fuller v. Holden*, 4 Mass. 498, *supra*, it was held that in an action against a sheriff for levying upon property claimed to have been exempt from execution the sheriff could contradict his return by answering and

b. CONTRADICTION AGAINST OFFICER. — As against the officer his return is not conclusive evidence of the facts therein stated, and it may be contradicted by extraneous testimony in order to charge him for a false return or for breach of duty.¹

Prima Facie. — In such a case the return is held to be merely *prima facie* evidence in the officer's favor, though to this extent a return which it is the duty of the officer to make is evidence for the officer as well as against him.² On the other hand, if the

denying the plaintiff's ownership and averring that when levied upon the property belonged to the plaintiff in the execution.

Between Sheriff and Execution Creditor as Purchaser. — If a sheriff sells property for a sum designated in his return and does not actually receive the money, but the execution creditor, who is the purchaser, receipts for the whole or a part of his bid as money, the sheriff will be allowed to prove the real facts in a contest between himself and the purchaser, especially where the return does not set forth a payment of the money. *Shotwell v. Hamblin*, 23 Miss. 156.

1. *Alabama.* — *Craven v. Higginbotham*, 83 Ala. 429; *Thorn v. Kemp*, 98 Ala. 417.

Indiana. — *Waymire v. State*, 80 Ind. 67; *Splahn v. Gillespie*, 48 Ind. 397; *Butler v. State*, 20 Ind. 169.

Kentucky. — *Chamberlin v. Brewer*, 3 Bush (Ky.) 564; *Taylor v. Com.*, 3 Bibb (Ky.) 356.

Maine. — *Nichols v. Patten*, 18 Me. 231.

Massachusetts. — *Bruce v. Holden*, 21 Pick. (Mass.) 187. See also *Gardner v. Hosmer*, 6 Mass. 325.

Missouri. — *State v. Finn*, 100 Mo. 429; *Perryman v. State*, 8 Mo. 208.

New Hampshire. — *Lucier v. Pierce*, 60 N. H. 13.

United States. — *Fife v. Bohlen*, 22 Fed. Rep. 878.

England. — *Gyfford v. Woodgate*, 11 East 297.

Thus in an action against an officer for a wrongful seizure of goods under an attachment, the plaintiff may show that other goods than those described in the return were seized. *Carpenter v. Scott*, 86 Iowa 563, wherein the court said that the action was not for the wrongful taking of what was seized under a writ, but for the wrongful taking of all the goods which were actually seized; *Craven v. Higginbotham*, 83 Ala. 429; *Thorn v. Kemp*, 98 Ala. 417.

No Cause of Action Shown Against Officer. — In an action by a judgment debtor against a judgment creditor to enforce a sale of real estate, it was held that while the sheriff was a party to the action, the complaint showed no cause of action against him, and the rule which governs in cases where the sheriff is sued for making a false return had no force. *Clark v. Shaw*, 79 Ind. 164.

The Sheriff's Administrator is in the same position as the sheriff with respect to the conclusiveness of a return made by the sheriff in his lifetime, and such a return is not conclusive evidence in favor of an administrator. *Winnebago County v. Brones*, 68 Iowa 682.

An Indictment Against an Officer for extortion in receiving fees for an intended execution of process is a direct attack on the validity of the officer's return of its due and proper execution, and the falsity of the return may be shown by extrinsic testimony. *Williams v. State*, 2 Sneed (Tenn.) 160.

2. *Williams v. Herndon*, 12 B. Mon. (Ky.) 485, *distinguishing* *First v. Miller*, 4 Bibb (Ky.) 311, where a part of the return was held incompetent to prove the facts stated in favor of the sheriff, in that this decision was evidently upon the ground that the sheriff was not required or authorized by law to return the particular fact, and not upon the ground that his return regularly made could not be used by him as evidence of a fact which he was required to certify; *Kendall v. White*, 13 Me. 245; *Bruce v. Holden*, 21 Pick. (Mass.) 187; *State v. Devitt*, 107 Mo. 573; *Miller v. Powers*, 117 N. Car. 218 [*citing* *Simpson v. Hiatt*, 13 Ired. L. (N. Car.) 470; *Loftin v. Huggins*, 2 Dev. L. (N. Car.) 10; *State v. Vick*, 3 Ired. L. (N. Car.) 491]; *Hyskill v. Givin*, 7 S. & R. (Pa.) 369; *McCully v. Malcom*, 9 Humph. (Tenn.) 194; *Stanton v. Hodges*, 6 Vt. 64.

Evidence of Amended Return. — In *Brown v. Com.*, 6 T. B. Mon. (Ky.)

return is of matter which the officer is not authorized by law to return, the return is not even *prima facie* evidence in his favor.¹

If the Return Is Silent upon matters which should have been stated therein, such matters cannot be supplied in favor of the officer by parol testimony.²

15. Unofficial Return. — A return of personal service made by a private person is open to contradiction by the defendant, and he is at liberty to show that no such service was made upon him.³

16. Sufficiency of Evidence to Impeach Return — *a.* IN GENERAL — CONVINCING TESTIMONY REQUIRED. — In whatever form the impeachment of a return is presented, it requires the clearest and most satisfactory evidence to overcome the statements thus made under the sanction of official oath and responsibility.⁴

62r, which was an action for an escape, it was held that, the plaintiff having read so much of the return as showed the capture and escape, the sheriff had a right to read the balance of the return, which stated a fresh pursuit, although this latter part of the return had been made by way of amendment, by leave of the court, after the original return.

Parol Testimony Independent of Return. — In an action of trover by an officer against a stranger for a chattel seized upon execution, the officer may prove the seizure by parol testimony and is not restricted to the return on the execution. *Hovey v. Lovell*, 9 Pick. (Mass.) 68.

Necessity to Support When Impeached. — Where an officer is sued for a breach of duty and it appears that he himself has admitted the falsity of his return, a finding that the recitals of the return are true, based upon no other evidence than the return itself, cannot be sustained. In such a case, the officer, in order to rebut the testimony impeaching his return, must offer some evidence either in explanation or denial of the admissions, or some independent proof of the truth of the return. *Raker v. Bucher*, 100 Cal. 216.

1. *First v. Miller*, 4 Bibb (Ky.) 311, holding that the officer's return that he had paid the amount of the execution to the plaintiff must be proved by the officer otherwise than by his return.

2. *Grant v. Shaw*, 1 Root (Conn.) 526. But see *Evans v. Davis*, 3 B. Mon. (Ky.) 346.

Where an Officer Attached Certain Personal Property, of which he removed a part, and was prevented by the defendant from removing the balance, and in

his return he described the property taken away, but made no mention of that which was not taken away, it was held in an action of trespass *de bonis asportatis* against another for taking the property not removed in such attachment that the officer's return could not be supplemented by parol evidence. *Sanford v. Pond*, 37 Conn. 591.

But in an Action Against the Purchaser claiming under the sheriff, it is held that the case would be different, as the purchaser would have no power over the officer's return and should be allowed to prove by other evidence the facts about which the return is silent. *Grant v. Shaw*, 1 Root (Conn.) 526.

3. *Peck v. Chambers*, 44 W. Va. 275, *distinguishing* *Stewart v. Stewart*, 27 W. Va. 167, which was an official return; *Campbell v. Wayne* Circuit Judge, 111 Mich. 247, holding that a writ of mandamus will lie to compel the trial court to set aside a default judgment on the sworn application of the defendant contradicting the return of a private person. But see *Allen v. McIntyre*, 56 Minn. 351.

4. *Alabama*. — *Paul v. Malone*, 87 Ala. 544.

California. — *People v. Dodge*, 104 Cal. 487.

Georgia. — *Davart v. Carlton*, 53 Ga. 491; *Denham v. Jones*, 96 Ga. 130.

Illinois. — *Davis v. Dresback*, 81 Ill. 393; *Allen v. Hickey*, 53 Ill. App. 437, 158 Ill. 362; *Callender v. Gates*, 45 Ill. App. 374; *Sullivan v. Niehoff*, 27 Ill. App. 421.

Indiana. — *Memphis, etc., Packet Co. v. Pikey*, 142 Ind. 304.

Iowa. — *Ketchum v. White*, 72 Iowa 193; *Wyland v. Frost*, 75 Iowa 209.

Kentucky. — *Jones v. Churchill*, 4 J.

b. SINGLE AFFIDAVIT — MERE DENIAL. — A single affidavit,¹ or the unsupported denial by the defendant of the service of process,² is not sufficient to overcome the verity of the official

J. Marsh. (Ky.) 45; Com. v. Jackson, 10 Bush (Ky.) 426.

Maryland. — Abell v. Simon, 49 Md. 318.

Michigan. — Detroit Free Press Co. v. Bagg, 78 Mich. 650.

Minnesota. — Gray v. Hays, 41 Minn. 12; Allen v. McIntyre, 56 Minn. 351; Jensen v. Crevier, 33 Minn. 372.

Mississippi. — Duncan v. Gerdine, 59 Miss. 550; Quarles v. Hiern, 70 Miss. 894.

Nebraska. — Connell v. Galligher, 36 Neb. 749; Wilson v. Shipman, 34 Neb. 573.

New York. — O'Connor v. Felix, 147 N. Y. 614; Dutton v. Smith, 23 N. Y. App. Div. 188; Szerlip v. Baier, (Supm. Ct. App. T.) 21 Misc. (N. Y.) 331; Wygant v. Brown, (Supm. Ct. Gen. T.) 9 N. Y. Supp. 372; Jacobs v. Zeltner, (C. Pl. Gen. T.) 24 Civ. Pro. (N. Y.) 45, 9 Misc. (N. Y.) 455.

Pennsylvania. — Bragdon v. Perkins-Campbell Co., 19 Pa. Co. Ct. 305.

Rhode Island. — Foster v. Berry, 14 R. I. 601.

Tennessee. — Hunt v. Childress, 5 Lea (Tenn.) 248.

Texas. — Randall v. Collins, 58 Tex. 231; Mayfield v. Schrier, 1 Tex. App. Civ. Cas., § 47.

Washington. — Johnson v. Gregory, 4 Wash. 109.

Issue for Jury. — Where, in an action on a judgment, the return as to service of process in the action in which the judgment was rendered is put in issue, the conflicting evidence of the officer and the parties should be submitted to the jury. Holliday v. Brown, 33 Neb. 657.

Refusal of Party to Testify. — Where, on a motion to set aside a judgment upon the ground that no personal service of summons was had on the defendant, a reference is ordered to ascertain the fact and the defendant's counsel is requested to call the defendant as a witness and declines to do so, and the process server is examined in support of the service, the referee is justified in finding that service was made. Smith v. Hickey, 25 N. Y. App. Div. 105.

1. Hunter v. Kirk, 4 Hawks (N. Car.) 277; Mason v. Miles, 63 N. Car. 564; Gatlin v. Dibrell, 74 Tex. 36; Wood v. Galveston, 76 Tex. 126.

The Mere Statement of an Attorney will not be taken to contradict a return of an officer that he served the defendant by delivering to him "a true copy of the summons, attached to a certified copy of the complaint in this action." Higley v. Pollock, 21 Nev. 198.

2. Hunter v. Stoneburner, 92 Ill. 79; Allen v. Hickey, 53 Ill. App. 441; Mace v. Mace, 24 N. Y. App. Div. 291; Sargeant v. Mead, (Supm. Ct. Gen. T.) 1 N. Y. Supp. 589; Harris v. McClanahan, 11 Lea (Tenn.) 181; Tatum v. Curtis, 9 Baxt. (Tenn.) 360; Posey v. Eaton, 9 Lea (Tenn.) 506; Henry v. Wilson, 9 Lea (Tenn.) 176; Driver v. Cobb, 1 Tenn. Ch. 490; U. S. v. Gayle, 45 Fed. Rep. 107. See also *supra*, VII. 1. b. *Lost Return*.

Recollection of Defendant. — That the defendant in the original process "has no recollection of ever having been cited to trial," together with a denial that any summons or other process was served upon him, is a denial according to recollection, and is not sufficient when opposed to the return of an officer showing service. Myers v. Hammond, 6 Baxt. (Tenn.) 61.

Certificate Without Affidavit. — In Campbell v. Self, (Supm. Ct. Spec. T.) 2 How. Pr. (N. Y.) 35, it was held that upon a motion to set aside a default an affidavit by the defendant as to the time of service of the declaration will be conclusive against the sheriff's certificate where the sheriff does not support the certificate by his affidavit.

Corroborated Evidence. — In an action in equity to set aside a former judgment the sheriff's writ book introduced in evidence, showing that the plaintiff was not personally served in the action sought to be set aside, together with the testimony of the party himself that he was not personally served, is sufficient to overcome the presumption of service from the record. Genobles v. West, 23 S. Car. 154.

Competency of Sheriff. — In *Tennessee* it was held that the return that land sold under an execution was advertised according to law might be contradicted in an action of ejectment by the testimony of the sheriff. Loyd v. Anglin, 7 Yerg. (Tenn.) 428.

It is held that the testimony of the sheriff may be admitted to show that a

return. In some cases, however, it is held that the affidavit of a party denying the truth of a return showing the service of process may be sufficient to overcome an official return.¹

c. DECISION UPON CONFLICTING TESTIMONY. — Notwithstanding there is corroborative testimony on behalf of the person attacking a return, the decision of the lower court in support of the return will not be disturbed in the appellate court unless it appears to be palpably erroneous.²

d. CONTRADICTION BY OTHER PARTS OF RECORD — (1) Exception to General Rule of Conclusiveness. — As an exception to the general rule of the conclusiveness of an officer's return, it is held that the court is not bound to concede the absolute verity of the return when other parts of the record show it to be false or incorrect.³

date inserted in his return was put there after the return was made. *Henderson v. Henderson*, 133 Pa. St. 399.

Incompetency of Party After Death of Sheriff. — In a suit in equity to enjoin a judgment upon the ground of the falsity of the return on which it is based, showing service of process, the plaintiff in the bill is not a competent witness where the sheriff who made the return is dead. *Duncan v. Gerdine*, 59 Miss. 550. See also *Willson v. Greathouse*, 2 Ill. 174.

1. In *Minnesota*, notwithstanding it was properly remarked in *Jensen v. Crevier*, 33 Minn. 372, that the return of the officer should be deemed strong evidence of the facts properly certified to and should be upheld ordinarily, it was held that a judgment may be set aside on the ground of the falsity of the return upon the affidavit of the person alleged to have been served, though the court recognized that it would be dangerous practice to permit the return to be overcome by a mere uncorroborated affidavit made long afterwards. *Allen v. McIntyre*, 56 Minn. 351; *Gray v. Hays*, 41 Minn. 12.

In *Rhode Island*, under a statute permitting a court to set aside its decrees within six months after the entry thereof, further cause shown by the affidavit of the defendant denying service of process was taken to be sufficient in a proceeding against her which sought a divorce upon the ground of adultery, the court saying that it should be very liberal in granting such an application within the six months allowed by law, when it appeared at all probable that there was no service, or where for other reasons the defend-

ant had not had a fair opportunity to be heard in her defense. Not only the interest of the parties themselves, but those of the public generally, required that in any such proceeding the court should aim to afford the fullest possible hearing thereof. *Locke v. Locke*, 18 R. I. 716.

2. *Allen v. Hickey*, 53 Ill. App. 441; *Callender v. Gates*, 45 Ill. App. 374; *Murrer v. Security Co.*, 131 Ind. 35; *Commercial Bank v. Eastern Banking Co.*, 51 Neb. 766.

3. *Wilson v. Moss*, 7 Heisk. (Tenn.) 417, holding that the return of an officer showing that he made service is evidence of no higher grade than the other papers of the case which come before the court as a part thereof, and that if other parts of the record either contradict the return or render it doubtful whether the return is true, the court is not bound to concede its absolute verity.

Date. — Where it appears that the date attached to the officer's return was Sunday and the clerk's entry and the indorsement on the writ show the return to have been made on Saturday, the date may be shown by such latter entries. This is said to come within an exception to the general rule as to the conclusiveness of an official return, some other part of the record in the same case contradicting the return. *Macomber v. Wright*, 108 Mich. 109. See also *Norvell v. McHenry*, 1 Mich. 227, wherein the date of service as stated in the affidavit of service was supplemented by the date of the jurat to show the time of service.

In a bill in equity to redeem a mortgage it appeared that on a writ of entry to foreclose the mortgage, an execution

(2) *Effect of Recital of Service* — (a) *Prima Facie Evidence*. — A recital of service of process in a judgment or decree is held to be sufficient *prima facie* evidence of that fact in the absence of anything in the record to contradict such recital.¹

(b) *Character of Service Shown by Record* — *Contradiction by Return*. — Where the record discloses the character of the service a finding of service refers to that shown by the record only;² and where the return of the officer is inconsistent with the recitals in the judgment or decree the former must control, and a recital of proper service of process will not aid an official return which shows a want of proper service.³

for possession, upon a conditional judgment, was dated May 6, 1869, and that the officer's return and acknowledgment of possession was dated May 3, 1869, and the execution was recorded June 10, 1869. It was held that the return of the officer on the writ of entry was not conclusive as to the actual date of the possession, it appearing from the whole record, without resort to other evidence, that possession was actually taken on a day after the issuance of the execution and before the date upon which the execution was recorded. *Worthy v. Warner*, 119 Mass. 550.

1. *McCoy v. Van Ness*, 98 Cal. 675; *Toliver v. Morgan*, 75 Iowa 619; *O'Driscoll v. Soper*, 19 Kan. 574; *Ornn v. Merchants Nat. Bank*, 16 Kan. 341; *Bowen v. Seale*, 45 Miss. 30; *Hamilton Gin, etc., Co. v. Sinkler*, 74 Tex. 51.

Presumption After Long Lapse of Time. — After a long lapse of time proper service of process will be presumed where such presumption is not rebutted by the record. *Wilson v. Holt*, 83 Ala. 528; *Nickrans v. Wilk*, 161 Ill. 76; *Cosby v. Powers*, 137 Ind. 694; *Best v. Vanhook*, (Ky. 1890) 13 S. W. Rep. 119; *Jones v. Edwards*, 78 Ky. 6.

In a Direct Proceeding it is only *prima facie* evidence. *Wolf v. Shenandoah Nat. Bank*, 84 Iowa 138; *Whitney v. Daggett*, 108 Cal. 232; *Thorn v. Salmonson*, 37 Kan. 441.

2. *O'Driscoll v. Soper*, 19 Kan. 574; *Hemmer v. Wolfer*, (Ill. 1887) 9 West. Rep. 536; *State v. Waterman*, 79 Iowa 360; *Godfrey v. Valentine*, 39 Minn. 336.

Lost Summons. — Where the record shows that two summonses were issued and served, and all the papers in the case are lost, the *prima facie* evidence of the recital of service in the journal entry will not be overthrown by the

fact that only one summons is copied into the record. *O'Driscoll v. Soper*, 19 Kan. 574.

After Continuance — *Presumption of Issuance of Alias*. — The finding by the court of due service of process will not be rebutted by a defective service of process as shown by the return where there has been a continuance to a subsequent term, but in support of the presumption in favor of the regularity of the proceedings it will be presumed that an alias summons to a subsequent term had been taken out and duly served, although such an alias writ might not appear upon the files. *Dickison v. Dickison*, 124 Ill. 483.

3. *California*. — *Lowe v. Alexander*, 15 Cal. 297.

Georgia. — *Hobby v. Bunch*, 83 Ga. 1. *Illinois*. — *Rivard v. Gardner*, 39 Ill. 125; *Barnett v. Wolf*, 70 Ill. 76; *Botsford v. O'Conner*, 57 Ill. 72; *Dickison v. Dickison*, 124 Ill. 483; *Hunter v. Stoneburner*, 92 Ill. 75; *Hemmer v. Wolfer*, 124 Ill. 435, (Ill. 1887) 11 N. E. Rep. 885; *Boylard v. Boyland*, 18 Ill. 551.

Indiana. — *Brooks v. Allen*, 62 Ind. 401; *Pegg v. Capp*, 2 Blackf. (Ind.) 257.

Kansas. — *Mickel v. Hicks*, 19 Kan. 578.

Missouri. — *Cloud v. Pierce City*, 86 Mo. 357.

Oregon. — *Heatherly v. Hadley*, 4 Oregon 1.

United States. — *Settlemer v. Sullivan*, 97 U. S. 444; *Blythe v. Hinckley*, 84 Fed. Rep. 238.

See also article JURISDICTION, vol. 12, p. 204 *et seq.*

Technical Defects or Mere Irregularities in the proof of service are held, however, to be cured by a recital in the judgment of legal service of process showing that the court acquired juris-

17. Explanation of Return — Evidence in Support of Return After Impeachment. — Where an officer's return is not defective upon its face, the officer may be permitted to testify in explanation thereof, such explanatory testimony not being in contradiction of the return.¹ And where the return is impeached by parol testimony it is held that the officer may support his return either by denials of the evidence impeaching it or by other testimony showing the truth of the return.²

diction. *Gregory v. Ford*, 14 Cal. 138, holding that such a recital cured a technical defect upon collateral attack; *Peck v. Strauss*, 33 Cal. 678; *Maples v. Mackey*, 89 N. Y. 146; *Blasdel v. Kean*, 8 Nev. 305, holding that on appeal a recital in a default judgment that it was entered upon due proof of service of summons, etc., was entitled to every presumption for the purpose of upholding the judgment though other parts of the record tended to show that the summons was served after it had been filed.

It has been held that where a judgment recites a legal service of process a mere defect in a return in that it does not show the relation of the party served to the defendant corporation is cured. *Ford v. Delta, etc., Land Co.*,

43 Fed. Rep. 181, which was a collateral attack.

1. *Liston v. Central Iowa R. Co.*, 70 Iowa 717; *Wardell v. Etter*, 143 Mass. 19; *Lapiec v. Hughes*, 24 Miss. 75; *Leonard v. O'Neal*, 16 Lea (Tenn.) 158.

2. *Raker v. Bucher*, 100 Cal. 216; *Smith v. Hickey*, 25 N. Y. App. Div. 105; *O'Connor v. Felix*, 147 N. Y. 614, in which two cases certificates and affidavits of service by process servers were supported by the testimony of such process servers; *Sargeant v. Mead*, (Supm. Ct. Gen. T.) 1 N. Y. Supp. 589; *Cunningham v. Mitchell*, 4 Rand. (Va.) 189; *State v. U. S. Mutual Acc. Assoc.*, 67 Wis. 624. See also *Ketchum v. White*, 72 Iowa 193; *Gray v. Hays*, 41 Minn. 12; *Meridian v. Trussell*, 52 Miss. 712.

REVENUE.

See article *TAXES*.

REVIEW.

By JAMES B. CLARK.

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CROSS-REFERENCES.

As to *Proceedings to Review Decrees*, see the article *BILLS OF REVIEW*, vol. 3, p. 569.

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See also articles *APPEALS*, vol. 2, p. 35; *CORAM NOBIS AND CORAM VOBIS*, vol. 5, p. 26; *NEW TRIAL*, vol. 14, p. 707; *OPENING, AMENDING, AND VACATING JUDGMENTS*, vol. 15, p. 202.

I. SCOPE OF ARTICLE. — This article treats of the action of review as distinguished from a bill of review, which is a bill cognizable in a court of equity, and has for its object the reversal or modification of a decree in equity. The action of review was unknown at the common law and exists in only a few states.

Unlike the bill of review, it is purely statutory, and although in some jurisdictions it has somewhat similar functions, yet wherever the remedy is in force it may be invoked to revise judgments at law and other determinations designated by statute.¹

II. NATURE OF PROCEEDINGS TO REVIEW. — In some respects proceedings to review a judgment are only incident to and a part of the original action, and not a separate and independent action. In other respects, however, and for some purposes, the review may be regarded as a new action. Thus if the original plaintiff should fail on the first trial and review, the review would be merely a continuation of the former suit; but if he should prevail on the first trial, and the defendant should review, that review would in effect be a new action, to recover back that which the plaintiff recovered of him on the first trial. In some jurisdictions a review is equivalent to a new trial after judgment, so as to let in on the review everything which might have been suggested in the original action.²

1. *Barron v. Jackson*, 42 N. H. 419; *Swett v. Sullivan*, 7 Mass. 342.

The *Indiana Statute* substantially embodies the ordinances in chancery of Lord Chancellor Bacon, and extends them to all judgments. *Ross v. Banta*, 140 Ind. 120.

Writ of Right. — It makes no difference that the writ has sometimes been regarded as a judicial and not an original writ. It is a writ of right, and not the less an action, suit, or proceeding, whether commenced by an original or a judicial writ. *Badger v. Gilmore*, 37 N. H. 457.

Scire Facias. — A writ of review is a writ of right, in the nature of a scire facias to hear errors, in a record or process remaining with the court. It is issued by the officer of the court, and in that respect may be regarded as of the nature of a judicial writ. It is, however, sometimes issued in the form of a capias and attachment, and with the same efficacy, and seems therefore to be to some purposes an original writ. *Burrell v. Burrell*, 10 Mass. 221.

2. *Evansville, etc., R. Co. v. Maddux*, 134 Ind. 575; *Douglass v. Davis*, 45 Ind. 493; *Sloan v. Whiteman*, 6 Ind. 434; *Kiley v. Murphy*, 7 Ind. App. 239; *Indianapolis First Nat. Bank v. Hanna*, 12 Ind. App. 240; *Ex p. Kiley*, 135 Ind. 225; *Jackson v. Gould*, 74 Me. 564; *Good v. Lehan*, 8 Cush. (Mass.) 299; *Safford v. Knight*, 117 Mass. 281; *Davenport v. Holland*, 2 Cush. (Mass.) 1; *Burley v. Burley*, 6 N. H. 204; *Bell v. Bartlett*, 7 N. H. 180; *Knox v.*

Knox, 12 N. H. 352; *Wiggin v. Janvrin*, 47 N. H. 295; *Sanford v. Candia*, 54 N. H. 421.

Indiana.—Proceeding in Nature of Appeal. — In Indiana a proceeding in review for error of law is in the nature of an appeal. *Indiana Mut. F. Ins. Co. v. Routledge*, 7 Ind. 25; *Barnes v. Wright*, 39 Ind. 293; *Barnes v. Bell*, 39 Ind. 328; *Richardson v. Howk*, 45 Ind. 451; *Hardy v. Chipman*, 54 Ind. 591; *Cravens v. Chambers*, 69 Ind. 84; *Dunkle v. Elston*, 71 Ind. 585; *Rice v. Turner*, 72 Ind. 559; *Searle v. Whipperman*, 79 Ind. 424; *Tachau v. Fiedeleay*, 81 Ind. 54; *Traders Ins. Co. v. Carpenter*, 85 Ind. 350; *Shoaf v. Joray*, 86 Ind. 70; *American Ins. Co. v. Gibson*, 104 Ind. 336; *Baker v. Ludlam*, 118 Ind. 87; *Rigler v. Rigler*, 120 Ind. 431; *Gates v. Scott*, 123 Ind. 459; *Clark v. Hillis*, 134 Ind. 421; *Evansville, etc., R. Co. v. Maddux*, 134 Ind. 571; *Graves v. State*, 136 Ind. 406; *Kiley v. Murphy*, 7 Ind. App. 239.

Or of a Rehearing. — *Ex p. Kiley*, 135 Ind. 225.

New Trial. — The object sought in a proceeding to review is a new trial of the cause. *Hornady v. Shields*, 119 Ind. 201.

In Massachusetts it was held in *Anderson v. Brown*, 10 Gray (Mass.) 92, that on review of a judgment of the Court of Common Pleas, affirming, on complaint of the defendant in review, a judgment of a justice of the peace, from which an appeal had been taken by the plaintiff in review, but which

III. WHAT DETERMINATIONS MAY BE REVIEWED — Judgment in Civil Action. — Except where the remedy by action or writ of review has practically replaced in whole or in part the remedy in equity by bill of review, or where there is statutory authority, express or implied, for a resort to such relief in any particular class of cases of proceedings, it can be invoked only in civil actions following the course of the common law.¹

The Interpretation of the Statutes relative to review should not be too strict, and it is unnecessary that the judgment should have been rendered after all the steps indicated. It is enough if the judg-

was not entered, the case must be tried on its merits, as if an appeal had been duly entered.

In New Hampshire review has been regarded as a distinct and independent proceeding, commenced by writ, not necessarily in the court where the judgment reviewed was rendered, and not operating to set aside or vacate the judgment or even as a supersedeas or stay of execution. In these respects it is the same whether brought as of right or by grant upon petition. *Barron v. Jackson*, 42 N. H. 419; *Exeter Bank v. Gilman*, 8 N. H. 332. See, however, *Knox v. Knox*, 12 N. H. 352, wherein it was said that review "cannot be properly regarded as an independent action. It relates back to the original writ and revives it, and, so far as regards the merits of the original controversy, is the same action."

Review as New Action. — In *Bell v. Bartlett*, 7 N. H. 180, it was said that notwithstanding a review is a matter of right, the judgment in the first instance is regarded as the end of the cause, that is, as a final judgment, and the review is regarded as a new action in which the merits of the original action may be retried. See also *Page v. Brewster*, 58 N. H. 126.

Effect of Amendment. — A review is no more than a new trial of the issues originally tried, unless the pleadings are amended by permission. *Zollar v. Janvrin*, 49 N. H. 114; *Cahoon v. Coe*, 57 N. H. 556; *Burley v. Burley*, 6 N. H. 204. See also *Frost v. Chesley*, *Smith* (N. H.) 202.

A Writ of Review Is Not the Commencement of an Action, within the meaning of a statute which forbids an action against an executor or administrator of an insolvent estate until after one year, etc., and it may be brought within the year. *Colman v. Churchill*, 2 N. H. 407.

Review by Defendant. — The proceed-

ing of review, when brought by a defendant, has been well characterized as analogous to an action for money had and received, brought to recover back funds obtained by duress or some false claim. *Badger v. Gilmore*, 37 N. H. 457. See *Knox v. Knox*, 12 N. H. 358.

Analogy to Writ of Error. — Proceedings to review have been regarded as in the nature of a writ of error. *Hardy v. Chipman*, 54 Ind. 591; *Little v. Bunce*, 7 N. H. 485.

1. Criminal Proceedings. — The *Indiana* statute (*Burns's Annot. Stat.* (1894), § 627) which authorizes the filing of a complaint to review a judgment in the court wherein such judgment was rendered has no application to criminal causes. *Frazier v. State*, 106 Ind. 562.

Judgment in Eminent Domain. — In *Massachusetts* a judgment of the Superior Court rendered upon a verdict assessing damages for land taken for railroad purposes is a judgment in a civil action within the meaning of *Pub. Stat. Mass.*, c. 187, §§ 16, 22, authorizing writs to review final judgments in civil actions. *Nantasket Beach R. Co. v. Ransom*, 147 Mass. 240.

Judgment on Referee's Report. — An action is none the less a civil action because referred; consequently a judgment rendered upon a referee's report may be reviewed, where no other matter between the parties is included in the reference. *Gooding v. Baker*, 60 Me. 52.

Probate Decree. — In *Pope v. Pope*, 4 Pick. (Mass.) 129, it was held that there was no authority to grant a review of an issue arising on an appeal from a decree of a judge of probate after a judgment had been entered on the appeal, the statute limiting the jurisdiction of the court to the review of trials in civil actions only. *Following Borden v. Brown*, 7 Mass. 93.

ment sought to be reviewed was rendered in an action at law, although the pleadings were not in the same form as in ordinary actions, and though no trial by jury was had.¹ It sometimes becomes important to look to the character of the action for the purpose of determining the propriety of resorting to this form of revision. Thus, where it is apparent that the right to review is confined to judgments at law which were rendered in an action commenced by writ or like process, upon the verdict of a jury after a trial of issues of fact joined, the judgment cannot be made the subject of review unless it is one rendered within such requirements.²

1. *Fuller v. Storer*, 111 Mass. 281.

Massachusetts Doctrine.—In *Lucas v. Lucas*, 3 Gray (Mass.) 136, wherein it was held that a writ of review would not lie to revise a decree dismissing a libel for divorce, Shaw, C. J., said that to follow the doctrine of the early Massachusetts cases, *Borden v. Brown*, 7 Mass. 93, and *Stone v. Davis*, 14 Mass. 360, which held that to authorize a review in a "civil action" the action must have been commenced by writ and the judgment rendered on a verdict, would be perhaps now [1854] holding the matter too strictly, but that those decisions indicated the prevailing conviction among lawyers and judges when these cases were decided, and after the operation of the statutes relating to reviews for many years.

A Decree Establishing a Mechanic's Lien and ordering a sale to satisfy the lien, upon a petition, inserted in a writ, may be the subject of a writ of review. *Hubon v. Bousley*, 123 Mass. 368.

A Final Judgment or Decree to Redeem a Mortgage may be re-examined and tried anew upon a writ of review, where a bill is inserted in a writ of original summons. *Beale v. Churchill*, cited in *Hubon v. Bousley*, 123 Mass. 369.

Scire Facias.—The court has authority to grant a review of a judgment against a trustee, rendered upon default to a scire facias. *Ex p. Packard*, 10 Mass. 426. In this case it was contended that a review could be granted only where the cause might be tried on the review; that is, that there must be issue to be tried. See also *Brigham v. Elliot*, 12 Pick. (Mass.) 172; *Safford v. Knight*, 117 Mass. 281; *Emerson v. Paine*, 9 Vt. 271.

In *Thayer v. Goddard*, 19 Pick. (Mass.) 60, it was held that a review might be had of a judgment on scire facias against bail.

The writ of scire facias upon a probate bond is not like the common and ordinary writs to carry into effect a former judgment, and founded wholly on the record, but is in the nature of an original action, and permits traversable facts, the trial of which may be by jury; hence a writ to review a judgment thereon will lie. *Aldrich v. Williams*, 10 Vt. 295.

A Judgment by Agreement open to review secures the right to review although no issue of fact was actually joined. *Coburn v. Rogers*, 32 N. H. 372.

The right to a review is not defeated by the fact that the suit was upon an indebtedness secured by mortgage, and that by agreement judgment was entered for the amount found due by a verdict in a suit upon the mortgage. *Messer v. Smyth*, 60 N. H. 436.

Judgment on Case Stated.—A review may be granted of an action in which judgment was rendered upon a case stated by the parties for the opinion of the court. *Stockbridge v. West Stockbridge*, 13 Mass. 302.

A Judgment by Confession may be corrected on complaint filed and heard. *Kindig v. March*, 15 Ind. 248.

2. *Dickenson v. Davis*, 4 Mass. 520; *Stone v. Davis*, 14 Mass. 360; *Borden v. Brown*, 7 Mass. 93; *Pope v. Pope*, 4 Pick. (Mass.) 129; *Smith v. McDaniel*, 15 N. H. 474; *Eldridge v. Bellows*, *Smith (N. H.)* 356; *Smith v. Gilman*, 3 N. H. 501, following *Lovejoy v. Harper*, an unreported case therein cited.

The New Hampshire Statute in force in 1854 authorizing reviews on petition, applied only to those cases in which the original proceedings were by writ, and after the course of the common law. *Sheafe v. Sheafe*, 29 N. H. 269.

General Appearance as Joinder of Issue.—A general appearance for the purpose of defending an action is equiva-

Judgment by Default — Ex Parte Proceedings. — In accordance with this doctrine, and irrespective of those cases hereinafter referred to as to which the right to review a judgment rendered by default is expressly given, there can be no review of a judgment rendered on a default without an appearance,¹ nor of *ex parte* proceedings.²

Partitions. — In some jurisdictions it has been held that no review of a judgment for the partition of realty can be had.³

Divorce Proceedings. — By statute in *Indiana* it is expressly provided that no complaint shall be filed for a review of a judgment of divorce.⁴

Valid Final Judgment. — The judgment which may be made the subject of a review by these proceedings must be a valid final judgment; mere interlocutory orders or judgments, or judgments which do not conclusively dispose of the questions arising in the original cause so far as that cause is concerned, cannot be

lent to a plea of the general issue, and issue will be deemed to have been joined so as to authorize a review of the judgment. *Messer v. Smyth*, 60 N. H. 436.

Judgment on Error. — A review of a judgment rendered on a writ of error is not permissible. *Enos v. Boardman*, 2 Tyler (Vt.) 271.

1. In *Massachusetts*, under a statute providing that either party aggrieved, where only one verdict has been given against him, may review the cause and have one trial more, no review was allowed unless there had been an issue to the jury and a trial by jury. A review would not lie upon a default whether the damages were assessed by the court or by the jury. *Perry v. Goodwin*, 6 Mass. 498.

2. *Barnes v. State*, 28 Ind. 82.

Sale of Infant's Real Estate. — Proceedings by a guardian's petition for the sale of his ward's real estate are *ex parte*, and a suit by the ward to review a judgment rendered therein will not lie. *Williams v. Williams*, 18 Ind. 345; *Davidson v. Lindsay*, 16 Ind. 186.

3. See *Bundy v. Hall*, 60 Ind. 177.

Massachusetts. — In *Borden v. Brown*, 7 Mass. 93, it was held that a review of a judgment on petition for partition of lands would not lie, the court saying that reviews were provided only where the original action was commenced by writ.

Vermont. — Under a statute allowing a review in "civil causes" a petition for partition is not reviewable. *Nichols v. Nichols*, 28 Vt. 228.

In *Maine* the right to review partition proceedings is expressly given by section 1 of chapter 89 of the Revised Statutes.

4. *Burns's Annot. Stat.* (1894), § 627. See also *Willman v. Willman*, 57 Ind. 500; *Sullivan v. Learned*, 49 Ind. 252; *McQuigg v. McQuigg*, 13 Ind. 294; *Woolley v. Woolley*, 12 Ind. 663; *Earle v. Earle*, 91 Ind. 27. But see *Hardy v. Kirtland*, 34 Ind. 365.

Attachment in Divorce. — In *Keller v. Keller*, 139 Ind. 38, it was held under the statute that an action would not lie to review a judgment in attachment in a divorce proceeding, it appearing that the judgment was merely in aid of the suit for divorce and alimony, and not an independent proceeding.

Miscellaneous Judgments. — In some jurisdictions where statutory review of the nature here treated of is in force, the adjudications are so few that no positive rule can be deduced therefrom. See *Lucas v. Lucas*, 3 Gray (Mass.) 136; *Sheafe v. Sheafe*, 29 N. H. 269.

Alimony and Dower. — Where a decree of divorce procured by a husband made no mention whatever of alimony, allowance, or dower, it was held that a petition by the wife for review "as far as the questions of alimony, allowance, and dower are concerned," could not be granted. If any decree on the subjects mentioned in the petition for review could be made during the life of the decree of divorce, it could be only upon an independent libel by the wife, praying for it. *Henderson v. Henderson*, 64 Me. 419.

reviewed.¹

Garnishment or Trustee Process. — The right to review is as applicable in garnishment or trustee process as in any other proceeding.²

IV. GROUNDS OF REVIEW — 1. **In General.** — The right to review being entirely dependent upon statute, the applicant is not entitled to the remedy unless it can be shown that the ground upon which the review is sought is designated by the statute or contemplated by its provisions.³

2. **Error Apparent** — **Judgment on Defective Pleading.** — Error apparent, or, as it is designated by statute, error of law appearing in the proceedings and judgment, may be relieved against by a complaint to review. What will constitute such error cannot be

1. **Validity of Judgment.** — A proceeding to review a judgment presupposes the existence of a valid judgment; consequently an action to amend and set aside a void judgment is not such a proceeding. *Willman v. Willman*, 57 Ind. 500.

Order for Sale of Decedent's Real Estate. — An interlocutory order to sell the real estate of a decedent is not reviewable. *Indianapolis First Nat. Bank v. Hanna*, 12 Ind. App. 240.

Orders Confirming a Sale by an executor of lands of a decedent to the heirs of the decedent are judgments within the meaning of the statute relative to review. *Quick v. Goodwin*, 19 Ind. 438.

Report of Auditors in Insolvency. — There is no right to review a report of auditors on proceedings in insolvency, since the rights of the creditors are fixed by law. *Stoevers Appeal*, 3 W. & S. (Pa.) 154.

An Interlocutory Order referring to former orders and motions, requiring a trustee to pay certain moneys to certain creditors, *pro rata*, cannot be reviewed. *Cravens v. Chambers*, 69 Ind. 84.

Review of Part of Action. — Where it is provided by statute that in all civil causes, tried before the County Court, either party may review, the cause only can be reviewed, and not some incident of the cause. Thus, a review will be denied in an action of book account brought originally to the County Court where the defendant sets off a matter of contract. Neither party is entitled to a review of the issue upon the plea in set-off. *Hall v. Hall*, 24 Vt. 637.

2. **An Action by a Tax Collector to collect taxes by invoking trustee proceed-**

ings is within the provisions of the statute relative to proceedings to review. *Allen v. Seaver*, 38 Vt. 673, holding that although the *Vermont* statutes relative to trustee process and proceedings against trustees do not contain any specific provision relative to writs of review in such proceedings, the provisions of the statutes relative to absent defendants and writs of review are sufficiently comprehensive to embrace proceedings commenced by trustee process.

Erroneous Judgment in Trustee's Favor. — In *Carrique v. Bristol Print Works*, 8 Met. (Mass.) 444, a trustee was charged by the court, but it appeared by the entry that he had been discharged. He took out an execution against the plaintiff for costs and collected them, and upon petition by the plaintiff a review was granted.

3. *Marvin v. Wilkins*, 1 Aik. (Vt.) 107; *Davis v. Beebe*, 5 Vt. 560.

Grounds Not Designated in Statute. — In *Nealis v. Dicks*, 72 Ind. 374, it was said: "The statute concerning the review of judgments does not mean that judgments shall only be vacated upon the grounds therein designated, or only in the mode there prescribed, to the exclusion of all other causes and all other modes. Neither the letter nor the spirit of the act warrants the conclusion that the legislature intended to so narrow the power of courts of general jurisdiction to relieve against judgments as to limit and confine them to the causes and modes expressly prescribed by statute. Where the statute does prescribe the causes for which a judgment may be set aside, and does provide a mode of procedure, then, of course, the statute controls, and is to be followed and obeyed."

specifically stated further than that the error must be one for which, had an appeal been taken, the judgment would have been revised. Thus, judgments rendered on defective pleadings are reviewable on the ground of error apparent.¹

Error in Entry and Form. — The improper entry of a judgment will furnish a sufficient ground for review,² but mere error in the form of a judgment does not.³

Technical Errors of Practice which do not go to the merits of the controversy do not seem to furnish a ground of review or a reason for interfering with the judgment originally rendered.⁴

Want of Jurisdiction. — Where the court in which the judgment

1. **After a Judgment Has Been Affirmed by the Supreme Court**, it cannot be reviewed for error of law, but a complaint to review for material new matter will lie after such affirmance if the appeal involved only supposed errors of law. *Hill v. Roach*, 72 Ind. 57.

Sustaining Demurrer. — The fact that a demurrer was erroneously sustained is error of law which, if it appears in the proceedings and judgment, presents a ground upon which proceedings and judgment may be reviewed. *Harlen v. Watson*, 63 Ind. 143; *Anderson v. Anderson*, 65 Ind. 196.

The Sufficiency of a Complaint may be presented by an action to review, but where no question is raised as to a paragraph of the complaint which would withstand any objections that might be urged, the only available objection is the ruling of the court as to the remainder of the complaint. *Ferguson v. Hull*, 136 Ind. 339.

A Complaint in a Suit for Foreclosure which is sufficient for that purpose, but is insufficient to warrant a personal judgment, is good as against a proceeding to review the judgment of foreclosure and a judgment *in personam* by default, brought on the ground that the complaint did not state facts sufficient to constitute cause of action. *Shoaf v. Joray*, 86 Ind. 70.

A Defect in the Title of the Complaint upon which the judgment was rendered is not a ground for review. *Shoaf v. Joray*, 86 Ind. 70.

Insufficient Prayer. — Where the facts alleged in a complaint entitle the plaintiff to the relief awarded, a complaint to review will not lie though the prayer is not broad enough to cover the relief granted. *Freeman v. Paul*, 105 Ind. 451.

2. **Time of Entry.** — Review of a judgment can be had for error in entering

it on the first day of the term. *Mitchell v. McCorkle*, 69 Ind. 184.

Separate Remedy — *Alleged Irregularities After Judgment*, i. e., fraud and irregularity of the clerk and sheriff, for which a separate remedy exists, cannot, be made a ground of complaint nor joined with an action to review. *Ferguson v. Hull*, 136 Ind. 339. In this case it was said: "It cannot be said that the court can review or reconsider or re-examine an act of an officer in issuing an execution, or in making a levy to satisfy an execution issued on a judgment rendered by it. To review or reconsider or re-examine means to look into, consider, or examine something that has already been once considered or examined. The court may review or re-examine any of its proceedings that enter into, or are connected with and form a part of, the judgment rendered by it; but not the acts of the officer, after judgment, in trying to enforce the collection of the same."

3. **Errors in Form Only**, though apparent on face of a decree and mere matter of abatement, seemingly are not grounds for review. *Fleming v. Stout*, 19 Ind. 328.

Plaintiff Entitled to Some Relief. — An action to review a judgment cannot be maintained for an error in the form of it where the complaint upon which it was rendered was sufficient to entitle the plaintiff to some relief. *Searle v. Whipperman*, 79 Ind. 424; *Slussman v. Kensler*, 88 Ind. 190; *Baddeley v. Patterson*, 78 Ind. 157.

Judgment by Default. — Error in the form of a judgment taken by default is not ground of review. *Shoaf v. Joray*, 86 Ind. 70.

4. **Proper Result.** — Although the manner in which the judgment was entered is not to be approved, if the

complained of was rendered had jurisdiction neither of the person¹ nor of the subject-matter, the party aggrieved by the unauthorized judgment may have it reviewed.²

Failure to Serve Process — Judgment by Default. — The fact that a judgment was taken against a party upon whom service of process had not been made, or against a party who, having been served with process, was not defaulted regularly, will not justify a review either for error apparent or for material new matter.³

3. New Matter. — The material new matter discovered since the rendition of the judgment for which a complaint may be filed in *Indiana* is new matter as distinguished from newly discovered evidence. That is, it must appear that there has been a discovery of facts, and not mere evidence of such facts. Newly discovered evidence of old matter already in the pleadings is insufficient.⁴

right result was reached the court will not reverse the cause for technical errors of practice which do not go to the merits of the controversy. *Kiley v. Murphy*, 7 Ind. App. 240.

The Former Indiana Statute contemplated cases in which the ground of relief was limited to the act of taking or rendering the judgment, and did not look to errors occurring during the trial. *Nelson v. Johnson*, 18 Ind. 329.

1. Denial of New Trial. — An action will lie to reverse the action of the court below in overruling a motion for a new trial made on behalf of a person over whom, as the record discloses, the court below had no jurisdiction. *Clark v. Hillis*, 134 Ind. 421.

Alien Enemies as Parties. — It is error for a court to render a judgment in a case between alien enemies, as it has no legal power to do so, and a party to such a judgment is entitled to a review of it. *Brooke v. Filer*, 35 Ind. 402.

Where an Attorney Has Appeared Without Authority there is no remedy by a proceeding for review. *Floyd County Agricultural, etc., Assoc. v. Tompkins*, 23 Ind. 348.

Unauthorized Actions. — The fact that without authority or consent an action was brought in the plaintiff's name and judgment was rendered against him in favor of the defendant for costs is not a ground for review, since by proceedings to review the plaintiff would adopt the original entry of the action in court, and by adopting it to that extent he could not consistently allege that the court had no jurisdiction to render the judgment. *Fullam v. McKenny*, 16 Gray (Mass.) 579.

2. Shoaf v. Joray, 86 Ind. 70.

Failure to Demur to the Complaint does not constitute a waiver of an objection that the court had no jurisdiction of the subject-matter of the action or that the complaint did not state facts sufficient to constitute a cause of action. *Searle v. Whipperman*, 79 Ind. 424.

3. Judgment Without Default. — The fact that judgment was taken against a party without defaulting him is not a ground for review. *Ferguson v. Hull*, 136 Ind. 339. See also *Doherty v. Chase*, 64 Ind. 73.

The Dismissal of an Action as to One of Several Defendants sued on a joint obligation is not error apparent on the record so as to authorize a review of the judgment entered against the other defendants, though such dismissal may have afforded ground for a plea in abatement. *Lee v. Basey*, 85 Ind. 543.

4. Hall v. Palmer, 18 Ind. 5; *Rich v. Starbuck*, 50 Ind. 126; *Hill v. Roach*, 72 Ind. 57.

New Matter Defined. — New matter which will authorize a review of a judgment must be new matter of fact which is material to the action in which the judgment was rendered, and it must have existed before the rendition of the judgment. Matters of law arising from a statute subsequently enacted are not sufficient. *Worley v. Ellettsville*, 60 Ind. 7; *Davidson v. King*, 51 Ind. 224.

Matter Which Would Have Changed Result. — New matter discovered since the rendition of the first judgment, which will entitle the losing party to a review of that judgment, must be such matter as, if alleged in the original

4. Newly Discovered Evidence. — Under some circumstances newly discovered evidence may be a ground to review the proceedings and judgment.¹ To justify a review, however, the

pleadings and supported by the evidence, would have entitled such party to a different judgment. *Jones v. Tip-ton*, 142 Ind. 643.

Review and New Trial Distinguished. — "There is a well-recognized distinction between a proceeding to review a judgment on account of material new matter discovered since it was rendered, and an application for a new trial on the ground of newly discovered evidence. *Webster v. Maiden*, 41 Ind. 124; *Hall v. Palmer*, 18 Ind. 5. In the latter case the affidavit of the witness by whose testimony it is expected to establish the newly discovered evidence must be filed with and made a part of the application, if it can be obtained. *Shipman v. State*, 38 Ind. 549. In the former case no affidavit is required to be filed with the complaint." *Hill v. Roach*, 72 Ind. 57.

Erroneous Legal Advice. — In *Dippel v. Schicketanz*, 100 Ind. 376, an attorney innocently but erroneously advised his client as to his rights in a matter wherein the attorney had an adverse interest, in consequence of which advice the client and the attorneys subsequently employed by him were misled and took a judgment which was to the advantage of the attorney first consulted. It was held that the discovery of the truth thereafter was such material new matter, not discoverable by reasonable diligence, as would justify a review against the attorney who had given the erroneous advice.

Reliance on Statement of Adverse Party. — In an action to review a judgment, it is not a reasonable excuse for not appearing to and defending the original action, that the plaintiff therein and his attorney assured the defendants therein, the present plaintiffs, that such action was only to recover the possession of the lands in suit, on which assurance they relied, where the original complaint averred that the plaintiff was the owner in fee and entitled to the possession of such lands. The fact that the plaintiff therein, without actual notice to the defendants, filed a second paragraph of complaint, charging that certain deeds under which the defendants claimed title to said lands were void, is not ground for review. *Rosa v. Prather*, 103 Ind. 191.

Reversal of Judgment. — When the title to property is dependent upon the judgment of a court, the reversal of such judgment by an appellate court will constitute material new matter and be a cause for a review of a judgment or proceedings that are based and founded upon the reversed judgment and had prior to its reversal. The action to review may be maintained by the heirs, assigns, or successors to the person who owned such property at the time when the judgment so reversed was originally entered. *Ross v. Banta*, 140 Ind. 120.

Matter Pleadable to Jurisdiction. — In *McCauley v. Murdock*, 97 Ind. 229, it was questioned whether the discovery of new matter which, if it had been known, could have been available only by plea to the jurisdiction as to the person of the defendant, would be good for the purpose of review.

Fraud of Third Parties. — In *Ferguson v. Hull*, 136 Ind. 339, the only new matter relied upon was the fraud or irregularity, after judgment, of the clerk and sheriff, parties not known in the original action. The court said: "Under the motion and view of counsel for appellants, he should have made the clerk a party to this proceeding. If counsel urges that it was error of law, we only need say that no such question could be presented in the Supreme Court if the original action had been appealed, and, therefore, cannot be presented in an action to review."

Exoneration of Surety. — In *Montgomery v. Hamilton*, 43 Ind. 451, it appeared that after an extension to the maker of the time of payment of a note, the surety on the note, in ignorance of the facts, which operated as a release, promised payment, and it was held that he was entitled to review a judgment taken against him on the note.

1. Indiana Statute. — In *Hall v. Palmer*, 18 Ind. 5, it was held that applications to review judgments, under the code, cannot be sustained upon the ground of newly discovered evidence, that being a ground for a new trial only, but may be sustained on the ground of "material new matter" discovered since the rendition of the former judgment, which new matter must

proposed evidence must bear directly on the merits of the controversy.¹

Suppression — Concealment. — Where material evidence has been directly or indirectly placed beyond the knowledge or control of the petitioner, by the other party, with a view to prejudice the petitioner's cause,² or where the newly discovered evidence relates to confessions or declarations of the adverse party respecting some material or influential fact, unknown to the petitioner at the time of trial, and inconsistent with the proofs adduced and urged by such party at the trial, a review may be had.³

consist of some fact or facts affecting the claim or defense, rather than mere evidence of facts.

Evidence Subsequently Made Admissible by Statute. — A party has an undoubted right to have his case tried by the application of the rules of law and evidence existing and regulating such cases at the time of trial; but after his rights have been thus ascertained and settled, he cannot have a new trial on the ground that a change has been subsequently made by the legislature in the law or in the rules of evidence applicable to his case. *Berry v. Lisherness*, 50 Me. 118, wherein the petitioner was precluded from testifying at the original trial because of his interest, but at the time of the review was a competent witness by reason of a change in the statute. The error assigned on exceptions to the ruling on the review was the exclusion of this testimony by the trial judge, and it was held that the testimony was properly excluded because it was not newly discovered evidence.

Lost Instrument Subsequently Found. — Where the defense to an action failed because of the admission of evidence of the contents of a document without first having properly established the loss of the original, the fact that the document was subsequently found was held to be insufficient as a cause for review. *Carpenter v. Sellers*, 38 Me. 427.

1. *Crafts v. Union Mut. F. Ins. Co.*, 36 N. H. 44.

Impeachment of Witness. — Its introduction must not be sought merely to discredit or impeach a witness who testified at the original trial. *Haskell v. Becket*, 3 Me. 92; *Crafts v. Union Mut. F. Ins. Co.*, 36 N. H. 44. See also *Trask v. Unity*, 74 Me. 208.

Merely Cumulative Evidence is not sufficient. *Warren v. Hope*, 6 Me. 479;

Crooker v. Randall, 53 Me. 355. See also *Dwinel v. Godfrey*, 44 Me. 65; *Berry v. Lisherness*, 50 Me. 119; *Atkinson v. Conner*, 56 Me. 550; *Trask v. Unity*, 74 Me. 208.

Correction of Testimony Given Mistakenly. — A review will be granted where the newly discovered evidence is the testimony of a witness whose testimony on the trial was in its tendency against the interest of the petitioner, and who has ascertained since that he was at that time mistaken, and that the facts were not as he testified. *Warren v. Hope*, 6 Me. 479.

2. *Warren v. Hope*, 6 Me. 479.

Misconduct of Adverse Party. — A new trial will not be granted on the ground of newly discovered evidence, where the party has a right to a review under the statute, unless such evidence has been kept from the knowledge of the party by the misconduct of the other side. *Ordway v. Haynes*, 47 N. H. 9.

Submission on Agreed Statement of Supposed Facts. — So where a party uses due diligence to procure evidence to prove a material part of his case, but is prevented from procuring it by measures taken by the witnesses to conceal the facts from his knowledge, and he therefore submits his case to the court on an agreed statement of such facts as are known to him, and the court decides against him, he is entitled to a review on his subsequently discovering proof of such concealed facts. *Ward v. Clapp*, 6 Met. (Mass.) 414.

3. *Warren v. Hope*, 6 Me. 479.

Perjury of Witness Summoned by Unsuccessful Party. — Where a witness whose testimony was in favor of the prevailing party is afterwards convicted of perjury in giving such testimony, the court, in the exercise of its discretion, may grant a review, although the witness was summoned by the party

Probable Change of Result. — The newly discovered evidence must be of such a controlling character that it would authorize a different determination from that originally arrived at. A review will not be granted to let in additional testimony which would not be likely to change the result.¹

Evidence as to Matters Abandoned. — A review will not be granted for newly discovered evidence which applies to a point directly drawn in question by the suit, but which was so far abandoned at the trial, and in the preparation of it by the losing party, that all inquiry for evidence upon that point was waived by him.²

Failure to Exercise Diligence. — It is well settled that a review will not be granted to enable the party complaining to introduce newly discovered evidence which with reasonable diligence he might have discovered and produced upon the trial. It is not sufficient that a petitioner for a review affirms that, with all the diligence in his power, he could not have discovered the evidence sought to be made available; the court must be satisfied that such evidence could not have been discovered by diligent inquiry.³ A review will not be allowed to permit the introduction of testimony which was either wilfully suppressed or negligently omitted at the trial.⁴

5. Probate Settlements. — In *Pennsylvania* proceedings will lie

against whom the verdict was rendered. *Morrell v. Kimball*, 1 Me. 322.

1. Sufficiency of New Evidence. — Where, upon the hearing of a petition, facts are presented as newly discovered evidence which, if they had been introduced at the trial of the original action, would have been submitted to the jury, and would have been sufficient to sustain a verdict for the petitioner, it is proper to grant a review. *Dwinel v. Godfrey*, 44 Me. 65.

Injustice Must Have Been Done. — A review will not be granted to let in additional testimony which would not be likely to change the result; nor unless upon the showing made by the petition it can be seen that injustice was probably done. *Todd v. Chipman*, 62 Me. 189.

More Injury than Good. — After a partition and distribution of a decedent's estate, a petition for a review of the partition proceedings on the ground that one of the distributees was not an heir at law of the decedent is properly refused, it being a rule in chancery not to grant a review for after-discovered evidence where more injury and mischief than good would result from the reopening of the controversy. *Wilson's Appeal*, (Pa. 1885) 3 Atl. Rep. 447.

2. Crafts v. Union Mut. F. Ins. Co., 36 N. H. 44.

3. Atkinson v. Conner, 56 Me. 550; *Todd v. Chipman*, 62 Me. 189; *Buck v. Pierce*, (Me. 1885) 1 Atl. Rep. 137.

4. Todd v. Chipman, 62 Me. 189; *Buck v. Pierce*, (Me. 1885) 1 Atl. Rep. 137.

Apparent Necessity of Evidence. — When, from the nature of the issue, a party has reasonable ground to anticipate that there will be a controversy as to certain facts, and when by due diligence he might have procured testimony which would sustain or tend to sustain his contention, he cannot thereafter claim to have been taken by surprise at the testimony introduced, so as to enable him to procure a review. *Atkinson v. Conner*, 56 Me. 546.

Erroneous Admission. — A review of a judgment against a defendant in an action to collect a subscription to stock, deliberately made, will not be granted because of an error in an admission by the defendant, when it appears that all the facts were matters of record to which the defendant had access at the time of the admission, though it might be different if the defendant had been entrapped or misled into making the admission without laches on his part, or had been pre-

to review settlements made by personal representatives of decedents with beneficiaries or by guardians with their wards.¹

6. Bankruptcy. — A discharge in bankruptcy has been prescribed by statute as a ground for reviewing a judgment rendered in an action wherein the cause of action accrued prior to the discharge; and the review in some jurisdictions is a matter of right.²

7. Accident, Mistake, Misfortune — *a.* IN GENERAL. — Statutory provisions have been made in some states for a review where, through accident, mistake, or misfortune, justice has not been done and a further hearing will be just and equitable.³

vented from ascertaining and procuring evidence of the real facts. *Brooks v. Belfast, etc., R. Co.*, 72 Me. 365.

1. *In re Smith's Estate*, 12 York Leg. Rec. (Pa.) 178.

Where an Account of an Administrator Has Been Confirmed the remedy for omissions and mistakes is by petition for a review in the court below, and not by a citation for a supplemental account by the administrators. *Downing's Estate*, 5 Watts (Pa.) 90. See *In re Seichrist*, 2 Pa. St. 432.

Ignorance of Filing Account — Laches of Ward. — In *Plum's Estate*, 16 Lanc. L. Rev. (Pa.) 268, a review was allowed four years after the ward became of age, where the ward alleged that he did not know that the account was filed until about a year before, and no final settlement was made or release taken.

2. *Shurtleff v. Thompson*, 63 Me. 118.

The Maine Act of 1852 authorized writs to review judgments against bankrupts without regard to the time of the rendition of the judgment. *Colby v. Dennis*, 36 Me. 9.

Bankruptcy on Day of Judgment. — If the parties to an action agree that judgment may be entered on a designated day, and on that day the defendant files a suggestion of his bankruptcy, which is not brought to the attention of the court until after entry of judgment, it is discretionary with the court, under the *Massachusetts* statute, to grant a writ of review to enable the defendant to set up a composition in bankruptcy as a defense. *Golden v. Blaskopf*, 126 Mass. 523.

Review Not in Court's Discretion. — Under an act providing for the granting of a review on a satisfactory showing that the defendant in the original action had been discharged in bankruptcy before or subsequent to the rendition of judgment in the original

action, provided that the cause of action accrued before the proceedings in bankruptcy and that the claim or demand was of such a character as would be bound by a discharge in bankruptcy, the granting of writs to review judgments against certificated bankrupts is not at the discretion of the court; but the statute is imperative as to all cases coming within its purview. *Colby v. Dennis*, 36 Me. 9.

Dishonest Purpose. — Where a review is sought, not for the purpose of reversing an erroneous judgment, but to prevent the satisfaction of an honest debt, it will not be granted. *Zollar v. Janvrin*, 49 N. H. 114.

3. *Wilbur v. Dyer*, 39 Me. 169; *Brigham v. Elliot*, 12 Pick. (Mass.) 172; *Barron v. Jackson*, 42 N. H. 419; *Emery v. Chesley*, 18 N. H. 198; *Weld v. Sabin*, 20 N. H. 533; *Wright v. Boynton*, 40 N. H. 353.

To Enable Prosecution of Cross-actions. — A review will not be granted for the mere purpose of affording to a judgment debtor time and opportunity to prosecute a cross-action to final judgment, where there has been no accident or mistake within the purview of a statute prescribing the causes for which a review may be had and no other prescribed ground for review is shown. *Pierce v. Bent*, 67 Me. 404.

Inquiry into Merits of Controversy. — Where it distinctly appears that by reason of accident, mistake, or misfortune no trial has been had, the court will generally grant a review without inquiring into the merits of the controversy between the parties, if satisfied that a matter of controversy actually exists which the party claiming the review desires and intends to try, and would have tried but for the accident. *Nashua, etc., R. Co. v. Stimpson*, 35 N. H. 286.

b. ERRORS OR MISTAKES IN JUDGMENTS. — Clerical errors or mistakes in a judgment may be remedied by proceedings to review.¹

Erroneous Partition. — Where, in partition after final judgment, it appears that a mistake was made by the commissioners in making the division, a review is properly granted because reasonable and for the advancement of justice. *Wilbur v. Dyer*, 39 Me. 169.

In *Sturdivant v. Greeley*, 4 Me. 534, a review was prayed on the ground of errors in the doings of a committee appointed to make a partition, and the errors complained of were not discovered until after the acceptance of the report and the entry of judgment thereon. On the petition for partition in that case the interlocutory judgment for the division was entered after a hearing by the court of a question of law arising on a demurrer to the petition, which was an admission by the respondent of all the material facts alleged therein. Review was refused on the ground that upon the trial of the review the case would be entirely opened, and each party would have the liberty to offer further evidence, so that the whole cause would be tried as if no judgment had been rendered therein originally.

Error in Agreed Statement. — In *Stockbridge v. West Stockbridge*, 13 Mass. 302, judgment was rendered upon an agreed statement of facts, and a review was allowed to the losing parties on a petition showing that one material fact in the agreement was erroneous, owing to causes for which they were not responsible. The court said: "We have no doubt of our authority to grant a review in this case. Nor do we perceive any reason against such an application as the present which does not equally apply to a judgment rendered upon a verdict." The case was treated as a case where a party has been entrapped or misled into an agreement without laches on his part. See also *Ward v. Clapp*, 6 Met. (Mass.) 414.

In Foreign Attachment a trustee, charged by accident or mistake either on the first process or on scire facias, has been granted a writ of review in order to enable him to file an answer and be thereupon discharged. *Fuller v. Storer*, 111 Mass. 281, citing *Brigham v. Elliot*, 12 Pick. (Mass.) 172; *Ex p. Packard*, 10 Mass. 426.

Accident Resulting in Default. — In an

action returnable before a justice, if a trustee fails through accident to appear, and a default is entered, and the justice leaves the place of trial, but the trustee appears in the course of the day, the justice and the plaintiff's attorney being present, and denies his liability, and asks for a trial, which is refused, a new trial will be granted, the costs of the petition to abide the event of the suit, if the trustee denies his liability under oath. *Rigney v. Hutchins*, 9 N. H. 257.

Mistake of Codefendant. — The failure of a guardian *ad litem*, appointed in a partition suit, to file an answer on behalf of his ward, an infant defendant, is not a ground for a review by an adult defendant. *McCarthy v. McCarthy*, 66 Ind. 128.

1. Mistakes of Computation as to the amount for which judgment was rendered may be corrected by review. *Lovell v. Kelley*, 48 Me. 263, citing *Starbird v. Eaton*, 42 Me. 569, wherein it was held that relief against a judgment which was erroneous for a mistake in casting interest might be had by a petition of review.

In *Isley v. Knight*, 1 Mass. 467, a review was granted on petition to correct a mistake in the computation of the amount due on a promissory note.

Excessive Judgment. — Where the judgment in the original action includes amounts to which the prevailing party had no right, the judgment cannot be nullified and the amount paid to satisfy it recovered back on the ground that it was unjustly recovered. The proper course is to petition for a review, since it is well settled that the merits of a judgment cannot be reviewed in a new action. *Hagar v. Springer*, 60 Me. 436; *Weeks v. Thomas*, 21 Me. 465; *Loring v. Mansfield*, 17 Mass. 394; *Jordan v. Phelps*, 3 Cush. (Mass.) 545. But see *contra*, *Fowler v. Shearer*, 7 Mass. 14; *Rowe v. Smith*, 16 Mass. 306.

Judgment by Default. — Where a defendant has judgment rendered against him in his absence, and without actual notice, for a larger sum than appears to have been justly due, a new trial will be granted. *Chase v. Brown*, 32 N. H. 130.

Unauthorized Entry of Judgment. — In

c. **DEPRIVATION OF RIGHT TO PROPER TRIAL.** — A comparatively frequent cause for granting a review is that there were irregularities attending the trial or in forcing the party to trial, or that he was deprived of such a trial as is guaranteed by the constitution.¹

Priest v. Soule, 70 Me. 414, the defendant in bastardy process failed to present his defense at the court where his bond required him to appear, and did not move to take off a default entered prior to the filing of the declaration. After such filing, judgment was entered against him, and it was held that he was entitled to review the judgment thus inadvertently entered, it being provided by statute that a declaration must be filed before proceeding to trial, or prior to a default or demurrer.

1. **Forcing to Trial Unprepared.** — If it is made to appear that injustice has been done to a party by hurrying him to trial unprepared, a review will be granted. *Parker, C. J.*, in *Reynard v. Brecknell*, 4 Pick. (Mass.) 304.

Refusal of Continuance. — If a party should be seriously injured by any determination of a trial court on matters clearly within its discretion, as the postponement or continuance of an action, the remedy, if any, is by petition for review. *Reynard v. Brecknell*, 4 Pick. (Mass.) 302.

In *Weeks v. Adamson*, 106 Mass. 514, the Supreme Court refused to grant a review of a judgment rendered in the Superior Court for the mere reason that the justice presiding at the trial refused a continuance or postponement.

Interest of Juror. — In *Davis v. Allen*, 11 Pick. (Mass.) 466, a review was granted because of the interest of a juror, the fact of such interest not having come to the knowledge of the petitioner until after the verdict had been returned against him and after the final adjournment of the court.

Knowledge of Hostility of Juror. — A review will not be granted because one of the jury was hostile to the petitioner, if that fact was known at the trial; nor because a juror had expressed a general opinion of the cause before trial, if it appears that he had formed no judgment of the merits and stood indifferent between the parties. *Haskell v. Becket*, 3 Me. 92.

Mistakes or Negligence of Counsel. — Where counsel, by mistake, have

suffered a verdict to pass against the plaintiff, a new trial will be granted upon terms which will place the parties in the same condition as if a nonsuit had been entered. *Riley v. Emerson*, 5 N. H. 531.

A review may be granted to allow a discharge in bankruptcy to be pleaded, the petitioner having been deprived of his right to avail himself of that defense by the mistake of his attorney. *Shurtleff v. Thompson*, 63 Me. 118.

Discretion of Court. — In *Sylvester v. Hubley*, 157 Mass. 306, in which case the petitioner rested his application on the negligence or misconduct of his attorney, the court, in denying a review, said: "The question whether to grant a review, and if so on what terms, is addressed largely to the discretion of the judge. This discretion should be exercised in such a way as to promote an orderly and proper administration of justice, and not to encourage carelessness, ignorance, and laxity of practice in the conduct of cases in courts." Citing *Thayer v. Goddard*, 19 Pick. (Mass.) 60; *Brewer v. Holmes*, 1 Met. (Mass.) 288.

Error of Judgment. — A new trial will not be granted upon petition for mere error of judgment or misapprehension, on the part of the petitioner's counsel, as to some point involved in the proceedings. *Heath v. Marshall*, 46 N. H. 40.

Neglect to Enter Appearance. — If counsel who are instructed to defend a suit mistake the term of the court and neglect to enter an appearance, it is such accident or misfortune as is contemplated by the statute giving the right to a review. *New England Mut. F. Ins. Co. v. Lisbon Mfg. Co.*, 22 N. H. 170.

There may be a review for the accidental mistake of an attorney in failing to enter an appearance for his client, but not for his carelessness or inattention. *Thayer v. Goddard*, 19 Pick. (Mass.) 60.

Absence of Counsel on Presentation of Referee's Report. — It is not a ground to review that the petitioner's counsel was not present when the report of the

Failure to Exercise Reasonable Diligence. — But where it appears that the conditions as to which complaint is made would not have resulted, or the alleged injurious consequences might have been avoided, had due care been taken, or if reasonable diligence had been exercised by the complaining party or his counsel, the mistake, error, or ignorance which the complainant or petitioner seeks to have excused will not be regarded as a sufficient reason for disturbing the determination originally made.¹

d. LOSS OF RIGHT TO ORDINARY METHODS OF REVIEW. — Where, without fault on his part, a party has lost or has been deprived of the right to prosecute an appeal or to sue out a writ of error, the court, in the exercise of the general discretion vested in it by statute, may grant a review.² And the like

referee was presented and accepted, although such presentation and acceptance were after the second day of the term. Such a "mistake" is a fault of counsel which the court will not cure. *Crooker v. Randall*, 53 Me. 355.

Misconduct of Referees. — Writ of review, and not writ of error, is the proper remedy to revise a judgment founded upon an award made by referees upon the ground that the referees called into the reference and consulted a third person whose advice and opinion they adopted and followed. *Denison v. Portland Co.*, 60 Me. 519.

1. *Ryder v. Phoenix Ins. Co.*, 101 Mass. 548; *Handy v. Davis*, 38 N. H. 411; *Bergeron v. Dartmouth Sav. Bank*, 62 N. H. 655; *Carroll v. McCullough*, 63 N. H. 95; *Couillard v. Seaver*, 64 N. H. 614.

Failure to Prepare for Trial. — If, in preparing for trial, a party fails to make an inquiry, obviously proper and necessary to determine what evidence he will require to make out his case, the omission to produce such evidence will not avail him as a ground to review or to obtain a new trial. *Clark v. Brigham*, 22 Pick. (Mass.) 81, where the defendant, supposing that the question of his liability to the plaintiff would be first tried, and that if a verdict should be found against him on that issue the matter of damages would be the subject of a subsequent inquiry, neglected to produce evidence as to the amount of damages.

2. *Petersham v. Dana*, 12 Mass. 429; *Keene v. White*, 136 Mass. 23.

Inadvertence. — A review of a judgment rendered by a justice of the peace may be granted on the ground that the party against whom it was ren-

dered intended to appeal and thought he had appealed, but through some mistake or inadvertence had omitted to claim an appeal. *Hutchinson v. Gurvey*, 8 Allen (Mass.) 23.

Appeal from Commissioner of Insolvent Estate. — A review will not be granted because of the loss of the right to appeal from a "decision" of a commissioner of an insolvent estate. *Hilton v. Wiggin*, 46 N. H. 120; *Smith v. McDaniel*, 15 N. H. 474.

Resort to Error Instead of Appeal. — In *Champion v. Brooks*, 9 Mass. 228, where a judgment had been rendered against the defendant and he failed to appeal, when he had a right so to do, but brought error, the court, having decided that he could not have error when he had a better remedy by appeal, said: "We can in this case relieve the plaintiff in error by granting him a review, if on his application it should appear that he has not had justice done him, and that his not claiming an appeal arose, not from his own laches, but from the misapprehension of the parties and of the lower court."

Laches in Asking Writ of Review. — Where a party is entitled to a writ of review as a matter of right, but fails to bring it within the time limited by the statute, it is discretionary with the court, upon a petition, to allow a review. *Jackson v. Gould*, 72 Me. 335; *Chase v. Brown*, 32 N. H. 130. But see *Smith v. Cole*, 18 N. H. 280.

Accident — Mistake. — Where by one section of a statute a review is given as of right, and in another section the court is authorized upon petition to grant a review "in any other case" where it shall appear that justice has not been done "through any accident,

power may be exercised where, on an appeal, exceptions duly taken below were not presented in proper form, or through accident were not presented to the reviewing court.¹

8. Fraud.—In equity, the remedy against a judgment obtained by fraud is not by a bill of review, but by an original bill, generally for an injunction; and the statutory action of review being analogous to the bill of review in equity, it follows that unless fraud in obtaining a judgment is expressly designated as a ground of review it will be unavailable.²

mistake, or misfortune," the words "in any other case" should not be construed as meaning in any other actions than those described in the first section, but as meaning in any other than those cases in which the party alleging injustice in the judgment has had an opportunity to correct it by a review as of right. Therefore, when judgment was rendered pursuant to a stipulation that the judgment should be "open to review," and the petition for review showed that the petition intended to have sued out a writ of review within the time limited by law, but was prevented by accident, mistake, and misfortune, and that there were probable grounds for reducing the amount of the judgment upon a rehearing on the merits, it was held that one of the "other cases" was presented within the meaning of the statute, and the review was granted. *Coburn v. Rogers*, 32 N. H. 372.

A review may be granted upon petition where the neglect to bring it within the one year was through accident and mistake, and it sufficiently appears that justice was not done at the trial, notwithstanding the failure of justice at the trial was not through mere accident or mistake, but from the want of sufficient diligence. *Woodworth v. Wilson*, 50 N. H. 220.

1. Petersham v. Dana, 12 Mass. 429, in which case the petitioner had no right of appeal, and in consequence of a mistake of the presiding judge in not affixing his seal to the bill of exceptions the petitioner lost his remedy by writ of error.

Failure to File Exceptions.—In *Bowditch Mut. F. Ins. Co. v. Winslow*, 3 Gray (Mass.) 415, the Supreme Court decided that it had power to grant a review of its own judgment affirming a judgment brought up to it, where by accident exceptions taken below were not filed in the Supreme Court, the exceptions showing substantial grounds

of defense affecting the merits of the case.

2. Indiana Statute.—A bill of review was not the appropriate remedy, under the old chancery practice, against a judgment obtained by fraud, and the Indiana Code did not enlarge the office of a bill of review, but provided substantially the same remedy. *Nealis v. Dicks*, 72 Ind. 374, *disapproving* the dictum of Hanna, J., in *Quick v. Goodwin*, 19 Ind. 438, wherein it was held that Rev. Stat. Ind., § 219, in force in 1862, applied to proceedings in transactions other than judgments, *i. e.*, the matter which was the foundation of the action to obtain the judgment, and was not intended to apply in cases where frauds were perpetrated in obtaining judgment.

Fraud in Cause of Action and in Obtaining Judgment.—A party to the record may have a judgment set aside for fraud in obtaining it, but not for fraud in the cause of action upon which it is founded, because he should have pleaded the fraud to the cause of action before the judgment was rendered. *State v. Holmes*, 69 Ind. 577.

Fraudulent Promise Pending Suit.—A judgment cannot be reviewed on the ground that the parties seeking the review were sureties on a note on which the judgment was rendered, and that the plaintiffs in judgment fraudulently promised them, while suit was pending, that if they would allow judgment to go against them by default, no execution on the judgment should ever be issued against them. *Mitchell v. Boyer*, 58 Ind. 19.

Fraudulent Action of Corporate Officer.—A complaint to set aside a judgment by default against a public corporation is insufficient if the only ground shown is the fraudulent action of one of the officers of such corporation upon whom service of the summons was made, as to which it does not appear that the adverse party had any knowledge nor

9. Default of Absent Defendant.—In *Massachusetts* and the other New England states which have substantially adopted the Massachusetts practice, provisions exist for reviewing a judgment which has been rendered on the default of a defendant upon whom service of process has not been made because of his absence, or because of inability to ascertain his whereabouts for the purpose of such service. The review in such a case is of right, and the object of allowing it is to enable such a defendant to avail himself of any defense to which he may deem himself entitled, and of which he might have availed himself in the original action.¹

If the Defendant Has Had Notice of the Suit by due service of process upon him, he is constructively and by legal intendment present in court, and a judgment rendered against him on his default cannot be reviewed under such provisions, although it may be reviewable on other grounds, such as accident, mistake, inadvertence, denial of justice, or the like.²

Recognizance for Execution.—In *Vermont*, in certain cases where judgment is rendered against absentees, execution cannot issue until the plaintiff gives security by way of recognizance in double the amount of recovery, to pay such sum as may be recovered by such absentee defendant on a review, to which the latter has a right by suing out a writ within a designated time.³

that he was in any wise guilty of fraud. *Adams School Tp. v. Irwin*, 150 Ind. 12.

Judgment on Notes Fraudulently Attested.—A judgment by default cannot be reversed by writ of error, upon the ground of the fraudulent attestation after their delivery to the payee of the notes on which the judgment was based. The remedy, if any, is by review. *Starbird v. Eaton*, 42 Me. 569.

1. **"Absence" Defined.**—Whenever the defendant does not appear, either in fact, or constructively by the service upon him of the summons to appear, a judgment rendered upon his involuntary default is rendered "in his absence," within the meaning of the statute allowing petitions for a review by absent defendants against whom judgments have been rendered on default. *James v. Townsend*, 104 Mass. 367.

Object of Statute.—"The right to have a review by writ without petition was intended to be based upon the want of service of the writ, either personal upon the defendant, or at his actual place of residence." Wells, J., in *James v. Townsend*, 104 Mass. 367.

Defective Service.—A review will be granted on the application of a resident

where it appears that, while temporarily absent, leaving an agent in the state, service of the original writ was attempted by leaving a summons at the last and usual place of abode of such agent; and that the defendant had not had a hearing. *Holmes v. Fox*, 19 Me. 107.

2. *Matthewson v. Moulton*, 135 Mass. 122; *Smith v. Brown*, 136 Mass. 416; *Manning v. Nettleton*, 140 Mass. 421; *Riley v. Hale*, 146 Mass. 465.

3. **Recognizance Not Taken—Trustee Process.**—If judgment be rendered against an absent defendant without personal notice, the fact that no recognizance for a writ of review was taken does not affect the regularity of the judgment, but merely makes it irregular to issue an execution thereon. Therefore, if an action against an absent defendant be brought by way of trustee process, the trustee, if adjudged chargeable, will be protected in whatever payments he may make to the plaintiff in accordance with such judgment, notwithstanding no recognizance for a writ of review was taken. *Stearns v. Wrisley*, 30 Vt. 661.

Sufficiency of Recognizance.—In *Ross v. Shurtleff*, 55 Vt. 177, the memorandum by a justice of a recognizance for

V. JURISDICTION TO REVIEW. — Jurisdiction to entertain proceedings to review is statutory, and unless authority is conferred on the court wherein the proceeding is instituted, or on the judge to whom the application is made, the proceedings are a nullity.¹

review was as follows: "The plaintiff as principal and W. S. as surety recognized to the defendant in the sum of \$275.50 as the law requires for the said H. C.'s right of a trial of the case at any time within two years from the date of this judgment;" and this was held to be sufficient.

1. Statute Not Retroactive. — Judgments are subject to revision according to the statutes existing at the time of their rendition, and statutes providing for a review are not retroactive unless made so in terms. *Treat v. Ingalls*, 9 Me. 61.

Amount in Controversy. — A statute conferring general jurisdiction to grant and try reviews is not affected by a subsequent statute limiting the jurisdictional amount where writs are issued in actions at law. *Day v. Croak*, 13 Gray (Mass.) 461. And see article AMOUNT IN CONTROVERSY, vol. 1, p. 702.

Cause Coming Up on Appeal. — Where it is provided that civil actions in the Supreme Court in which an issue has been joined and judgment rendered, except in cases otherwise provided, may be once reviewed, and no distinction is made between an action entered in the Supreme Court and one in the court by appeal, a review may be had of an action coming by appeal from a police court. *Moulton v. Fellows*, 51 N. H. 421.

Judgment in Justice's Court. — Where there can be no review of right of a justice's judgment, and it is provided by statute that the review shall be tried in the county where the original trial was had, a justice's judgment rendered on default may be reviewed in the Court of Common Pleas, wherein a jury trial may be had. *Rigney v. Hutchins*, 9 N. H. 257.

In *Anderson v. Brown*, 10 Gray (Mass.) 92, it was held that a review might be granted by the Court of Common Pleas of a judgment of that court affirming a judgment of a justice of the peace on the complaint of the defendant in review. *Following Bowditch Mut. F. Ins. Co. v. Winslow*, 3 Gray (Mass.) 415.

Denial of New Trial as Preclusion of Jurisdiction. — The denial by the Superior Court of a motion for a new trial will not, as a matter of law, deprive the Supreme Court of its jurisdiction to review a judgment under Pub. Stat. Mass., c. 187. *Stillman v. Whittemore*, 165 Mass. 234.

Objection at Hearing. — If the Superior Court grants a petition for a writ of review which it had no jurisdiction to entertain, an objection to such jurisdiction taken at the hearing upon the writ is not too late. *Smith v. Brown*, 136 Mass. 416.

Review by Court Rendering Judgment. — In *Indiana* the remedy is applied in the court rendering the decree or judgment. It involves the merits of the original action and partakes of its jurisdictional features. It is treated as following the jurisdiction of the original action, and thus far at least it is incidental to the original action. *Jones v. Tipton*, 13 Ind. App. 392; *Kiley v. Murphy*, 7 Ind. App. 239; *Jones v. Ahrens*, 116 Ind. 490; *Ex p. Kiley*, 135 Ind. 230; *Evansville, etc., R. Co. v. Maddux*, 134 Ind. 571, in which case it was said that the court which originally tried the cause sits as an appellate court in the review.

Analogy to Appeal. — Jurisdiction on appeal from a proceeding in review of a judgment follows the jurisdiction of the action sought to be reviewed, and if an appeal from the judgment in the original action would have been in the Appellate Court, jurisdiction of an appeal from a proceeding to review the judgment will be in the Appellate Court, and the same is true as to the Supreme Court. *Ex p. Kiley*, 135 Ind. 225.

In *Maine* the Supreme Court, in the exercise of its general power to grant reviews in all cases, will refuse to entertain an application for the review of an action in a justice's court where the party aggrieved may have redress in a superior court. *Merrill v. Crocket*, 6 Me. 412.

In *New Hampshire* the writ of review is an independent and strict proceeding which need not be commenced in

VI. PARTIES — 1. Original Parties. — Proceedings in review when tried on the issues originally joined are but a continuation of the primary case, and must be instituted in the names of and maintained by the original parties to the action; and this rule applies whether the review is of a judgment rendered after a trial on the merits or of a judgment by default.¹

the court wherein the original judgment was rendered. *Barron v. Jackson*, 42 N. H. 419.

Removal to United States Court. — An action or proceeding to review instituted in a state court cannot be removed to the Circuit Court of the United States under the removal act, since such a proceeding is not one over which the federal court has original jurisdiction. *Jackson v. Gould*, 74 Me. 564; *Whittier v. Hartford F. Ins. Co.*, 55 N. H. 141. See also article REMOVAL OF CAUSES, *ante*, p. 150.

1. *Evansville, etc., R. Co. v. Mad-dux*, 134 Ind. 571; *Sloan v. Whiteman*, 6 Ind. 434; *Cassel v. Case*, 14 Ind. 393; *Douglass v. Davis*, 45 Ind. 493; *Owen v. Cooper*, 46 Ind. 524; *Nowell v. Sanborn*, 44 Me. 80; *Elwell v. Sylvester*, 27 Me. 536; *Winch v. Hosmer*, 122 Mass. 438; *Johnson v. Thaxter*, 7 Gray (Mass.) 242.

Person Interested. — A review of the judgment and proceedings on a petition for partition can be granted only upon the application of a party to the former process, or of one representing the interest of such a party. A person interested in the estate and who was not a party originally cannot be allowed to come in. *Elwell v. Sylvester*, 27 Me. 536.

Assignment of Subject-matter. — A right to review a judgment may be transferred by a conveyance of the property affected by the judgment, provided the grantor had such a right. *Ross v. Banta*, 140 Ind. 120, *disapproving Walker v. Heller*, 90 Ind. 198.

Assignee in Bankruptcy. — An action of review is a chose in action, which "in virtue of the adjudication of bankruptcy" becomes vested in the assignee in bankruptcy, and he alone is empowered to prosecute or defend it in his own name; consequently the bankrupt himself cannot prosecute the review. *Zollar v. Janvrin*, 49 N. H. 114.

In *Winch v. Hosmer*, 122 Mass. 438, the petitioners' assignor in bankruptcy was not a party of record to the original action, and it was held that the

petitioners as his assignees could not maintain a petition for a review in his name or in their own.

Pending Review. — In *Tate v. Hamlin*, 149 Ind. 107, proceedings were instituted by the mortgagors and the junior mortgagee to review foreclosure proceedings by the senior mortgagee. During the pendency of the proceedings a sheriff's deed of the mortgaged property was made to the senior mortgagee and his wife. It was held that the proceedings were properly continued in the name of the original parties.

Person Not Party to Trustee Process. — In *Carrique v. Bristol Print Works*, 8 Met. (Mass.) 444, it appeared that an employee drew an order on his employer, requesting him to pay his wages to a person named, which order was accepted and several payments were made thereon. Subsequently the drawee was summoned as trustee of the drawer in a suit brought by a creditor, of which proceeding the payee had notice, but failed to notify the drawee that he claimed anything further on the order. The drawee was charged as trustee of the creditor, but by mistake, in entering the judgment, the record showed that he was discharged. It was held, on a writ of review brought by the creditor to reverse this judgment, that the payee could not come in as a party and show that the order in question, though purporting to be a naked authority to receive the wages, was in fact given for value, etc., and was an assignment of the wages, and by this showing prevent a reversal of the judgment so entered by mistake.

Widow, Heirs, and Legatees. — A residuary legatee is not a party to an action by record nor a party in interest so as to authorize him to petition for a review of an action brought by an administrator with the will annexed against an alleged debtor to the estate. *Johnson v. Johnson*, 81 Me. 202.

The widow and heirs of a decedent cannot maintain proceedings to review and set aside proceedings for the sale

2. Successors in Interest. — In a proper case the privies of the original parties to the action, *i. e.*, those who have succeeded to their rights as heirs, devisees, assignees, and successors in interest generally, may likewise institute or maintain an action to review the original judgment and proceedings.¹

Personal Representatives. — The rule is that after the death of a party, if the cause of action is one that survives, the personal representative may maintain proceedings to review,² but if the cause of action does not survive, he cannot continue or maintain such proceedings.³

of a decedent's lands on account of alleged fraud in the recovery of a judgment against the estate to which they were not parties, and for payment of which the sale was made. *Cassel v. Case*, 14 Ind. 393.

An Administrator cannot commence or prosecute a proceeding for review in a real action other than an action to foreclose a mortgage. *Berry v. Whitaker*, 58 Me. 422.

1. *Owen v. Cooper*, 46 Ind. 524; *Monumoi Great Beach v. Rogers*, 1 Mass. 159; *Otis v. Bixby*, 9 Mass. 520; *Winch v. Hosmer*, 122 Mass. 438; *Johnson v. Thaxter*, 7 Gray (Mass.) 242.

Real Action—Heirs and Their Grantees. — Where a party to a judgment which affects the title to real estate has a right to have such judgment reviewed, the heirs of such party, or their grantee, while holding the title to such real estate, may maintain an action for the review of such judgment. *Ross v. Banta*, 140 Ind. 120.

2. Death Pending Review. — Where, after service of the writ of review and before its return the plaintiff in review dies, his administrator, upon suggesting the death on the record, may be admitted to prosecute the review. *Otis v. Bixby*, 9 Mass. 520.

In *Monumoi Great Beach v. Rogers*, 1 Mass. 159, it was held that under the Act of February 9, 1789 (Stat. 1788, c. 47), the administrator of a person who died pending a writ of review brought on a judgment rendered against him for damages in an action of trespass *quare clausum fregit* might come in and prosecute the review.

An Administrator De Bonis Non cannot petition to review a judgment recovered against his predecessor, for any cause. *Taylor v. Sewall*, 69 Me. 148.

3. The Doctrine Stated. — If the plaintiff failed on the first trial and review, and pending the review died, his ad-

ministrator could not come in to prosecute the review if the original cause of action did not survive; whereas, if the plaintiff on the first trial prevailed, and the defendant brought the review, the right to review would survive the death of the original plaintiff, even though the plaintiff's original cause of action would not have survived had that action been pending. *Wiggin v. Janvrin*, 47 N. H. 295.

The Provisions of the Massachusetts Statutes of 1788 (c. 47, § 3), that pending a writ of review in a personal action if either party dies his executor or administrator may come in and prosecute or defend, have no application to a personal action which does not survive; hence in an original action on the case to recover damages sustained from a common nuisance, if pending review the plaintiff dies his administrator cannot be admitted to prosecute the review and it will abate. *Thayer v. Dudley*, 3 Mass. 296, followed in *Fernald v. Ladd*, 4 N. H. 145, wherein the defendant in an action for malicious prosecution died pending review by him and the court refused to admit his administrator to prosecute.

Death of Defendant in Review. — Where the plaintiff in an action, the cause of which does not by law survive, obtains a judgment, and the defendant institutes a review of the action, the death of the original plaintiff will not defeat the action of review. *Knox v. Knox*, 12 N. H. 352, overruling *Fernald v. Ladd*, 4 N. H. 145. And see *Wiggin v. Janvrin*, 47 N. H. 295.

Recovering Back Money. — In *Knox v. Knox*, 12 N. H. 352, it was said: "Where a review has been instituted, as in this case, a prominent question to be determined by the suit is whether the money previously recovered is rightly holden. It is not, therefore, merely a controversy on a claim of personal injury, but is also prosecuted

3. Real Party — Interveners. — There are decisions holding that where the original action is brought against a nominal party, the real party in interest may maintain a writ of review in the name of the nominal party.¹

4. Joint Parties. — One of several joint plaintiffs or defendants may review the original judgment, where no prejudice will result to his coplaintiff or codefendant,² but a review obtained by one or more joint parties will not affect the rights of such of the parties as do not choose to avail themselves of the remedy.³

to recover back money contended to be wrongfully in the plaintiff's hands; and while such is an important feature in the action, the principle of the common-law doctrine does not apply." This was an action brought by husband and wife for slander of the character of the wife, and judgment for damages was recovered, the execution was satisfied, and the defendant brought a review, after which the husband and then the wife died. It was held that the review might be prosecuted against the administrator of the husband.

1. *Winch v. Hosmer*, 122 Mass. 438, which was a petition by assignees in bankruptcy to review a judgment recovered in an action to replevy property alleged to belong to their assignor. It was objected that the petitioners were not parties to the record, and the decision was that it was in the discretion of the court below to allow an amendment to the petition of review by substituting the name of the original defendant as the formal petitioner and allowing the petition thus amended to be prosecuted for the benefit of the real parties in interest.

Trustee Process — Claimant of Funds. — One who has appeared as a claimant of funds in the hands of persons summoned as trustees, after judgment for the plaintiff, may be allowed to review in the name of the trustees upon giving to them a bond of indemnity. *Fuller v. Storer*, 111 Mass. 281.

Substitution of Plaintiff in Original Action. — A writ of review will not lie to set aside a judgment obtained in an action in the trial of which no errors of law or fact occurred, for the sole purpose of striking out the name of the plaintiff in the original action and substituting in its place the name of another person who, if he should prevail, would hold the money proceeds of the action in his own right and not for the benefit of the original plaintiff. *Skill-*

ings v. Massachusetts Ben. Assoc., 155 Mass. 581.

Leave to an Attaching Creditor to appear and defend a suit in the name of the original party on the record, upon giving a bond for costs, will not be extended so as to permit the party so substituting himself to review the action, and a writ of review brought by such creditor after the payment of the costs in the original action and the withdrawal of his bond will be dismissed. *Pike v. Pike*, 24 N. H. 384.

2. One of Two Defendants Stricken Out. — Where the name of one of two defendants is stricken from the original writ on the motion of the plaintiff's attorney, the remaining defendant may bring review in his own name. *Fling v. Trafton*, 13 Me. 295.

Action on Negotiable Paper. — Under Rev. Stat. Ind. 1881, § 615 (Burns's Annot. Stat. 1894, § 622), one party, *i. e.*, an accommodation guarantor or indorser, may review a judgment against him without disturbing a separate judgment in the same proceeding in favor of the makers. *Michener v. Springfield Engine, etc., Co.*, 142 Ind. 130. In this case judgment was taken by default against a surety whose principal, having interposed a defense of want of consideration, was successful, and the ground upon which the action of review was brought was new matter.

Securing Associates. — In *Nowell v. Sanborn*, 44 Me. 80, it was held that in the absence of a statute providing in direct terms that one of several joint plaintiffs or defendants may petition for a review of the original action, one of several joint defendants would not be interfered with in proceedings brought by him to review, when he had filed a bond of indemnity which might sufficiently protect his associates.

3. A Plaintiff Who Is Dissatisfied with a judgment recovered against two defendants, against one on a default and

VII. PROCESS. — Proceedings for a review, whether it is of right or is discretionary with the court, must be commenced by such process or notice as is prescribed by statute; and this process must be properly served, either personally¹ or on some person who may be designated as a person on whom service may be made.²

VIII. REVIEW AS OF FAVOR — 1. **Petition** — *a.* **IN GENERAL.** — A petition for a writ of review, as distinguished from the review itself, is a separate and independent proceeding, and is to be entered or instituted and service made thereunder as such. In its broad sense it is a civil action.³ Particular requirements as to such petitions are matters of statutory prescription. It may be said generally, however, that the petition should be in such

against the other after issue joined, a trial, and a verdict, cannot review the judgment as to the defaulted defendant, although he can as to the other. *Smith v. Gilman*, 3 N. H. 501.

Defendant Stricken Out by Consent. — Where, by leave of the court, the name of one of two defendants is stricken out, the remaining defendant consenting, the action stands as if it were originally brought against such defendant alone; a writ of review must be sued out in his name, and the other defendant will not be added on motion of the original plaintiff. *Fling v. Trafton*, 13 Me. 295.

One of Several Defendants in an action of tort may have a review when the judgment is final as to the other defendants; and this will not have the effect to carry the case forward as to those who do not review. *Paine v. Tilden*, 20 Vt. 554. And see *May v. Bliss*, 22 Vt. 480; *Frost v. Philbrook*, 28 Vt. 736.

1. All the Parties to the Original Action who are made parties to the review should be brought before the court on proper notice and an opportunity to be heard should be afforded to them. *Douglass v. Davis*, 45 Ind. 493.

2. Service upon Attorney. — In *New Hampshire* if the defendant in review resides without the state, service upon the attorney of record who appeared for him in the original actions is sufficient. *Smith v. Hill*, 45 N. H. 403.

Service on Proceedings to Quash for Want of Notice. — In *Clap v. Joslyn*, 1 Mass. 129, on presentation by the adverse party of an affidavit that he had no notice of the application for the writ, the court granted a rule to show cause why a writ of review should not

be quashed, and directed service of the rule upon the attorney in court of the adverse party, without insertion of such attorney's name in the rule or any special order for the service upon him.

In *Ferrill v. Simpson*, 8 Pick. (Mass.) 359, the notice of a petition for a review was ordered to be served on the defendant's attorney of record. The demandant was only a nominal party, but the parties in interest were present when the order was passed, and it was held that such notice was sufficient.

Requisites of Notice Not Prescribed. — Where a statute requiring notice does not prescribe the manner in which notice shall be given nor the term to which it shall be made returnable, a notice allowing such time as the law prescribes for parties in other cases and returnable where the respondent may be heard is sufficient. *Colby v. Dennis*, 36 Me. 9.

3. Bradstreet v. Partridge, 59 Me. 155; *Clarke v. Bacall*, 171 Mass. 292; *Yetten v. Conroy*, 165 Mass. 238; *Davenport v. Holland*, 2 Cush. (Mass.) 1; *Winch v. Hosmer*, 122 Mass. 438; *Green v. French*, 1 Allen (Mass.) 265.

Time of Petitioning. — A review of a judgment rendered on default in an action, where, because of a mistake in the service of the original writ, the defendant had no knowledge of the suit until after judgment, may be granted on a petition filed within one year after notice of the judgment, although the time of such notice was more than a year after rendition of the judgment, and although at the time of its rendition the defendant was within the commonwealth. *James v. Townsend*, 104 Mass. 367.

form as may be required by the local practice, and should be sufficient to present to the court or judge to whom the application is made the ground or grounds upon which the review is sought.¹

b. AMENDMENTS. — Petitions for review are within the purview of statutes permitting amendments in civil actions, and whenever it is apparent that an amendment will be in furtherance of justice it will be allowed.²

2. Pleading and Proof — Variance. — The existence of the grounds set out in the petition and relied on to obtain a review must be established by competent proof,³ and the testimony in

1. *Boody v. Watson*, 64 N. H. 162.

Review of Right. — Where the petitioner, misconceiving his remedy, sets up facts showing that he is entitled to a writ of review as of right, rather than a review in the discretion of the court, such as requires a petition, a review will be denied. *Byrnes v. Piper*, 5 Mass. 363.

Petition to Vacate Judgment. — In *Clarke v. Bacall*, 171 Mass. 292, it was held that the Superior Court erred in ordering a writ of review to issue on appeal from a judgment of the municipal court denying a petition to vacate a judgment.

Objections Waived. — Questions as to the form of the petition which are not raised by exceptions will not be considered. *Winch v. Hosmer*, 122 Mass. 438.

2. Davenport v. Holland, 2 Cush. (Mass.) 1, wherein a petition for a review was duly filed within a year after the rendition of the judgment in the original action; after the expiration of the year a cause of review which existed at the time of the filing of the petition was discovered, and it was held that an amendment was allowable. And see generally article AMENDMENTS, vol. 1, p. 458.

Substitution of Petitioner. — The court, in its discretion, may allow a petition for review to be amended by substituting the name of the original defendant as the formal petitioner, and the petition thus amended may be prosecuted for the benefit of the real parties in interest. *Winch v. Hosmer*, 122 Mass. 438, wherein it was said that statutes which "authorize the courts, in their discretion, to allow amendments in any civil suit or proceeding, by change of parties or of form of action, or in any other matter, either of form or substance, which may enable the plaintiff

to maintain the suit for the cause for which it was intended to be brought, however the same may be misdescribed, * * * permit the substitution of a new plaintiff, and are applicable to petitions for review."

Names of Proposed Witnesses. — Where a review is sought of a judgment obtained by default because of a mistake, and without the fault of the petitioner, a petition which states the circumstances under which the default was taken, but does not mention the names of the witnesses by whom the petitioner expects to prove such circumstances, may be amended, against objection, by inserting the names of such witnesses. *Haskell v. Hazard*, 33 Me. 585.

Appealability of Order Allowing Amendment. — An order of the Court of Common Pleas allowing an amendment of a petition for a review is subject to revision in the Supreme Judicial Court on exceptions. *Davenport v. Holland*, 2 Cush. (Mass.) 1.

3. There Must Be Some Evidence, at least to support the allegations of the petition, or a review will not be granted. *Willard v. Ward*, 3 Mass. 24.

Failure to Perfect Appeal. — Where a review is sought on the ground that an appeal was taken from a judgment on a sham demurrer, but through mistake the appeal was not entered, but was dismissed, it is unnecessary to go into the merits of the cause. All that is required is that the petitioner shall make affidavit that he has merits which he relies on to maintain his action. *Knight v. Bean*, 19 Me. 259.

The Affidavits of Witnesses will not be received on the hearing to sustain the petition. The testimony of the witnesses must be taken *viva voce* or by deposition, so as to enable the adverse party to cross-examine. *Gray v. Moore*, 7 Gray (Mass.) 215.

support of the application must be of a character sufficient to satisfy the court of the existence of the grounds on which the application is based and that the ends of justice will be promoted by granting the review.¹ The petitioner will be confined, how-

Depositions of Persons Other than the Petitioner. taken to be used on the hearing, are inadmissible unless taken in the same way as depositions on the trial. *Coffin v. Abbot*, 7 Mass. 252.

The Affidavit of a Party petitioning for a review will not be received except as to facts which are within his knowledge alone. Thus in *Rogers v. Hill*, 4 Mass. 349, the petitioner, to support his application, offered his own affidavit stating that since the former trial he had learned that a certain witness would have testified to material facts but that at the time of the trial the plaintiff was ignorant of that fact, but the court declined to receive the affidavit, stating that the supposed witness should have been summoned or that his deposition should have been obtained.

Examination as to Prejudice of Juror. — On the hearing of a petition to review because of the hostility of a juror to the petitioner, and his expressions of opinion prior to the trial respecting the cause, the juror may be called to explain his own feelings and declarations, and he may be examined generally in support of the verdict. *Haskell v. Becket*, 3 Me. 92.

Explanation of Verdict by Juror. — In *Ferrill v. Simpson*, 8 Pick. (Mass.) 359, the testimony of a juror that a misapprehension at the trial in regard to a certain line had no influence upon the verdict was admitted on the hearing of a petition for a review, for the reason as assigned that "the petition was addressed to the discretion of the court." In *Woodward v. Leavitt*, 107 Mass. 465, this reason was declared to be wholly unsound, because on the hearing of a petition for review the ordinary legal rules of evidence must govern.

Default Without Notice. — On the hearing of petition to review an action brought during the defendant's absence from the state, and of which he had no notice, proof by him that an attorney who appeared for him and consented to a judgment by default acted without his knowledge or authority is not an attempt to impeach the judgment by parol evidence, but is competent to enable the court to exercise its discretion as to whether or not the

petitioner should have an opportunity to be heard upon the original issue. *McNamara v. Carr*, 84 Me. 299.

Petitioner Contradicted. — Where the petitioner has been defaulted in the original action, the review will be granted on slight evidence, although that evidence be contradicted by testimony on the part of the respondent. *Coffin v. Abbot*, 7 Mass. 252.

Subsequent Removal of Disability of Witness. — Where, subsequent to the original trial, the disability of a party to testify in his own behalf is removed by statute, that fact will not render him competent to testify on the hearing of the petition for a review. *Warren v. Hope*, 6 Me. 479; *Berry v. Lisherness*, 50 Me. 118.

1. Newly Discovered Evidence. — Where, upon the hearing of a petition, facts are presented as newly discovered evidence which, if they had been introduced at the trial of the original action, would have been submitted to the jury and would have been sufficient to sustain a verdict for the petitioner it is proper to grant a review. *Dwinell v. Godfrey*, 44 Me. 65.

Exercise of Diligence. — Before a review will be granted on the ground of newly discovered evidence, the court must be satisfied from the evidence introduced in support of the petition that the evidence claimed as newly discovered could not have been obtained by diligent inquiry prior to the trial. *Atkinson v. Conner*, 56 Me. 546.

Cumulative Evidence. — A review will not be granted on the ground of newly discovered evidence when it does not appear that the evidence was admissible, or that it is not cumulative, where all the evidence is not presented so that the court may determine whether or not it is not cumulative. *Crooker v. Randall*, 53 Me. 355.

Surprise. — The court must be satisfied of the fact of surprise before it will grant a review upon that ground. *Atkinson v. Conner*, 56 Me. 546.

Contradicting Return of Service. — On hearing of a petition for a review, upon the ground that the party had no notice of the original action, evidence is admissible to contradict an officer's return

ever, to proof of the matters alleged or set forth in his petition,¹ though a failure to make timely objection to variant testimony will be treated as a waiver of the variance.²

3. Exercise of Discretion. — A petition to review is addressed to the discretion of the court, which discretion must be exercised with due regard to the rights and interests of all the parties. Although the court is not limited by technical rules, the discretion should be exercised with great caution, and in such a way as to promote an orderly and proper administration of justice and to avoid encouraging carelessness and laxity of practice.³

which states that he gave to the party a summons for his appearance at court. Although the record shows that the petitioner appeared in the original action by attorney, evidence is admissible that such appearance was at the request of a third party, and without the knowledge of the petitioner. *Brewer v. Holmes*, 1 Met. (Mass.) 288.

For the purpose of a review the apparent jurisdiction arising from the return of service by the officer may be shown not to have existed in fact. *James v. Townsend*, 104 Mass. 367.

Sufficiency of Evidence. — Questions as to the sufficiency of the evidence to justify a review will be considered by the Supreme Judicial Court in the absence of proper exceptions. *Winch v. Hosmer*, 122 Mass. 438.

1. *Simmons v. Apthorp*, 1 Mass. 99.

Newly Discovered Evidence. — Upon a hearing upon a petition to review, the petitioner in offering testimony as newly discovered evidence will be confined to such evidence as is set forth in the petition. *Warren v. Hope*, 6 Me. 479.

Allegations as to What Witnesses Will Testify to. — Under a statutory requirement that "when the discovery of new evidence is alleged in the petition, the names of the witnesses to prove it and what each is expected to testify must be stated under oath," on a petition for a review for newly discovered evidence the witnesses will be confined to the matters set out in the petition and which it is therein stated will be proved or are expected to be proved by them. They are not competent to prove other alleged causes of review as to which they were not named as witnesses. *Berry v. Lisherness*, 50 Me. 118.

2. Waiver of Variance. — The failure to object at the hearing of the petition that the evidence offered as a ground for granting a review did not sustain the allegation in the petition is a waiver

of the variance, and the objection cannot be urged on the review. *Hutchinson v. Gurley*, 8 Allen (Mass.) 23.

3. *Maine.* — *Holmes v. Fox*, 19 Me. 107; *Tuttle v. Gates*, 24 Me. 397; *Howard v. Grover*, 28 Me. 97; *Hobbs v. Burns*, 33 Me. 233; *Moody v. Larrabee*, 39 Me. 282; *Jewell v. Gage*, 42 Me. 247; *York, etc. R. Co. v. Clark*, 45 Me. 151; *Scruton v. Moulton*, 45 Me. 417; *Withers v. Larrabee*, 48 Me. 570; *Jones v. Eaton*, 51 Me. 386; *Brooks v. Belfast, etc., R. Co.*, 72 Me. 365; *Sherman v. Ward*, 73 Me. 29; *Buck v. Pierce*, (Me. 1885) 1 Atl. Rep. 137.

Massachusetts. — *Hart v. Huckins*, 5 Mass. 260; *Richardson v. Lloyd*, 99 Mass. 475; *Weeks v. Adamson*, 106 Mass. 514; *Hayes v. Collins*, 114 Mass. 54; *Boston v. Robbins*, 116 Mass. 313; *Todd v. Barton*, 117 Mass. 291; *Bush v. Hovey*, 124 Mass. 217; *Golden v. Blaskopf*, 126 Mass. 523; *Sylvester v. Hubley*, 157 Mass. 306; *Stillman v. Whittemore*, 165 Mass. 234; *Scituate Water Co. v. Simmons*, 167 Mass. 313; *Stillman v. Donovan*, 170 Mass. 360; *Bowditch Mut. F. Ins. Co. v. Winslow*, 3 Gray (Mass.) 415; *Reynard v. Brecknell*, 4 Pick. (Mass.) 304; *Thayer v. Goddard*, 19 Pick. (Mass.) 60; *Brewer v. Holmes*, 1 Met. (Mass.) 288; *Davenport v. Holland*, 2 Cush. (Mass.) 1; *Converse v. Carter*, 8 Allen (Mass.) 568.

Pennsylvania. — *Wilson's Appeal*, (Pa. 1885) 3 Atl. Rep. 447.

Vermont. — *Hazen v. Smith*, 2 Tyler (Vt.) 59, and see *Chipman v. Sawyer*, 2 Tyler (Vt.) 61.

Opening Foreclosure. — "If the original plaintiff recovers judgment upon a mortgage, and, entering under a writ of possession, holds for one year, the mortgage is thereby foreclosed, subject to be defeated by a review. Such foreclosure does not prevent an examination into the validity of his mortgage, or the amount of his debt, when the original cause of action is again

A review will not be granted where the result will be futile or where a simpler or more appropriate remedy is available, as where error or appeal will lie.¹

4. Terms and Conditions. — In granting the petition for a review in those jurisdictions where review is a matter of discretion, the court to which the application is made has power, by virtue of the discretion so vested, or by the express terms of the statute, to impose such terms and conditions or to require such stipulations, as a condition of the review, as to it may seem just and reasonable under the circumstances;² or the court may in its discretion decline to permit a review upon the performance of conditions by the respondent.³

brought under consideration upon review. The writ of review will not open the foreclosure so as to permit a redemption, if the plaintiff's judgment was rightful." *Otis v. Currier*, 18 N. H. 85.

1. *Bowditch Mut. F. Ins. Co. v. Winslow*, 3 Gray (Mass.) 415; *Sturdivant v. Greeley*, 4 Me. 534; *Emery v. Chesley*, 18 N. H. 198.

Probability of Similar Verdict. — An application for a review will not be granted if the court is satisfied that another trial would result in a verdict similar to the one before returned. *Parker v. Currier*, 24 Me. 168.

Appeal as Remedy. — If a party has a right of appeal, the court will not grant a review. The remedy by appeal is more direct and simple. *Keene v. White*, 136 Mass. 23.

Error as Remedy. — A review will not be granted where the record shows that the judgment complained of would be reversed on error. *Hart v. Huckins*, 5 Mass. 260; *Elden v. Cole*, 8 Me. 211.

2. *Jones v. Eaton*, 51 Me. 386; *Tuttle v. Gates*, 24 Me. 397.

Discretion of Court. — Under the *Massachusetts* statutes empowering the court to grant a review on such terms as it deems reasonable, the granting of the review and the terms imposed are largely within the discretion of the court. *Sylvester v. Hubley*, 157 Mass. 306.

Right to Review Doubtful. — In *Judd v. Buchanan*, 4 Mass. 579, wherein the affidavit of the petitioner was very imperfect as to his grounds of defense, and the original plaintiff's declaration was also defective, a review was granted on terms.

Imposing Terms as to Increase of Damages. — In *Maine* it has been provided that "the party prevailing in the review shall recover his costs, but this

shall not prevent the court, when granting a review on petition, from imposing on him such terms as to costs as they may deem reasonable," and it has been held that this provision "only refers to the subject-matter of costs, and does not authorize the court to impose terms as to the increase of damages." *Nowell v. Sanborn*, 44 Me. 80.

Limiting Questions to Be Considered. — A review "so far only as necessary to revise the assessment of damages" is substantially upon condition that at the new trial the petitioner shall be precluded from raising any other issue, and is one that the court in the exercise of its legal discretion may lawfully impose. *Berry v. Titus*, 76 Me. 285.

Stipulation as to Testimony. — A review may be granted to an insane person under guardianship upon condition that the petitioner will stipulate that no objection shall be made to general testimony on the part of the respondent at the trial. *Austin v. Dunham*, 65 Me. 533.

Requiring Bond. — After a general judgment has been a second time rendered for the plaintiff in the original action, it is within the power of the court, upon a petition for review, to require a bond containing a condition that the sureties will pay the amount of a special judgment recovered, within a designated time after its entry, to be given as a condition to the allowance of a supersedeas of the execution issued on the judgment. *Bush v. Hovey*, 124 Mass. 217.

Time of Imposing Terms. — The power of the court to impose terms as to costs can be exercised only at the time when the petition for review is granted. *Williams v. Hodge*, 11 Met. (Mass.) 266.

3. Remission of Erroneous Part of Judgment. — Where, at the suggestion of

Security for Costs. — The nonresidence or the insolvency of a party who is prosecuting a review may furnish a reason for requiring such party to give security for the costs of the review.¹

5. Stay — Supersedeas — By Mere Institution of Proceedings. — The institution of an action of review, or of proceedings to obtain a review, will not operate to stay execution on the judgment, nor will it operate to reverse or annul the judgment in whole or in part, or to set aside the verdict.²

Bond or Other Security. — It is provided generally in those states wherein the mode of review here treated of is recognized that to procure a stay of proceedings on the original judgment or of the execution the court may require a bond or other security sufficient to protect the successful party, before authorizing or entertaining the proceedings to review.³

the court, a judgment creditor will remit so much of the judgment recovered as he should have credited the debtor with, or will indorse the amount as paid upon the execution, there is no necessity for a review. *Hobbs v. Burns*, 33 Me. 233.

Performance of Condition. — Where a review is not granted absolutely, but only on the happening of a contingency, the petitioner has only a modified and conditional right to a review, and the respondent may prove the performance of such acts required to be performed by him to prevent the issuance of the writ. *Jones v. Eaton*, 51 Me. 386.

1. *Sanford v. Candia*, 54 N. H. 419, wherein the plaintiff in review was a nonresident; *Gale v. French*, 16 N. H. 95, wherein he was insolvent.

2. *Knox v. Knox*, 12 N. H. 357; *Wiggin v. Janvrin*, 47 N. H. 295; *Whitton v. Bicknell*, 3 Allen (Mass.) 472. See *Ely v. Forward*, 7 Mass. 26.

In **New Hampshire** the commencement of proceedings by writ of review will not operate to vacate the original judgment nor have the effect of a supersedeas or stay of execution. *Barron v. Jackson*, 42 N. H. 419.

Effect of Review. — "Everything is open upon the review which might have been suggested in the original action. * * * The original judgment is not, indeed, set aside, but stands until the judgment in the review, which may affirm, reverse, or modify the former judgment, in whole or in part, or make such other disposition of the case as may be necessary to secure the just and legal rights of all parties." *Gray, C. J.*, in *Safford v. Knight*, 117 Mass. 284.

The Effect of a Petition for a Review which is granted, and a new hearing had, is not to supersede or stay execution of the first judgment. This is effected only by the filing of a bond, if the party chooses so to do. Where the first judgment has been executed, and nothing remains to be done, then a review can only give a new judgment, which may be equal to the former, and enable the party on this new judgment to recover back what he was unjustly compelled to pay by the first. *Dyer v. Wilbur*, 48 Me. 287.

Discharge of Replevin Bond. — A suit in review will not have the effect to discharge a replevin bond given in the original action; certainly not without a proper order for that purpose made on the filing of a proper bond as a substitute. *Brown v. Brigham*, 5 Allen (Mass.) 582.

3. **Failure to Prosecute Diligently.** — In *Nickols v. Foster*, 7 Mass. 63, the court refused to stay execution upon a petition for a review where the petitioner had failed to serve the first order of notice, and before a second notice would be returnable the year would expire within which execution must issue.

Of Whom Security Required. — "Defendant," in a statute which provides that "after the rendition of a judgment in a civil action, if the execution has not been satisfied, the court or justice, upon petition of the defendant, may order a stay or supersedeas" of it, if the petitioner gives to the adverse party security for the prosecution of the review, refers to the party against whom the judgment sought to be reversed is rendered, and not to the defendant in the original action, and

Form of Bond. — When the form of the bond is prescribed by statute, there should be a substantial conformity with the specific statutory requirements. Because of the diversity in the practice it is impossible to make any positive statement as to what will be a sufficient bond in this respect. However, as a rule, the bond should require the reviewing party to prosecute the review to effect, that is, to final judgment, and should contain conditions which will save the adverse party harmless by reason of the

therefore may comprehend the plaintiff. *Leavitt v. Lyons*, 118 Mass. 470.

Substitution of Security. — The County Court has power to change the bail taken for a review, and the substituted bail will be held for the cost and intervening damages accruing from the time when the review was granted; but the exercise of this power is discretionary, and not the subject of exception. *Colgate v. Hill*, 20 Vt. 56.

Insolvency. — Under a rule of court providing that "upon the finding of a verdict for the plaintiff, if the defendant shall satisfy the court by affidavit that the plaintiff is insolvent, or that it would be difficult by reason of the condition of his pecuniary affairs for the defendant to collect of him the sum by which the damages might be reduced upon a review of the action, etc., the court may make an order for stay of execution," etc., when an administrator of an insolvent estate obtains a verdict, the defendant is entitled as a matter of right to have execution stayed, if he desires to review the action. *Wiggin v. Janvrin*, 47 N. H. 295.

In New Hampshire the rules of court "have been framed upon the idea that the costs of the original action cannot be recovered back. The defendant cannot obtain a stay of execution until he pays the costs of the original action and files a bond conditioned to pay all such damages and costs as shall be adjudged against him on review, and the plaintiff may prevent a stay of execution by filing a counter bond to refund such sum as the damages shall be reduced on review. Rule 51, 56 N. H. 590; Rule 48, 38 N. H. 592; Rule 47 of edition adopted July term, 1849." *Taylor v. Gilman*, 61 N. H. 636.

"The 48th rule of court comes in aid of the statute, and in those cases enumerated in the rule, and upon the terms there specified, it is provided that when the plaintiff prevails, execu-

tion be stayed till the controversy is determined, in order that money shall not be collected by him when the case is to be reviewed, if the plaintiff's condition, circumstances, or situation is shown to be such as that the money could not well be recovered back in case the defendant should prevail on the review." *Wiggin v. Janvrin*, 47 N. H. 295.

Presumption as to Bond. — Where a writ has been granted it will be presumed that the bond required was filed upon the issuance of the supersedeas, although the bill of exceptions fails to show the time of the filing of the bond. *Di Filippo v. Allen*, 163 Mass. 528.

Bond of One of Several Parties. — A bond against damages and costs which is filed by a petitioner in review who is one of several joint defendants defaulted in the original suit is, it would seem, a sufficient protection to his associates against additional damages and costs to entitle him to a writ of review. *Nowell v. Sanborn*, 44 Me. 80.

Effect of Supersedeas — Action on Original Judgment. — The filing of a petition for a review and the awarding of a supersedeas of the execution issued on the judgment in the action sought to be reviewed are no bar to maintaining a subsequent action on such judgment. *Gifford v. Whalon*, 8 Cush. (Mass.) 428.

Recognizance on Arrest. — A statutory provision that execution shall not be superseded or stayed by the writ of review, unless where security has been given by the judgment debtor to prosecute his review and satisfy such execution as may be issued against him on the review, has no application to the operation of the judgment of review.

Whitton v. Bicknell, 3 Allen (Mass.) 472, wherein it was held that an action could not be maintained upon a recognizance given by a defendant arrested on execution, if the judgment upon which the execution issued had been reversed on review.

review.¹ The bond thus given, if valid otherwise, will not be invalidated by proceedings had pending the review, as a change or substitution of parties, immaterial amendments, or the like,

1. Effect of Affirmance of Original Judgment. — Where it is provided by statute that a recognizance on review shall be "conditioned that the party prosecute his review to effect, and answer and pay all intervening damages occasioned to the adverse party by delay, with additional costs in case judgment be affirmed," such an obligation will be regarded as in the alternative, and the mere affirmance of a judgment reviewed will not be deemed a breach of the recognizance unless intervening damages have been sustained or additional costs have been recovered. *Brown v. Clark*, 27 Vt. 576, 28 Vt. 690.

Affirmation in Whole or in Part. — In *Bingham v. Pepoon*, 9 Mass. 239, the condition of a bond to review was to pay the former judgment and twelve per cent. interest, with additional damages and double costs if the judgment should be affirmed in whole, and if the judgment was affirmed in part only, to pay the part unreversed, with six per cent. interest. This bond was held good.

"Intervening Damages" Defined. — The expense of litigation, the fees of counsel, the waste of time, and other charges incurred in the defense of the original suit are not "intervening damages" within the meaning of a condition that the party reviewing shall "prosecute" his review "to effect, and answer and pay all intervening damages" and costs, in case judgment should be affirmed. *Peasely v. Buckminster*, 1 Tyler (Vt.) 264.

In scire facias upon a recognizance given for a review, where the reviewer was wholly destitute of property at the time of the review, and so continued, it was held that as no damage had accrued from the loss of any part of the debt, the plaintiff could not recover the accrued interest as "intervening damages." *Roberts v. Warner*, 17 Vt. 46.

Compliance with Order for Security. — Where it was ordered that a notice issue and that "upon filing a bond for the payment of the amount of the judgment for costs rendered in said case, if said judgment shall not be reversed, execution therefor be stayed until the determination hereof, such bond to be satisfactory to the clerk and his approval indorsed thereon," a bond

conditioned that if the petitioner should prosecute said review to final judgment and satisfy such execution as might be issued against him on such review then the bond should be null and void was held to be sufficient within the statutes, and it was further held that the fact that the bond did not follow the terms of the order did not vitiate it. *Leavitt v. Lyons*, 118 Mass. 470.

Defect in Form. — In *Green v. French*, 1 Allen (Mass.) 265, the condition of the bond was that if the petitioner should pay to the judgment creditor "whatever shall be due to her upon the judgment aforesaid after the final judgment in review" it should be void; and it was held that the condition of the bond was inartificially drawn, and did not conform to the terms prescribed by the statute.

In *Kenney v. Burke*, 61 Me. 134, the defendants gave a bond to stay the execution, on filing a petition for review of an action in which judgment was rendered against the principal defendant, and in favor of the plaintiff. This review being denied, a new petition for review was presented, a new bond was filed, and the execution was again stayed; and it was held that the condition in the first bond was broken.

Nonsuit. — A bond to prosecute a review to final judgment is forfeited by the obligor becoming nonsuit. *Hicks v. Atkins*, 4 Mass. 103.

Dismissal of Petition. — In *Randall v. Bancroft*, 10 Allen (Mass.) 346, the condition of the bond was that if the petitioner "shall forthwith prosecute a review of said action to final judgment, and satisfy such execution as may be issued against him on the review, then this bond shall be void; otherwise, the same shall remain in full force." This condition was held to have been broken by a dismissal of the petition for review. But see *Green v. French*, 1 Allen (Mass.) 265, decided under other provisions of the statute.

A condition that the petitioner shall prosecute her said petition to final judgment and shall pay all such costs and damages as the respondent shall recover upon the final judgment is not broken by a judgment dismissing the petition without costs. *Roberts v. Pepper*, 108 Mass. 356.

which do not affect the liability of the sureties and are not prejudicial in their nature.¹

The Liability of the Sureties Is Fixed, of course, by the final judgment rendered on the review, and is entirely dependent upon that judgment and the condition of the obligation entered into by them.²

Prosecution — "Forthwith." — Where a bond conditioned that the petitioner should "forthwith" prosecute the review was approved by the court, which fixed no time for bringing the writ, it was held that the failure to bring the writ forthwith, or within a reasonable time, *i. e.*, for more than a year, was a breach of the bond. *Quinn v. Brennan*, 148 Mass. 562.

Diligent Prosecution — "Forthwith." — A condition "forthwith" to prosecute a review to final judgment will be deemed to have been satisfied if the petitioner prosecutes within such time as the court having jurisdiction of the petition may direct. *Bamforth v. Raddin*, 14 Allen (Mass.) 66, in which case it was held that there was no breach of such a condition by the omission to take out an order of notice returnable at the next term of court, in compliance with the original order, provided that a new order of notice, returnable at a subsequent term, was afterwards passed and the case was still pending.

"At the Next Term" — Alterations of Writ. — In *Lehan v. Good*, 8 Cush. (Mass.) 302, the condition was to cause the entry of a writ of review at the next term. Thereafter an order for review in general terms was obtained, but the order did not specify the term at which it should be entered. Being unable to procure service of the writ in time for the next term, the plaintiff in review altered the writ so as to make it returnable at the next ensuing term, and as altered it was served and entered at that term. It was held that there was a breach of the condition by the failure to enter the review at the term specified.

1. Joint Obligation — Discontinuance as to One Obligor. — In *Happenny v. Trayner*, 111 Mass. 279, two defendants gave a bond to prosecute a writ of review to final judgment and to pay such judgment as might be recovered against them; on the review the original plaintiff discontinued against one defendant and recovered judgment against the other, and it was held that

the sureties were liable for the amount of the judgment.

Immaterial Amendment After Final Judgment. — The validity of a bond to review a judgment against two defendants, obtained upon a declaration charging the liability of both in a single count, is not affected by an amendment filed after the vacation of the original judgment which does not introduce any new or additional claim or cause of action, or any new party, nor affect the rights of the defendants as between themselves, and the only effect of which is to set out accurately the cause of action informally described in the original declaration. *Lanahan v. Porter*, 148 Mass. 596.

Death of Obligor. — Security for a review of a cause by the defendant is not discharged by the death of the defendant, where the suit proceeded to judgment against his administrator. *Hoy v. Herrington*, *Brayt. (Vt.)* 36.

2. Effect of Judgment — For Costs of Suit. — It seems that no action will lie upon a bond conditioned to pay the sum for which judgment was rendered, with interest and costs, "in case the former judgment shall be affirmed in full or in part, and the sum for which judgment shall be rendered, if the said judgment shall be affirmed in part," if the record of the proceedings on the writ of review does not show that the former judgment was affirmed in full or in part, but is simply a judgment that the defendant in review recover his costs of suit. *Ellis v. Pulsifer*, 4 Allen (Mass.) 165.

Affirmation of Former Judgment. — In *Crehore v. Pike*, 47 Me. 435, the bond was conditioned that the obligors should pay the first judgment "if such shall be the final judgment on the review." There was a verdict for increased damages and a judgment against the original defendant therefor, and for the costs of the review; and it was held that the judgment on review was in effect an affirmation of the original judgment, and that there was a breach of the condition because of the refusal to pay such judgment.

6. Costs. — In the absence of any special statute governing the allowance of costs on a petition for a writ of review, the court has recourse to general rules, particularly to those which apply to the allowance of costs in proceedings in which the court exercises its discretion.¹

7. Judgment. — On petition for review the only judgment that can be given is that a review shall or shall not be granted, and the judgment when rendered in either form is final in that proceeding. If a writ of review is granted, it is a new process to be sued out and served like other original writs, and upon which the

Interest. — In *Jenkins v. New England Marine Ins. Co.*, 6 Mass. 335, the bond was conditioned to pay to the plaintiffs, if the judgment was affirmed in the whole, the amount thereof with twelve per cent. interest and double costs, and on the review the jury affirmed the former judgment and added interest at six per cent. to the time of the verdict. It was held that the defendants were liable for such further six per cent. on the damages first assessed, double costs, and interest on the whole from the time of the judgment in review.

In *Whittaker v. Berry*, 64 Me. 236, a bond given under Rev. Stat. 1857, c. 89, § 4, was held to be discharged by payment of the original judgment and statutory interest from the date of the bond to the date of the final judgment in review, and the taxable costs.

The Double Interest secured by a bond to review is to be computed only to the time of judgment on the review. *Bacon v. Otis*, 11 Mass. 407.

Discharge of Bail and Indorser of Writ. — Bail who have become answerable that the principal defendant shall abide and not avoid are discharged by a judgment in favor of their principal in the original action; and the indorser of a writ who is surety for the costs which the defendant may recover, if judgment be rendered for the plaintiff in the first instance, is no longer holden for the costs, notwithstanding the defendant, upon review, may recover the costs to which he was subjected prior to the first judgment. *Badger v. Gilmore*, 37 N. H. 457.

Surrender of Bail. — In *Swett v. Sullivan*, 7 Mass. 342, it was declared by Parsons, C. J., that after the entry of final judgment in the original action, "and until the return and entry of the writ of review, no suit would be pending so that the bail could surrender the principal," implying that after the

entry of the writ or review such surrender could be made.

In *Thayer v. Goddard*, 19 Pick. (Mass.) 60, Chief Justice Shaw said that in *Jones v. Howland*, decided in 1830 and not reported, "the court reversed a judgment rendered on scire facias against bail, and accepted the surrender of the principal in discharge of bail, in the same manner as if no judgment against the bail had been rendered."

Bail against whom a judgment has been rendered on scire facias by mistake and without their fault are entitled at the hearing upon the review, upon payment of costs, to surrender their principal, pursuant to statute, and to have judgment entered reversing the former judgment and discharging them. *Safford v. Knight*, 117 Mass. 281.

1. See generally article COSTS, vol. 5, p. 100.

Discretion of Court. — A petition for a review is not an "action" within the *Maine* statute which allows costs to the prevailing party in all "actions," but the court has power to award costs for the respondent, in such case, under statutory provisions which authorize an allowance of costs on application for certain writs "or any like process." *Hopkins v. Benson*, 21 Me. 399.

Error in Computation. — In *Ilsey v. Knight*, 1 Mass. 467, the court refused to award costs on granting a review to correct a mistake in the calculation of interest in a judgment in the petitioner's favor, although the respondent had refused to correct it, since the petitioner ought to have seen that the computation was correct.

Review of Right. — In *Byrnes v. Piper*, 5 Mass. 363, wherein the petitioner was entitled to his review as of right, the court refused to allow costs to the respondent on denial of a petition for a review which was not vexatious.

parties are again brought into court and further proceedings are had.¹

IX. REVIEW OF RIGHT — 1. In General. — In all the states which have passed statutes conferring the right to review, there are certain designated grounds upon which the party deeming himself aggrieved may review the judgment and proceedings below as a strict matter of right. In such cases there is no discretion vested in the court, but upon a compliance with the forms of practice prescribed, or, in the absence of such prescription, with the forms in analogous proceedings, the plaintiff in the action or writ may avail himself of the right thus conferred.²

2. Second Review. — In *Maine* a second review may be allowed under some circumstances upon petition, when the court is of opinion that justice manifestly requires it, but when there has been more than one verdict against the petitioner, the second review can be granted by the full court only.³ Elsewhere the rule is that where a review has been granted and a determination had thereon, the right to review is exhausted, and the remedy cannot be resorted to a second time.⁴

1. *Bradstreet v. Partridge*, 59 Me. 155; *Green v. French*, 1 Allen (Mass.) 265; *Davenport v. Holland*, 2 Cush. (Mass.) 1.

Change of Entry. — Until a petition for review has been finally disposed of, the erroneous entry of a writ of review may be changed or altered by the court. *Bradstreet v. Partridge*, 59 Me. 155.

2. In Indiana the action of review is of right in all cases wherein a review for any cause may be had. Burns's Annot. Stat. (1894), § 627 *et seq.*; *Hornady v. Shields*, 119 Ind. 201.

In *Massachusetts* the writ of review will issue of right where judgment has been rendered upon the default of a defendant upon whom service has not been made by reason of his being out of the commonwealth, or by reason of his residence being unknown. Pub. Stat. Mass. Supp. (1889-95), p. 1310, c. 234, § 8.

In *Maine*, *New Hampshire*, and *Vermont* the provisions authorizing the writ as of right are substantially the same as in *Massachusetts*. Rev. Stat. Me., c. 82, § 4, c. 89, § 7; Pub. Stat. N. H., c. 222, §§ 4-6, as amended by Laws 1897, c. 64; Stat. Vt., §§ 1646-1652.

In *Pennsylvania* the relief appears to be of right and is confined to the review of proceedings in Orphans' Courts by what is substantially a bill of review. The proceeding is statutory. Act Oct. 13, 1840; P. L. (1841) 1, § 1.

3. Rev. Stat. Me., c. 89, § 6.

Newly Discovered Evidence — Maine. — In *Trask v. Unity*, 74 Me. 208, eight years elapsed from the time of the commencement of the action, there were two verdicts adverse to the petitioner, and one review was had on the alleged ground of the discovery of new testimony. The court refused to grant a second review on the like ground, because it was not fully satisfied that the alleged newly discovered evidence had been unattainable by the utmost diligence, or that it would change the result.

4. *Coen v. Funk*, 26 Ind. 289; *Ratliff v. Baldwin*, 29 Ind. 16; *Ruggles v. Freeland*, 6 Mass. 513.

Second Judgment for Same Cause. — In *Chesman v. Lane*, 17 Vt. 83, the defendant filed a plea in offset. At the first trial he offered no evidence to support the plea, and the plaintiff recovered judgment for his whole demand. The defendant then entered a review. Subsequent to that trial, the defendant, by leave of the court, filed an additional plea in offset and on the second trial sustained his plea, but the plaintiff recovered judgment for a less sum than he had recovered at first. It was held that the cause was the same, that judgment had been rendered in the cause "twice for the same party," and that, therefore, the plaintiff was not entitled to review the last judgment.

Review of Right, After Review on Peti-

Proceedings Not Prosecuted to Judgment. — However, the mere institution or attempted institution of proceedings to review which are not prosecuted to judgment will not affect or bar the right to the complete remedy.¹

3. Waiver — Loss of Right — a. IN GENERAL. — The right to a review, whether it rests in the discretion of the court or is a matter of right, may be waived or lost in various ways;² among

tion. — Where one party has obtained by petition a review of a judgment rendered by default, the other party cannot afterwards review the same action as of right under a statute allowing a review where a verdict has been returned. His remedy is to petition the court to exercise a discretion vested in it by statute to grant review as often as justice requires, upon such terms as are equitable and just. *Howe v. Hapgood*, 13 Mass. 490.

Unsatisfactory Verdict. — A statute providing that a review may be had by a party aggrieved if only one verdict has been rendered against him authorizes a review where there has been but one trial with a verdict in favor of the applicant, if he deems himself aggrieved, and he is entitled to a review although agreeably to the letter of the statute there has not been one verdict against him. *Perry v. Goodwin*, 6 Mass. 498.

Verdicts on Separate Courts. — Where a declaration contained two counts for two several causes of action, and on the first trial the plaintiff obtained a verdict on one count, and on a second trial had a verdict on the other for a much less sum than that for which the first verdict was returned, he was held entitled to a review of the action. *Rice v. Townsend*, 14 Mass. 366.

Ejectment. — In *Frost v. Philbrook*, 28 Vt. 736, the plaintiff in ejectment against two defendants recovered at the first trial against one only, who reviewed; and the plaintiff reviewed as to the other defendant. On the second trial there was a verdict for both defendants. It was held that, the plaintiff's title being an entire thing to be tried, he was not entitled to review as to the defendant against whom he recovered at the first trial.

1. Failure to Prosecute. — A petition to the Supreme Court to review a judgment is not barred by the fact that a former petition was made to the Superior Court where it does not appear that such petition was filed, and there is no record as to it, it appearing, how-

ever, that it was presented to a justice of the court who refused to grant an order of notice thereon. *Nantasket Beach R. Co. v. Ransom*, 147 Mass. 240.

Discontinuance. — In *Burrell v. Burrell*, 10 Mass. 222, the court said: "So far as a writ of review is a writ of right and an original suit, it is within the principles which regulate other suits, where a nonsuit with leave, or a discontinuance by the nonappearance of the parties, is no bar to another action for the same cause." In this case it was held that a review commenced but discontinued was not a bar to another review by the same party in the same action, if his right was not otherwise limited.

Nonsuit. — In *Hayes v. Collins*, 114 Mass. 54, judgment for costs was entered upon a petition which was in the nature of a judgment upon a nonsuit or discontinuance, and not upon the merits, and this judgment was held to be no bar to a new petition for review filed within the statutory period.

2. Ordering Reference. — Where there is judicial discretion to refer a cause, though the defeated party has instituted proceedings to review, a reference may be refused when it is probable that the determination of the referee will not be accepted as final. *Stevens v. Rolfe*, 56 N. H. 183.

Effect of Statute. — Act N. H., Aug. 17, 1878 (Laws 1878, c. 64), "relating to review and new trials," did not take away the right of review in actions pending when the statute went into effect, nor in actions in which judgment had been rendered and the limitation of time for review had not expired at the time of the passage of the act. *Rowell v. Boston, etc., R. Co.*, 59 N. H. 35; *Paine v. Grand Trunk R. Co.*, 59 N. H. 215; *Knight v. Epsom*, 60 N. H. 581. See also, as to Act N. H. 1855, *Dickinson v. Lovell*, 36 N. H. 364.

Saving Clause — "*Actions Pending.*" — A petition for review is within an exception of the statute repealing the

others by consenting to a verdict or judgment¹ or to the finality of the judgment² by agreement to pay a judgment recovered, to avert the enforcement thereof,³ and in such other ways as will indicate the intention of the parties, in consideration of some benefit or loss, to accept the determination in the original proceeding as an end of the controversy.⁴

b. SUBMISSION TO JURISDICTION.—The review of a judg-

statutory provision for review except as to "actions pending," the phrase "actions pending" meaning pending petitions, and not pending actions of review commenced after a review has been granted. *Colby v. Dennis*, 36 Me. 9.

1. Judgment by Agreement.—When a judgment is entered by agreement of the parties, errors in the prior proceedings are waived and proceedings in review will not lie. *Collins v. Rose*, 59 Ind. 33.

Agreement Not Mutual.—In *Hall v. Wolcott*, 10 Mass. 218, the defendant demurred to the declaration in the original action in the court below, reserved the right of waiving the demurrer in the Supreme Court, and also agreed that the plaintiff should have the benefit of a verdict at the term. It was held that the defendant had waived his right of review, but that there was no waiver on the part of the plaintiff, who, on obtaining an unsatisfactory verdict in the Supreme Court, might review the judgment.

2. Judgment on Referee's Report.—A party waives his right of review by consenting to a reference of his cause, with an agreement that the report of the referee shall be final and that judgment shall be entered thereon. *Bennett v. Atwood*, 57 N. H. 216; *Carroll v. Locke*, 58 N. H. 163; *Rand v. Merchants' Despatch Transp. Co.*, 60 N. H. 276; *Parsons v. Hilliard*, 61 N. H. 642.

Agreement Not Mutual.—Where it was agreed by the plaintiff in a pending suit, by a memorandum on the docket, that one trial should be final on his part, and on the trial the defendant had judgment from which the plaintiff appealed, it was held that after a trial in the appellate court, in which the plaintiff prevailed, the agreement did not preclude the defendant from maintaining a writ of review. *Hatch v. Dennis*, 10 Me. 244.

3. Smith v. O'Brien, 146 Mass. 294, wherein the petitioner informed the re-

spondents that he intended to procure a supersedeas and a review, and was then told that the execution would be immediately enforced by levy upon his property, whereupon he paid a part of the judgment, paid the officer, and made an oral contract to pay the balance of the execution a few days thereafter upon agreement by the attorney to refrain from enforcing it until that time. This was held to be a waiver of the right to review.

4. Change of Interest After Original Judgment.—A conveyance of realty by the party prevailing pending the suit and after verdict, but before rendition of judgment, will not defeat the right of the grantor to a judgment in his favor in an action to review, provided that he is otherwise entitled thereto. *Berry v. Whitaker*, 58 Me. 422. And see *Williams College v. Mallett*, 16 Me. 84.

Discharge from Inadvertent Agreement.—In *M'Fadden v. Otis*, 6 Mass. 323, before the statute allowing a review as of right was repealed, the court, on motion, discharged a party from an agreement to waive his review, because it was proved that it had been entered into inadvertently upon the advice of counsel, and without a due regard to its consequences.

Qualifying Defendant as Witness.—In an action of tort against several, the plaintiff on trial voluntarily entered judgment in favor of one of the defendants and then used him as a witness, and a verdict was rendered in favor of the other defendants. The plaintiff thereupon entered a review as to all the defendants, and at the next term the defendant in whose favor the plaintiff had voluntarily entered judgment moved to set aside the review as to himself. This the court refused to do, and on a second trial there was a verdict against that defendant and in favor of the others. It was held that there was no error in the proceedings, the plaintiff not having waived his review. *Lyndon v. Cook*, 19 Vt. 35.

ment on account of the subsequent discovery of a fact which if it had been known could have been available only by a plea to the jurisdiction will not be permitted when it appears that the party could have pleaded other facts to the jurisdiction, but instead submitted to the jurisdiction and went to trial upon the merits.¹

c. PURSUING OTHER REMEDY. — The fact that a remedy is given by an action or writ of review will not preclude a resort to any other concurrent remedy. But where a party deeming himself aggrieved has appealed or brought error, or pursued any other remedy to which he considered himself entitled, he is precluded from testing the proceedings and judgment below by the statutory proceeding of review. It is likewise true that by taking relief by way of review a party will preclude himself from concurrent remedies.²

1. *McCauley v. Murdock*, 97 Ind. 229.

Excusing Laches — Infancy. — An infant whose guardian did not appear and approve a partition, and was not served with process, can have a review of such partition proceedings within a year after coming of age, only for cause shown. *Brown v. Keyser*, 53 Ind. 85.

2. *Indiana Mut. F. Ins. Co. v. Routledge*, 7 Ind. 25; *Hardy v. Chipman*, 54 Ind 591; *Davis v. Binford*, 70 Ind. 44; *Dunkle v. Elston*, 71 Ind. 585; *Searle v. Whipperman*, 79 Ind. 424; *Klebar v. Corydon*, 80 Ind. 95; *Traders Ins. Co. v. Carpenter*, 85 Ind. 350; *Harvey v. Fink*, 111 Ind. 240.

Appeal After Review. — In *Indiana Mut. F. Ins. Co. v. Routledge*, 7 Ind. 25, it was held that a party who has prosecuted to final judgment, in the Circuit Court, a complaint for review, for error of law only, cannot afterwards appeal from the original judgment to the Supreme Court, because the mode of procedure and judgment upon such a complaint for review and upon an appeal are in effect the same, and the law does not intend that a party shall have two revisions of the same case before two different courts, each sitting as a court of error.

If proceedings to review a judgment are merely incident to and part of the original action, and not a separate and independent action, and the court would have jurisdiction of an appeal from the original judgment, the institution of proceedings to review will not divest it of that jurisdiction. *Kiley v. Murphy*, 7 Ind. App. 239.

Remedy by Appeal Only. — Although

Act Mass. 1895, c. 234, § 2, does not permit the filing of a petition for a writ of review or to vacate a judgment rendered in a police, district, or municipal court, the Superior Court is not thereby deprived of its appellate jurisdiction. *Clarke v. Bacall*, 171 Mass. 292.

Review After Unperfected Appeal. — The fact that an appeal was prayed, but not perfected, does not prevent the lower court from reviewing its judgment. *State v. Kolsem*, 130 Ind. 434.

Concurrent Writ of Error. — The fact that a remedy is given by writ of review will not preclude resort to proceedings in error. *Smith v. Paige*, 4 Allen (Mass.) 94. And see *Bodurtha v. Goodrich*, 3 Gray (Mass.) 508.

Action of Debt After Judgment. — Where, after a levy upon an execution, the judgment creditor brings an action founded upon it, to recover the property levied on, and judgment is rendered against him, he may bring his action of debt, or present his claim against the estate, if the debtor is dead, without prosecuting a review of the action in which he has failed. Or he may review the action thus brought, and, if he fails on the review, seek his remedy afterwards, on his first judgment, in an action of debt under the statute, on account of the failure of the title. But he cannot, after a judgment against him in the action founded on the levy, maintain an action of debt, or have an allowance of a claim against the estate of the debtor, upon the ground of a failure of the title, and at the same time reserve a right to prosecute a review. Nor

Review and Appeal on Different Grounds. — However, if the grounds upon which a review is sought are of a different kind or character from those upon which the appeal was based, the proposition stated does not apply, for by appealing on a ground for which a right of appeal exists there is no waiver of a statutory right to review for another and entirely different cause.¹

d. FAILURE TO OBJECT AND EXCEPT. — The right to review for errors in the judgment and proceedings below may also be waived by the failure to take advantage of such errors below by proper objections and exceptions,² as it is settled that objections to alleged erroneous action on the part of the court below, other than mere discretionary action, must be taken in due form, otherwise they cannot be urged on the review. Objection alone, however, is not sufficient. The objection must be preserved by an appropriate exception, otherwise the reviewing court will not consider the matter alleged to be objectionable.³

will a subsequent release of the amount recovered or allowed restore or continue the right to claim the property under the levy of the execution. *Barker v. Wendell*, 12 N. H. 119.

1. Review for New Matter After Appeal for Error Apparent. — In *Hill v. Roach*, 72 Ind. 57, the court said: "It is unquestionably true that, in this state, a complaint for the review of a judgment for error of law in the proceedings will not lie after the judgment has been affirmed upon an appeal to this court; but we know of nothing, either in principle or based on authority, which can be properly construed to prevent the prosecution of a complaint for review, as in this case, for material new matter, after the judgment has been affirmed by this court upon an appeal involving only supposed errors of law in the proceedings below, provided the complaint is filed within the time limited for the commencement of such actions." And see *Harvey v. Fink*, 111 Ind. 249.

2. Collins v. Rose, 59 Ind. 33; *Preston v. Sandford*, 21 Ind. 156; *Train v. Gridley*, 36 Ind. 241; *Richardson v. Howk*, 45 Ind. 451; *Davidson v. King*, 51 Ind. 224. And see article EXCEPTIONS AND OBJECTIONS, vol. 8, p. 153.

Inadvertence. — Where a party omits through inadvertence to take a proper exception to the exclusion of evidence or to take exceptions which he should have taken if he desired to have the judge's rulings revised, there is no right to a writ of review, nor will an exception lie to the refusal of the court

to grant it. *Stillman v. Whittemore*, 165 Mass. 234.

Default — Insufficient Complaint. — A judgment rendered by default on an insufficient complaint, may be the subject of review though no exception is in the record. *Berkshire v. Young*, 45 Ind. 461.

3. Richardson v. Howk, 45 Ind. 451; *Preston v. Sandford*, 21 Ind. 156; *Train v. Gridley*, 36 Ind. 241; *Tachau v. Fiedeldey*, 81 Ind. 54.

Necessity of Exception. — "A bill of review cannot be used as a means of creating an exception in the first instance. The error must be an available one, otherwise there is nothing to review." *Osborn, J.*, in *Richardson v. Howk*, 45 Ind. 451. See also *Rice v. Turner*, 72 Ind. 559.

Judgment by Default — Objections. — "It has uniformly been held that if no objection be made to the judgment, and no motion made to modify it in the trial court, no objection can be made available upon appeal nor in an action to review, however erroneous the judgment may be. This rule has been applied even where judgment was rendered by default." *American Ins. Co. v. Gibson*, 104 Ind. 336.

Effect of Appearance. — It was held in *Preston v. Sandford*, 21 Ind. 156, that there could be no review of a judgment by the court that rendered it for error of law appearing in the proceedings and judgment, unless an exception had been taken to the decision in the original cause, where the defendant had appeared to the action, and was, there-

Preliminary Motions and Proceedings. — For the like reason, whenever it is necessary that a preliminary motion should be made below, or that the sufficiency of a proceeding should be tested, so that a ruling may be made to which objection and exception can be taken, the failure to take such action and to object and except to the ruling thereon will preclude the consideration of the error alleged on review.¹

c. LACK OF DILIGENCE. — Proceedings to review a judgment must be seasonably instituted and diligently prosecuted. Failure to commence the proceedings within the time prescribed by statute or fixed by the court will preclude, except in the special instances hereinafter referred to, a resort to this form of remedy.²

fore, presumed to be personally present in court and charged with notice of all the proceedings in the cause. And see *Train v. Gridley*, 36 Ind. 241.

New Trial Denied. — Where no objection is made or exception reserved to rulings made during the trial, or on the overruling of the motion for a new trial, an action to review the judgment cannot be maintained upon the ground that there was error in such rulings. *Slussman v. Kensler*, 88 Ind. 190.

Review of an Interlocutory Order to which no exception was taken and from which no appeal could be taken cannot be had. *Craven v. Chambers*, 69 Ind. 84.

1. Correction of Record *Nunc pro Tunc*. — Where a party appears after due notice of a motion to correct a record by an entry *nunc pro tunc*, and makes no objection to the notice in the court below, nor tests the sufficiency of the notice by a motion to reject or strike out, no question thereon is presented for review. *Bush v. Bush*, 46 Ind. 70.

Motion to Set Aside Default. — Proceedings to review a judgment rendered by default will lie without a preliminary motion to set aside the default. *Searle v. Whipperman*, 79 Ind. 424. See *contra*, *Barnes v. Wright*, 39 Ind. 293.

Objections to Original Writ. — If objections to the mere form of the original writ can be taken by a defendant on a writ of review sued out by him after he has been defaulted by mistake at the return term of the original writ, they must be taken at the return term of the writ of review or they are waived. *Brewer v. Sibley*, 13 Met. (Mass.) 175.

2. *Rupert v. Martz*, 116 Ind. 72; *Bush v. Bush*, 46 Ind. 70; *Indianapolis First Nat. Bank v. Hanna*, 12 Ind. App. 240; *Jackson v. Gould*, 72 Me.

335; *Atkinson v. Dunlap*, 50 Me. 111; *Mason v. Pearson*, 118 Mass. 61; *Tuttle v. Stickney*, 3 N. H. 319; *Hobbs v. Whidden*, 27 N. H. 386; *New Hampshire Strafford Bank v. Cornell*, 2 N. H. 324.

Requirement to Prosecute "Forthwith."

— In *Quinn v. Brennan*, 148 Mass. 562, the bond given upon a petition to review a judgment required the petitioner forthwith to prosecute the review, but the court fixed no time for bringing the writ. It was held that the bringing of the writ more than one year thereafter was a breach of the bond, since it was neither brought forthwith nor within reasonable time. And see *Bamforth v. Raddin*, 14 Allen (Mass.) 66.

Diligence Implied — Absence of Statutory Limitation. — While the *Massachusetts* statutes do not directly prescribe the time within which a writ of review must be brought, it is implied in the different sections that early action must be taken. *Di Filippo v. Allen*, 163 Mass. 528, wherein it was held that filing a writ of review ten months after leave of the court had been obtained was not a seasonable prosecution, and that the writ would be dismissed on motion although the cause of the delay was the detention of the plaintiff abroad on business and through illness.

Delay in Service of Writ. — If a writ of review is issued within a year after the judgment, though the service is delayed till after the expiration of the year, the review is seasonably brought and may be prosecuted. *Society, etc., v. Whitcomb*, 2 N. H. 227; *Howard v. Hunt*, 17 N. H. 449.

Computation of Time. — The three years which are limited for the prosecution of a petition for review are to be computed from the term of which the

Ordinary Limitations Inapplicable. — Statutory methods provided for obtaining the review of a judgment are special proceedings to which the various statutes of limitations governing other actions and proceedings have no application.¹

Absent Defendants against whom judgment has been rendered on default may, in some jurisdictions, obtain a review within a prescribed time, but to authorize a review in such a case the party seeking it must clearly bring himself within the terms of the statute.²

4. Plaintiff's Pleading — *a. IN GENERAL.* — The proceedings to review must be instituted by pleadings proper in form, whether the institution is by complaint or by writ, and irrespective of whether the action is to be tried on the issue originally joined or on a former judgment rendered by default.³

b. COMPLAINT — (1) *General Requisites.* — In Indiana the proceeding to review a judgment must be instituted by a complaint,

judgment was entitled. *Leighton v. Lithgow*, 2 Me. 114.

Entry of Writ at Second Term. — Under the *Maine* statute (now Rev. Stat. 1883, c. 89, § 7), if a plaintiff fails to enter a writ of review at the next term after it is granted, the court in its discretion may allow it to be entered at the second term. *Look v. Ramsdell*, 68 Me. 479. And see *Hobart v. Tilton*, 1 Me. 399, decided under the statute of 1821, in which case it was held that the court might by a special order at the time of granting a review authorize the prosecution of the writ at the second term.

1. *Rosa v. Prather*, 103 Ind. 191; *Rupert v. Martz*, 116 Ind. 72; *Ela v. Ela*, 63 N. H. 116.

Nonresidents. — Where there is no reservation in favor of nonresidents of the state, such a reservation cannot be inferred from statutes enacted with reference to other proceedings. *Rosa v. Prather*, 103 Ind. 191.

2. **"Absence" Defined.** — A judgment in the original suit wherein personal service was made upon the defendant on his personal appearance entered is not rendered in his absence within the meaning of Pub. Stat. Mass., c. 187, § 22, allowing an absentee defendant who has been defaulted to petition for a review more than one year after rendition of the judgment but within a year after he first has notice of it. *Riley v. Hale*, 146 Mass. 465. And if a writ is served personally upon a defendant, he is constructively present in court, and a judgment rendered upon his default is not rendered in his ab-

sence, within the statute above cited. *Matthewson v. Moulton*, 135 Mass. 122; *Smith v. Brown*, 136 Mass. 416.

In *Manning v. Nettleton*, 140 Mass. 421, judgment was rendered for costs on a nonsuit of the plaintiff in an action wherein the defendant was summoned to answer unto the next friend of a minor. The next friend entered the action and appeared as the attorney for the plaintiff. More than ten years after rendition of the judgment the next friend filed a petition to review the judgment, alleging that it should have been rendered against the minor and not against the next friend, and that he had no knowledge that the judgment was against him until the time limited for filing his petition. It was held that the judgment was not rendered "in the absence of the petitioner," within the meaning of the statute.

Anticipation of Period of Limitation. — Under the Rev. Stat. Me., c. 89, § 1, providing that a review of an action where there has been a default without an appearance may be had "within three years after an officer having the execution * * * demands its payment of the defendant," the defendant need not wait until the demand, but may apply for a review as soon as he becomes aware of the judgment. *McNamara v. Carr*, 84 Me. 299.

3. *Nowell v. Sanborn*, 44 Me. 80; *Elwell v. Sylvester*, 27 Me. 536.

Statement Indorsed on Transcript on Appeal. — A statement constituting a sufficient assignment of error which is indorsed upon the transcript on appeal.

which should be framed as a complaint in a civil action, and which, as to its general form and sufficiency, is governed by the same general rules of pleading as are prescribed in other civil cases.¹

Averments of Legal Conclusions will be insufficient. Facts must be set out from which it will appear that the right exists to review upon one or more of the grounds prescribed by statute.²

Anticipating Defenses. — Like a complaint in ordinary proceedings, a complaint to review need not anticipate matters of defense by negating or seeking to avoid the effect of matters which may be urged to defeat the proceeding, but the defendant in review will be required to present properly such matters as he may rely on to sustain the original judgment.³

is not sufficient as a complaint to review. *Travelers' Ins. Co. v. Prairie School Tp.*, 151 Ind. 36.

A Cross-complaint May Be Filed in an action of review brought under the *Indiana* statutes. *Harlen v. Watson*, 63 Ind. 143.

Theory of Pleading. — Where a cross-complaint is framed on the theory that it is a bill to review a judgment, the cross-complainant must stand or fall by his pleading on that theory. *Baker v. Ludlam*, 118 Ind. 87.

1. *Hornady v. Shields*, 119 Ind. 201.

Complaint as in Action for Injunction. — Where a complaint is filed to have the enforcement of a judgment enjoined, and the facts stated show a case for a review of such judgment, the action should not be dismissed for want of jurisdiction, but the cause should be entertained by the court and the proper relief granted upon due proof. *Michener v. Springfield Engine, etc., Co.*, 142 Ind. 130.

Amendment. — An action to enjoin a sale under execution may be amended so as to make it a suit for a review for error apparent and for newly discovered matter. *Brown v. Lucas*, 18 Ind. 286. See also *Foster v. Potter*, 24 Ind. 363.

A Cross-complaint Which Is Insufficient as a bill of review will not be sustained as a statutory application to be relieved from the judgment on the ground of mistake, inadvertence, surprise, or excusable neglect. *Baker v. Ludlam*, 118 Ind. 87.

2. Necessary Averments. — To render the complaint for review sufficient to withstand a demurrer for want of facts, all the averments necessary to show a right to review the judgment and proceedings should be embodied in or

made a part of the complaint. *Jamison v. Lake Erie, etc., R. Co.*, 149 Ind. 521.

Averment of Minority. — A statement in the caption of a complaint for a review that some of the plaintiffs named are adults, and that others there described are minors suing by their next friends, is not a sufficient averment of the minority. *Funk v. Davis*, 103 Ind. 283.

Insufficiency of Original Complaint. — A complaint to review a judgment of foreclosure and *in personam* by default which alleges as the ground of the review that the original complaint in the cause did not state facts sufficient to constitute a cause of action on which a judgment *in personam* could be rendered is insufficient. *Shoaf v. Joray*, 86 Ind. 70.

Attacking One of Several Paragraphs — A complaint for review which only questions one of several paragraphs of the complaint upon which the judgment sought to be reviewed rests is insufficient. *Funk v. Davis*, 103 Ind. 283.

A Complaint Properly Assigning One Good Cause for review will not be bad because others are not well assigned. *Funk v. Davis*, 103 Ind. 281.

3. Waiver of Process. — Where a final order or judgment is attacked because jurisdiction of the person was not acquired, the proceeding may be instituted by a complaint, and if the defect relied on is want of notice the complaint need not show that notice was not waived. *Scudder v. Jones*, 134 Ind. 547.

Statute of Limitations. — A demurrer to a cross-complaint showing on its face that the action was not brought within three years next after the ren-

(2) *For Error Apparent — Substitute for Appeal.* — In *Indiana* proceedings to review a judgment for error of law appearing in the proceedings and judgment, and having for their object the correction of such error and judgment, are a substitute for the remedy by appeal, are of the same nature, and can be predicated only upon such error or errors as would be available on appeal. Therefore the complaint must show such error in the record as would be ground for reversal on a direct appeal in the original case, and no error below which would not be available on appeal can be reached or brought before the court on the review.¹

dition of the judgment sought to be reviewed, but failing to show that the plaintiff was under no legal disability to sue during the time, will not be sustained upon the ground that the action was not commenced within the time required by the statute. *Harlen v. Watson*, 63 Ind. 143.

A complaint to review a judgment, if otherwise sufficient, is not bad for want of facts merely because it fails to show that the suit was commenced within three years after rendition of judgment or after the removal of the plaintiff's disabilities. *Boyd v. Fitch*, 71 Ind. 306. See also *Whitehall v. Crawford*, 67 Ind. 84.

Coverture. — The failure of a married woman to file her complaint to review a judgment within the statutory time is avoided by an averment of her coverture. *Harlen v. Watson*, 63 Ind. 143.

Prosecution of Appeal. — In *Davis v. Binford*, 70 Ind. 44, the court considered, though it did not decide, the question whether or not a showing on the face of the complaint for review that the plaintiff had prosecuted an appeal from the judgment sought to be reviewed would be sufficient to preclude him from prosecuting a suit for the review of such judgment.

1. *Indiana Mut. F. Ins. Co. v. Rutledge*, 7 Ind. 25; *Barnes v. Wright*, 39 Ind. 293; *Barnes v. Bell*, 39 Ind. 328; *Richardson v. Howk*, 45 Ind. 451; *Hardy v. Chipman*, 54 Ind. 591; *Cravens v. Chambers*, 69 Ind. 84; *Dunkle v. Elston*, 71 Ind. 585; *Rice v. Turner*, 72 Ind. 559; *Searle v. Whipperman*, 79 Ind. 424; *Tachau v. Fiedeldey*, 81 Ind. 54; *Stayner v. Joice*, 82 Ind. 35; *Traders Ins. Co. v. Carpenter*, 85 Ind. 350; *Shoat v. Joray*, 86 Ind. 70; *American Ins. Co. v. Gibson*, 104 Ind. 336; *Jones v. Ahrens*, 116 Ind. 490; *Baker v. Ludlam*, 118 Ind. 87; *Hornady v.*

Shields, 119 Ind. 201; *Rigler v. Rigler*, 120 Ind. 431; *Gates v. Scott*, 123 Ind. 459; *Evansville, etc., R. Co., v. Maddux*, 134 Ind. 571; *Graves v. State*, 136 Ind. 406; *Kiley v. Murphy*, 7 Ind. App. 239.

Matters Dehors Record. — In *Clark v. Hillis*, 134 Ind. 421, it was said: "It is not so clear that a proceeding to review a judgment is a direct attack upon it in the sense that matters *dehors* the record may be made the ground of attack."

Motion for New Trial. — The complaint is bad where a written motion for a new trial in the original case does not appear in the proceedings set out in such complaint. *Funk v. Davis*, 103 Ind. 283.

Errors in Proceeding to Obtain New Trial. — A complaint that in effect is a complaint for review for alleged errors of law only, which is primarily based upon the proceedings and judgment in a partition suit, does not properly bring up for review the judgment rendered upon a complaint for a new trial from which an appeal would lie. *Harvey v. Fink*, 111 Ind. 249.

Consideration of Error Apparent on Complaint for New Matter. — A claim of error of law embraced in a motion for a new trial cannot be considered where it appears that the motion was not properly made and the discovery of material new matter since the judgment is not relied on as the ground of review. *Evansville, etc., R. Co. v. Maddux*, 134 Ind. 571.

Setting Aside Default — Modifying Judgment. — Any question that arises upon an appeal may be reached by a bill to review, and any question that does not arise upon an appeal cannot be reached by proceedings to review. In this respect they are precisely alike. In neither case can any question arise that depends upon a motion to set aside

Requisites of Complaint. — The complaint must indicate the error which it is sought to review,¹ and must show that exceptions were saved to the errors claimed to have been made.² The errors assigned must be errors which are curable by an action of review. No question for review is presented if it is apparent that another appropriate remedy is given, whereby, if the assignment is good,

a default or to modify the judgment, unless such motions were made. *Searle v. Whipperman*, 79 Ind. 424.

Coverture. — The fact that a personal judgment was taken against a woman whose coverture appeared on the face of the pleadings is such error apparent as will warrant a review. *Hinsey v. Feeley*, 62 Ind. 85; *Emmett v. Yandes*, 60 Ind. 548; *Long v. Dixon*, 55 Ind. 352.

Usury. — A judgment bearing a greater rate of interest than that prescribed by statute is error apparent. *Davidson v. King*, 49 Ind. 338.

Insanity at the time of executing a mortgage and pending an action to foreclose the same is not error of law appearing in the proceedings and judgment such as will sustain an action to review. *Alexander v. Daugherty*, 69 Ind. 388.

In *Epstein v. Greer*, 93 Ind. 140, which was a complaint by the guardian of a married woman to review a judgment against his ward and her husband of foreclosure of a mortgage on the ward's property, on the ground of the ward's mental incapacity, it appeared that both defendants appeared in person in the foreclosure suit and made no question as to the wife's mental condition, nor was any suggestion made during the pendency of the suit that she was *non compos mentis*. It was held that the complaint did not show either error of law or material new matter. It was also held that the fact that the plaintiff in foreclosure was aware of the wife's mental condition would not aid the guardian in maintaining the proceedings.

Excessive Judgment on Default. — Where a judgment was rendered on default, after due service of process, and the complaint upon which the judgment was based is sufficient to withstand a demurrer, a complaint to review for error apparent cannot be maintained. *Hardy v. Miller*, 89 Ind. 440, wherein the judgment was for more than the complaint showed the plaintiff to be entitled to.

1. *Worley v. Ellettsville*, 60 Ind. 7; *Fleming v. Stout*, 19 Ind. 328; *Findling v. Lewis*, 148 Ind. 429; *Richardson v. Howk*, 45 Ind. 451; *Jamison v. Lake Erie, etc., R. Co.*, 149 Ind. 521; *Travelers' Ins. Co. v. Prairie School Tp.*, 151 Ind. 36.

Grounds Not Alleged. — A ruling of the court which is not made the ground of objection in the complaint for review is not involved in an appeal from a judgment on that complaint. *Dunkle v. Elston*, 71 Ind. 585.

Striking Out Improper Assignments. — Assignments of error which have no proper foundation in the record may be stricken out on motion. *Graves v. State*, 136 Ind. 406.

Insufficiency of Complaint. — An assignment that the original complaint did not state facts sufficient to constitute a cause of action brings under review the sufficiency of the complaint upon which the proceedings and judgment sought to be reviewed are founded. *Funk v. Davis*, 103 Ind. 283.

Insufficiency of Evidence to Support Judgment. — In an action to review a judgment on account of the insufficiency of the evidence to sustain the finding of the court, a complaint which shows that there was evidence tending to support the finding upon which the judgment was rendered is insufficient. *Terry v. Bronnenberg*, 87 Ind. 95.

Judgment on Altered Instrument. — In proceedings to review a judgment for error apparent because of a material alteration of a promissory note in suit, a complaint which sets out that the original note was uncontradicted evidence in support of an answer of *non est factum* is sufficient where the note, as shown by the record, shows material changes by erasures and interlineations, and is consequently of no validity against the maker. *Stayner v. Joice*, 82 Ind. 35.

2. *Goar v. Cravens*, 57 Ind. 365; *Kitch v. State*, 53 Ind. 59; *Davidson v. King*, 51 Ind. 224; *Train v. Gridley*, 36 Ind. 241.

complete relief may be or might have been afforded, as where the error assigned is only cause for a new trial.¹

Rulings in Original Cause. — To entitle the plaintiff to a review of rulings made in the conduct of the original cause it must appear from his complaint what such rulings were, that he made seasonable objections and exceptions, and that, when he had grounds for a new trial, a motion therefor was made; and the complaint must show that proper bills of exceptions were saved.²

1. Grounds for New Trial — Exclusion of Evidence. — An assignment of error that the court erred in permitting the defendant to testify as a witness in the case, while a proper ground to move for a new trial, is not a proper assignment of error on proceedings to review the judgment. *Hancher v. Stephenson*, 147 Ind. 498.

Denial of Change of Venue. — Assignments that error was committed in overruling a motion for a change of venue and in permitting an amendment to the complaint at the close of the evidence are but causes for a new trial, and if not embraced therein they are waived the same as if an appeal had been taken directly for the correction of the supposed errors in the proceeding and judgment below, instead of seeking to correct them by filing a complaint to review in the court where they are alleged to have been committed. *Bement v. May*, 135 Ind. 664.

Grounds for Correcting Judgment. — Where the only assignment of error is that the complaint in the original action does not state facts sufficient to authorize the judgment, no question arises that depends upon a motion to set aside or modify the judgment unless such motion was made. *Searle v. Whipperman*, 79 Ind. 424.

2. *Graves v. State*, 136 Ind. 406; *Rigler v. Rigler*, 120 Ind. 431. And see *Boyd v. Fitch*, 71 Ind. 306; *Richardson v. Hawk*, 45 Ind. 451; *Rice v. Turner*, 72 Ind. 559; *American Ins. Co. v. Gibson*, 104 Ind. 336; *Tachau v. Fiedeldey*, 81 Ind. 54; *Traders' Ins. Co. v. Carpenter*, 85 Ind. 350; *Shoaf v. Joray*, 86 Ind. 70; *Funk v. Davis*, 103 Ind. 283.

Motions Generally. — The authorities seem to be conclusive that all such questions as those pertaining to changes of venue and the competency of jurors must be brought into the record by special bill of exceptions, and then made the ground of a motion for a new trial, before they become avail-

able on complaint to review. *Graves v. State*, 136 Ind. 406.

Motion for New Trial. — Rulings constituting, or which it is claimed constitute, proper reasons for a new trial cannot be considered on review unless they were embodied in a motion for a new trial. To enable the complaining party to question the propriety of the denial of a motion for a new trial, the record must show that the motion was made in like manner as if it were intended to present the question on appeal. *Graves v. State*, 136 Ind. 406.

Where it is apparent that the motion for a new trial came too late and the errors alleged and embraced in the motion are not in the record, they cannot be considered. *Evansville, etc., R. Co. v. Maddux*, 134 Ind. 571.

In an action to review on the ground that the court erred in overruling a motion for a new trial, no question is presented as to the sufficiency of the evidence or the amount of damages, unless the evidence was made a part of the record. *Peoria, etc., R. Co. v. Flicker*, 95 Ind. 180.

Where the Evidence Is Not in the Record, and there is no showing as to what paragraph of the complaint the court found upon, the reviewing court will presume in favor of the correctness of the decision below. *Ferguson v. Hull*, 136 Ind. 339; *Funk v. Davis*, 103 Ind. 283.

To Make the Overruling of a Motion for a New Trial Available on review, the bill of exceptions must have been filed in the time allowed by law, and the question as to the alleged error in overruling a motion for a new trial is not properly presented where it does not appear that any bill of exceptions was ever prepared, signed, or filed. *Gates v. Scott*, 123 Ind. 459.

Erroneous Admission of Testimony. — To make errors in denying a motion for a new trial based on the alleged improper admission of testimony and on the ground that the verdict is not

Presentation of Complete Record. — Whenever the error is of such a nature that a perusal of the entire record is necessary to present properly the matters relied on to sustain the proceedings to review, the complaint must present the whole record, including the original pleadings and proceedings, in such form as to show the grounds upon which the plaintiff relies to revise the original determination.¹

sustained by sufficient evidence and is contrary to law, they must appear in the record of the proceedings and judgments to be reviewed by the incorporation of the evidence in the bill of exceptions so filed as to become a part of the record. *Hancher v. Stephenson*, 147 Ind. 498.

A Motion to Strike Out, as Well as the Ruling of the court thereon, is a part of the record only by proper bill of exceptions or by order of the court. *Kiley v. Murphy*, 7 Ind. App. 240.

Setting Aside Default. — On review no question can be made which depends upon a motion to set aside a default unless the record shows that such a motion was made and overruled and an exception taken. *Baker v. Ludlam*, 118 Ind. 87.

Modification of Judgment. — Questions depending upon a motion to set aside a default or to modify a judgment cannot be considered on review unless such motion was made. The complaint for review will not subserve such a purpose. *Searle v. Whipperman*, 79 Ind. 424.

Intervention on Attachment. — Where, in attachment proceedings, a third person, upon his verified petition or affidavit that he is the owner of the attached property, is made a party defendant, the order of the court in admitting such party, if erroneous, is not an "error of law appearing in the proceedings and judgment," unless the verified petition or affidavit and the ruling of the court thereon are made a part of the record by bill of exceptions or order of court. *Rice v. Turner*, 72 Ind. 559.

Sufficiency of Bill of Exceptions. — The evidence and rulings on a trial are not made a part of the record by a bill of exceptions which is signed by a judge who had no power or authority to attach his signature thereto. *Reed v. Worland*, 64 Ind. 216.

Extension of Time to File Exceptions — How Shown. — Where the time to file a bill of exceptions incorporating evidence on the trial is extended, that fact

must appear by the record accompanying the complaint to review, and cannot be shown by a mere recital of such facts in the bill of exceptions itself. *Hancher v. Stephenson*, 147 Ind. 498.

1. *Hoppes v. Hoppes*, 123 Ind. 397; *Stevens v. Logansport*, 76 Ind. 498; *McDade v. McDade*, 29 Ind. 340; *Davis v. Perry*, 41 Ind. 305; *Owen v. Cooper*, 46 Ind. 524; *Kitch v. State*, 53 Ind. 59; *Hardy v. Chipman*, 54 Ind. 591; *Worley v. Ellettsville*, 60 Ind. 7; *Weathers v. Doerr*, 53 Ind. 104; *Goar v. Cravens*, 57 Ind. 365; *Davis v. Binford*, 70 Ind. 44; *Meharry v. Meharry*, 59 Ind. 257; *Cravens v. Chambers*, 69 Ind. 84; *Kiley v. Murphy*, 7 Ind. App. 240; *Findling v. Lewis*, 148 Ind. 429; *Whitehall v. Crawford*, 67 Ind. 84; *Mitchell v. Boyer*, 58 Ind. 19; *Comer v. Himes*, 58 Ind. 573; *Reed v. Worland*, 64 Ind. 216; *Graves v. State*, 136 Ind. 410.

Completeness of Record. — The record will not be deemed complete unless the complaint avers its completeness. *Cravens v. Chambers*, 69 Ind. 84.

Presumption Indulged. — In an action to review a judgment, when the complaint sets out the complaint in the original action, the answer thereto, a demurrer to a paragraph of the answer with the ruling thereon, the trial, verdict, and judgment, the latter being the logical and legal result of what precedes it, it will be presumed, on demurrer, that this is a full record of the original cause, and a direct averment of that fact is not necessary. *Leech v. Perry*, 77 Ind. 422.

Evidence on Trial. — An averment in the complaint that "a full transcript of the evidence given" is filed is not sufficient, as this may be true and yet the evidence may not have been made a part of the record. *Peoria, etc., R. Co. v. Flicker*, 95 Ind. 180.

Admission of Averment by Demurrer. — A demurrer to a cross complaint which avers that the transcript of the pleadings and judgment therewith set forth or accompanying it is a full, true, and complete record, admits the truth of the averment and disposes of an

Presentation of Partial Record — Exhibits. — If, however, the error can be made to appear without a complete record, the complaint need present in the body thereof only so much of the original pleadings and proceedings in the cause sought to be reviewed, or the substance, nature, or character thereof, as will be sufficient

objection that the plaintiff has not brought before the court a complete record of the proceedings and judgment which are sought to be reviewed. *Harlan v. Watson*, 63 Ind. 143.

Similarity to Appeal. — “The complaint for a review * * * for error apparent in the record is in the nature of an appeal, just as in equity ‘a bill of review was in the nature of a writ of error.’ The question must be tried by the record of the case to be reviewed, and hence the same necessity for the presentation of a complete record as in case of an appeal.” *Stevens v. Logansport*, 76 Ind. 498.

It Is Necessary to Allege the Condition of the Record so as to advise the court of the existence of the error or errors relied upon. “The pleading is not a sufficient complaint if, when its allegations are presented to the court, the court cannot say: ‘If supported by the record this was error.’” *Travelers’ Ins. Co. v. Prairie School Tp.*, 151 Ind. 36.

Setting Aside Order for New Trial. — A complaint to review a judgment for error in setting aside an order granting a new trial as of right, and reinstating the original judgment, should set out a copy of such original judgment. *Bradford v. Marion School Tp.*, 107 Ind. 280.

Demurrer to Original Complaint. — Whether or not it is necessary, in a complaint for review, to set forth a copy of the record sought to be reviewed need not be considered if the original complaint was sufficient to withstand a demurrer. *Jamison v. Lake Erie, etc., R. Co.*, 149 Ind. 521.

Failure to Specify Papers Apparently Filed. — A complaint which does not contain a motion made for a new trial, nor the cause assigned for the motion, nor a bill of exceptions, all of which apparently were filed and made a part of the record, affirmatively shows that the record is incomplete, and for that reason is fatally defective. *Whitehall v. Crawford*, 67 Ind. 84. See also *McDade v. McDade*, 29 Ind. 340.

Errors Depending on Evidence. — A complaint to review a judgment which

specifies errors depending upon the evidence presents no question, where it fails to show that a motion for a new trial was made in the original case or that there was any bill of exceptions filed containing the evidence or showing any alleged erroneous ruling on the trial of that case. *Boyd v. Fitch*, 71 Ind. 306.

Original Complaint. — Where an amended complaint has been filed the original complaint is not a necessary part of the record. *Funk v. Davis*, 103 Ind. 281.

Papers in Evidence. — Papers presented to the court below and acted upon as evidence are no part of the record. *Lovell v. Kelley*, 48 Me. 263; *Cravens v. Chambers*, 69 Ind. 84; *Hoppes v. Hoppes*, 123 Ind. 397.

The Fact that the Record Is Not Authenticated by the clerk's record and seal is immaterial, where by demurring to the complaint it is admitted to be the record. *Harlan v. Watson*, 63 Ind. 143.

Omission of Verdict. — Where the proceedings are not all before the reviewing court, as where the sufficiency of the original complaint comes in question and it is insisted that it did not contain facts sufficient to constitute a cause of action, the reviewing court cannot pass on the question of such sufficiency. *Hardy v. Chipman*, 54 Ind. 591, in which case the verdict was not such as to enable the court to judge what defects it might have cured or was capable of curing.

Necessity of Certified Transcript. — In an action to review a judgment for error of law occurring at the trial it is indispensable that there should be set out with the complaint for review a copy of so much of the record in the original case as fully to present the ruling claimed to be erroneous and for which error a review of the judgment is asked. All that is necessary, however, is that a copy of the record shall be set out and be averred to be a copy of the complaint for review, and it is not necessary that there should be a certified transcript of the complete record of the case. *Hoppes v. Hoppes*, 123 Ind. 397.

to disclose the alleged errors in the same manner as would be necessary to present the like question on appeal. Under such circumstances immaterial and irrelevant matters may be omitted. A complaint referring generally to the original pleadings or proceedings, or to the transcript or other papers accompanying the complaint as an exhibit, is insufficient.¹

Immaterial Exhibits which can in no way aid in determining the questions presented by the review and which do not affect the validity of the complaint may be disregarded.²

Conclusiveness of Record. — The record may be contradicted, or it

1. *Graves v. State*, 136 Ind. 406; *Michener v. Springfield Engine, etc., Co.*, 142 Ind. 130; *Findling v. Lewis*, 148 Ind. 429; *Stevens v. Logansport*, 76 Ind. 498; *Cain v. Goda*, 84 Ind. 209; *Funk v. Davis*, 103 Ind. 281; *Kiley v. Murphy*, 7 Ind. App. 239; *Travelers' Ins. Co. v. Prairie School Tp.*, 151 Ind. 36; *Jamison v. Lake Erie, etc., R. Co.*, 149 Ind. 521.

Answer. — It is necessary to set out so much of a paragraph of the answer, or the substance, nature, or character thereof, as will show whether or not it is a defense to both paragraphs of the complaint to which it is addressed. *Jamison v. Lake Erie, etc., R. Co.*, 149 Ind. 521.

Original and Amended Pleadings. — Where an amended complaint was filed in the action a review of which is sought, it is not necessary, in the complaint to review, to set out the original complaint. *Funk v. Davis*, 103 Ind. 281.

Lost Deposition. — In *Davis v. Davis*, 145 Ind. 4, it was alleged in the complaint that a deposition which had been read in evidence had been lost and could not be found, and the alleged testimony of the witness was made a part of the complaint. It was held that the complaint was sufficient.

A Reference to the Pleadings sought to be reviewed is insufficient. *Owen v. Cooper*, 46 Ind. 524.

Resort to Original Pleadings and Evidence. — In determining the sufficiency of the complaint the pleadings and evidence in the original case which are made a part thereof cannot be considered; neither can the evidence or the pleadings in the original case be resorted to for the purpose of supplying any averment essential to the sufficiency of the complaint, but all the essential averments necessary to its validity must be set out in the body of the complaint. *Davis v. Davis*, 145

Ind. 4; *Jamison v. Lake Erie, etc., R. Co.*, 149 Ind. 521.

Reference to Copy of Judgment. — A judgment is not a written instrument within the meaning of *Burns's Annot. Stat. Ind.* (1894), § 365, which permits an exhibit to be filed when a pleading is found on a written instrument or on account therefor, and a copy of the judgment filed with a complaint for review does not become a part of it by reference, although the judgment is the foundation of the complaint. *Indianapolis First Nat. Bank v. Hanna*, 12 Ind. App. 240.

Reference to Transcript. — Assuming it to be sufficient to file a copy of the record below, the facts stated in the complaint to review for error of law should be sufficient to withstand a demurrer without reference to the transcript filed therewith. *Jamison v. Lake Erie, etc., R. Co.*, 149 Ind. 521.

Judgment on Demurrer. — In *Findling v. Lewis*, 148 Ind. 429, the complaint in review alleged the filing by the complainant of his complaint to set aside a judgment and vacate a sale thereunder, that the defendant appeared and demurred to the complaint, and that the demurrer was sustained and judgment thereon rendered by the court. Nothing further appeared except that there was a recital in the transcript stating that a copy of the record to be reviewed was set out as an exhibit, which exhibit itself appeared in the transcript, and this was held to be insufficient as a presentation of a complete record of the case.

2. **An Affidavit as to Newly Discovered Evidence** which is filed with the complaint is an exhibit and can neither add to nor subtract from any substantial averments of the complaint, and cannot be considered for any practicable purpose a part of the complaint. *Hill v. Roach*, 72 Ind. 57.

Immaterial Exhibits. — A complaint

may be corrected as to erroneous matters when no prejudice will result to the parties to the controversy.¹

Variance Between Complaint and Record.—The record will control the averments of the complaint or writ, and a material variance between the record and the allegations of such a pleading will invalidate the latter so far as there is a direct conflict.²

(3) *For New Matter*—**Diligence of Plaintiff.**—In *Indiana*, where it is required by statute that a complaint for new matter discovered since the rendition of the judgment must show that the new matter could not have been discovered before judgment by reasonable diligence, and that the complaint was filed without delay after the discovery, the rule as to diligence is the same as in the case of motions for new trials on account of newly discovered evidence. General averments of diligence are not sufficient; the complaint must state the facts constituting the diligence

is not deficient because it fails to set out the exhibits referred to therein, nor is the record insufficient because it fails to show any exhibits accompanying the complaint, where they are not the basis of the action and therefore not necessary parts of the complaint. *Ferguson v. Hull*, 136 Ind. 339.

Sheriff's Return.—On proceedings to review a judgment of foreclosure, a copy of the sheriff's return to the execution, filed with the complaint, is no part thereof. *Davidson v. King*, 49 Ind. 338.

1. Unauthorized Appearance.—Though the record shows that the petitioner appeared to the original action by attorney, evidence is admissible to show that such appearance was at the request of a third person, and without the petitioner's knowledge. *Brewer v. Holmes*, 1 Met. (Mass.) 288.

Failure to Enter Exceptions.—In *Bowditch Mut. F. Ins. Co. v. Winslow*, 3 Gray (Mass.) 415, it was held that the Supreme Court had power, under the *Massachusetts* statute, to grant a review of its judgment, affirming a judgment of the Court of Common Pleas, to which exceptions were taken and their entry in the Supreme Court accidentally omitted, on being satisfied that the exceptions affected the substantial merits of the case.

2. Mode of Rendition of Judgment.—In *Anderson v. Brown*, 10 Gray (Mass.) 92, on review of a judgment of the Court of Common Pleas, the omission to allege that the judgment was rendered on complaint of the defendant in review in affirmance of a judgment of

a justice of the peace was held to be no variance.

General and Special Allegations.—In an application for a review of a judgment upon default, upon the ground of want of jurisdiction over the person, if the record of the former trial shows *prima facie* that a summons was issued and served in due time on the party applying for the review, and no facts controverting such showing are specially alleged, the complaint is bad on demurrer, notwithstanding a general allegation of such want of jurisdiction. *Hall v. Palmer*, 18 Ind. 5.

In *Indianapolis First Nat. Bank v. Hanna*, 12 Ind. App. 240, an allegation that process upon a cross-petition was not duly served, without an additional averment that the record showed on its face such want of service, or at least that the judgment entry failed to show such service or an appearance, was held insufficient to overcome the presumption in favor of the validity of the judgment.

Jurisdiction of Person.—In *State v. Holmes*, 69 Ind. 577, a record showing an appearance by attorney was held to control an averment in the complaint that there was no service of process, and that consequently the complaint failed to show that jurisdiction of the person had not been acquired.

A complaint by the defendant in the original cause to review a judgment on the ground that there was no appearance, answer, or default on his part is insufficient if it appears by the record that there was an appearance and that an answer was filed. *Bush v. Bush*, 46 Ind. 70.

used. Thus, if the diligence relied on is the making of inquiries, the time, place, and circumstances of such inquiries must be stated.¹

Materiality of New Matter. — The complaint must allege facts showing that the new matter is such as would have entitled the plaintiff to a different verdict had it been introduced.² A complaint which merely sets up newly discovered evidence of the facts alleged in the original complaint is not sufficient, the remedy where there is newly discovered evidence, as distinguished from

1. *Simpkins v. Wilson*, 11 Ind. 541; *Hall v. Palmer*, 18 Ind. 5; *Nelson v. Johnson*, 18 Ind. 329; *Comer v. Himes*, 49 Ind. 482; *Davidson v. King*, 51 Ind. 224; *Gregg v. Loudon*, 51 Ind. 585; *Bryant v. Hoskins*, 53 Ind. 218; *Barnes v. Dewey*, 58 Ind. 418; *Collins v. Rose*, 59 Ind. 33; *Whitehall v. Crawford*, 67 Ind. 84; *State v. Holmes*, 69 Ind. 577; *Francis v. Davis*, 69 Ind. 452; *Peyton v. Kruger*, 77 Ind. 486; *Debolt v. Debolt*, 86 Ind. 521; *Johnson v. Herr*, 88 Ind. 280; *McCauley v. Murdock*, 97 Ind. 229; *Dippel v. Schicketanz*, 100 Ind. 376; *Osgood v. Smock*, 144 Ind. 387; *Hill v. Roach*, 72 Ind. 57.

The Complaint Must Allege How and from Whom the new matter was discovered, in order that the court may determine whether by reasonable diligence the same information could have been obtained through the same means before the rendition of the judgment. *Osgood v. Smock*, 144 Ind. 387; *Debolt v. Debolt*, 86 Ind. 521.

Concealment of Facts. — An allegation of the fraudulent concealment of facts is insufficient if it fails to state the facts, if any, which constitute such fraudulent concealment. *Osgood v. Smock*, 144 Ind. 387.

Search in Public Office. — Where matter claimed to be new, on account of which it is sought to obtain the review of a judgment, is a matter of public record, and could have been known by an ordinarily careful search of such record, the failure to show that proper diligence was used to discover it prior to the trial of the original cause is insufficient. *Jones v. Tipton*, 142 Ind. 643, holding that reasonable diligence in discovering the facts as to the illegality of certain taxes before the rendition of the judgment sought to be reviewed was not shown by an allegation that the plaintiff made a search for the facts but could not find them in the city or county offices.

Ignorance of Alteration of Negotiable

Paper. — In *Tate v. Fletcher*, 77 Ind. 102, a cross-complaint by a junior mortgagee to review a judgment of foreclosure alleged that a note secured by the senior mortgage had been altered after its execution by the holder and without the consent of the maker, whereby a conditional promise to pay attorney's fees was changed to an absolute promise, and that the cross-complainant was ignorant of such alteration until after the judgment of foreclosure and could not have discovered it by reasonable diligence; and further, that the cross-complaint, which was duly verified, was filed without delay after discovery. It was held that the averments were sufficient.

Filing Without Delay. — The complaint must aver that it is filed without delay after the discovery of such new matter. This is an express statutory requirement. *Burns's Annot. Stat. Ind.* (1894), § 629; *Francis v. Davis*, 69 Ind. 452.

Laches in Asking Review. — In *State v. Holmes*, 69 Ind. 577, which was an action to review a judgment on a treasurer's bond, it appeared that the bond had been on file for three years and ten months before the action was instituted, and four years and three months before the rendition of judgment. A year and four months after the judgment was rendered a discovery was claimed that the signature of the judgment defendant to the bond was forged. It was held that no such reasonable diligence was shown as would entitle the defendant to review the judgment.

2. *Jones v. Tipton*, 142 Ind. 643. See also *Francis v. Davis*, 69 Ind. 452.

"Material New Matter" Defined. — The words "material new matter" in the *Indiana* statute mean material new facts; that is, facts discovered after the rendition of the judgment, material to a just determination of the cause. *Hornady v. Shields*, 119 Ind. 201.

new matter, being a motion for a new trial.¹

Verification. — The complaint in an action or proceeding to review a judgment for material new matter should be verified in compliance with the statute.²

c. WRIT. — Where a writ of review is of right in the special cases designated by statute, it is in the nature of a judicial writ, and in the main is subject to the same general provisions and rules of practice.³

1. *Barnes v. Dewey*, 58 Ind. 418; *Webster v. Maiden*, 41 Ind. 124; *Fleming v. Stout*, 19 Ind. 328; *Nelson v. Johnson*, 18 Ind. 329; *Hall v. Palmer*, 18 Ind. 5; *Roush v. Layton*, 51 Ind. 106.

Newly Discovered Evidence. — In *Peyton v. Kruger*, 77 Ind. 486, the complaint alleged that the judgment plaintiff claimed through a sale and conveyance of school land by a county auditor under a mortgage made by the judgment defendant for the purchase money, and that since the rendition of the judgment the judgment defendant had discovered new matter, *i. e.*, that the sale was made without notice. It was held that this was not new matter, but merely new evidence in contradiction of the recital in the auditor's deed.

Necessity of Complete Record. — In an action to review for material new matter discovered after the rendition of the original judgment, a complaint which sets out a copy of the original complaint and all the pleadings, the summons, and the record in the case is not open to the objection that it does not contain a complete certified copy of all the proceedings, record, and judgment in the original cause. *Hoppes v. Hoppes*, 123 Ind. 397.

Affidavit of Proposed Witness. — In *Hill v. Roach*, 72 Ind. 57, it was held that the newly discovered matter should be set out in the body of the complaint, and that affidavits of witnesses by whom it was expected to prove such new matter filed with such a complaint could not be resorted to in determining the sufficiency of the complaint as to the materiality of the new matter.

Judgment by Default. — In *Comer v. Himes*, 58 Ind. 573, the complaint alleged that since the recovery of a judgment by default against the plaintiff on review he had discovered material new matter constituting a defense to the action, and prayed for permission to set up such new matter in defense of the

action. However, the complaint did not contain any averment as to the intermediate proceedings between the service of the summons and the finding of the court, nor was anything shown as to how the cause came to be submitted to the court for its finding, nor was there any showing supporting an averment that default had been made by the plaintiff. It was held that a demurrer to the complaint was properly sustained below.

2. *Burns's Annot. Stat. Ind.* (1894), § 629; *Francis v. Davis*, 69 Ind. 452; *Cox v. Hutchings*, 21 Ind. 219; *Hill v. Roach*, 72 Ind. 57.

3. *Hall v. Wolcott*, 10 Mass. 218.

New Process. — If a writ of review is granted, it is a new process, to be sued out, served, and returned like original writs, and in which the parties are again impleaded and a new judgment is rendered. *Davenport v. Holland*, 2 Cush. (Mass.) 1; *Green v. French*, 1 Allen (Mass.) 265.

In New Hampshire the action of review is commenced by a writ sued out of the clerk's office, returnable generally at the court in which the original action was tried, and served like writs of summons and scire facias. *Badger v. Gilmore*, 37 N. H. 457.

Writ as Pending Suit. — While a writ of review is a suit or proceeding, it is not a pending suit or proceeding prior to the suing out of the writ by which it is commenced. This is so whether the review is regarded as a new action or as a revival or renewal of the original action. *Badger v. Gilmore*, 37 N. H. 457.

Description of Judgment. — In a writ of review of a judgment of the Court of Common Pleas, an omission to allege that the judgment was rendered on complaint of the defendant in review, in affirmance of a judgment of a justice of the peace, was held to be no variance. *Anderson v. Brown*, 10 Gray (Mass.) 92.

Issuance Out of Wrong Court. — Where,

5. Defendant's Pleading — To Complaint. — After service of notice of the filing of the complaint, the defendant in review may interpose a demurrer with the like effect as in civil actions generally,¹ or he may answer, or take such other steps as are prescribed by statute and the general rules of practice in respect to civil causes.²

To Writ. — In *Vermont*, where review is commenced by writ, a writ setting forth the facts on which the party relies, as a ground for the relief asked for, does not at once bring forward the original action, and may be met by a plea or demurrer as other writs may. Though the defenses which may be set up are not many, facts which constitute a defense, and which afford sufficient reason why the review should not be granted, may be pleaded in bar.³ In other jurisdictions a writ of review cannot be

by statute, writs of review were made returnable in the Court of Common Pleas in the county where judgment was rendered, it was held that a writ which was not issued or sued out in the court to which it was made returnable would be quashed. *Exeter Bank v. Gilman*, 8 N. H. 332.

Indorsement of Writs. — In *Tracy v. Perry*, 5 N. H. 172, it was said that writs of review are judicial and not original writs within the meaning of a statute requiring the indorsement of writs.

1. *Hornady v. Shields*, 119 Ind. 201.

Questions Raised by Demurrer. —

Where the review is not sought for newly discovered matter, a demurrer to the complaint raises the question whether any error of law appears in the proceedings and judgment. *Evansville, etc., R. Co. v. Maddux*, 134 Ind. 571.

Bar of Statute of Limitations. — The question whether or not an action of review was brought within the statutory time cannot be raised by demurrer to the complaint. *Funk v. Davis*, 103 Ind. 283; *Indianapolis First Nat. Bank v. Hanna*, 12 Ind. App. 240.

Harmless Error in Overruling Demurrer. — Error in overruling a demurrer to a complaint for a review may be cured by the conclusions of law made upon the facts found. *Ferguson v. Hull*, 136 Ind. 339.

Final Judgment on Overruling Demurrer. — When a demurrer to a complaint setting up error of law appearing on the face of the record is overruled, and the defendant does not offer to answer, it is not error to render final judgment of reversal upon the demurrer, without

first entering a rule to answer. *Leech v. Perry*, 77 Ind. 422.

2. Answer to Complaint for Error Apparent. — When a complaint assigns errors of law apparent on the face of the record, the defendant can in his answer assign other errors apparent on the face of the record, which, if assigned as cross-errors on appeal, would result in an affirmance of the judgment; or he may interpose such defenses as the statute of limitations, the pendency of an appeal from the judgment, or payment; or he may deny that the copy of the record set out in the complaint is a correct and complete copy of the record sought to be reviewed. *Buscher v. Knapp*, 107 Ind. 340; *Kiley v. Murphy*, 7 Ind. App. 239.

Sufficiency of Answer to Show Defects in Record. — Where the copy of a record filed with the complaint did not show on its face that it was incomplete, and the answer failed to point out the deficiency, it was held that an allegation that a motion was made to strike out part of the testimony did not show the record to be incorrect or incomplete, no such motion or any ruling thereon appearing by the record itself. *Kiley v. Murphy*, 7 Ind. App. 239.

Matters Not Apparent — Propriety of Motion to Dismiss. — The pendency of an appeal from the judgment of which a review is sought cannot be presented by a motion to dismiss the complaint. The proper method, where the fact that an appeal has been prosecuted is not apparent on the face of the record, is by answer. *Buscher v. Knapp*, 107 Ind. 340.

3. *Davis v. Beebe*, 5 Vt. 560, *per Williams, J.*

attacked by demurrer.¹

Quashal and Abatement of Writ. — Like other writs, a writ of review may be quashed on motion or abated upon a plea in abatement.²

Set-off. — The defendant in review will not be permitted to plead a set-off.³

New Matter Since Original Judgment. — The only errors or irregularities which are available on review are those which were committed or which occurred prior to or in connection with the judgment sought to be reviewed. New matter arising since the final judgment in the original action and after the institution of the proceedings to review cannot be considered. Hence, no matter or thing which has arisen since the judgment in the original cause can be pleaded in bar of the further maintenance of the suit; nor will any defense be permitted which could not have been made in the original action.⁴

Jurisdiction of Defendant Treated as Nonresident. — When the plaintiff procures a cause to be continued for the purpose of giving notice to the defendant and afterwards obtains a judgment and enters into a recognizance to refund and pay back what may be recovered on the writ of review, he cannot plead in bar that the defendant was within the state at the time when the judgment was taken against him, for the reason that the proceedings before the justice are equivalent to a legal adjudication in the suit that the defendant in such proceedings was out of the state. *Davis v. Beebe*, 5 Vt. 560.

1. *Eldridge v. Bellows*, Smith (N. H.) 356, wherein the following reasons were assigned: "First, Because there can be no demurrer to any writ. From the nature of the demurrer, it must be to the declaration. Demurrer admits the facts stated in the declaration. The writ is not before the court on demurrer. Defects in the writ can only be taken advantage of in abatement or motion to the court to quash. Second, No demurrer to the declaration in writ of review, unless there is also an issue to the country; and both do not lie where there is but one count. And, in this case, there can be none put in on the review, because this would be trying the cause on a different plea from that on which it was tried before; certainly not, unless by consent, or on leave obtained, if such can be granted. But in this case the party may have all the advantage he wishes in arrest of judgment."

Trial on Former Pleas. — Where by statute an action of review is required

to be tried "on the pleas made upon the former trial upon record," if the only plea in the original action was the general issue, a demurrer to the declaration cannot be filed on review. *Eldridge v. Bellows*, Smith (N. H.) 356.

Conditional Review — Noncompliance with Terms. — Where a review is granted unless the defendant in review complies with certain terms imposed, compliance with such conditions may be pleaded in bar of the action of review. *Jones v. Eaton*, 51 Me. 386.

2. *Ballard v. McLean*, Quincy (Mass.) 106; *Hall v. Wolcott*, 10 Mass. 218.

Where the Plaintiff in Review Is Not Entitled to a Review, the court will quash the writ on motion, or abate it on the discovery of the defect. *Hall v. Wolcott*, 10 Mass. 218.

Defective Service. — It is competent to the court, in its discretion, to quash a writ of review upon motion for a defect of service, or put the defendant to plead the matter in abatement. *Tilton v. Parker*, 4 N. H. 142.

3. **A Set-off**, being in the nature of a cross-action, cannot be introduced into the cause upon review. *Edgerly v. Emerson*, 4 N. H. 147.

4. *Burley v. Burley*, 6 N. H. 205; *Barker v. Wendell*, 12 N. H. 119; *Otis v. Currier*, 17 N. H. 463; *Zollar v. Janvrin*, 49 N. H. 114; *Todd v. Barton*, 117 Mass. 291. See also *Hart v. Johnson*, 7 Mass. 472; *Whitton v. Bicknell*, 3 Allen (Mass.) 472; *Worley v. Ellettsville*, 60 Ind. 7.

Effect of Replication upon Bad Plea. — A plea in bar setting forth matter arising subsequent to the original judgment is irregular, and such plea is not

6. Amendments — a. OF PLEADINGS IN PROCEEDINGS FOR REVIEW. — The general principles respecting amendments are applicable to the amendment of the pleadings in proceedings to review commenced by a complaint;¹ and a writ of review may be amended in a proper case, as to matters of mere form,² or in such a manner as properly to designate a defendant and validate service upon him.³

cured or strengthened by a replication. *Otis v. Currier*, 17 N. H. 463.

Release After Judgment. — No matter which has arisen since the judgment can be pleaded in bar of the original action. If the verdict and judgment were originally right, nothing which has since occurred can make them wrong. Therefore, a release of the original cause of action, after judgment, is without effect, unless it amounts to a release of the judgment. *Burley v. Burley*, 6 N. H. 204, wherein it was said: "We are not aware of any new matter that can be pleaded by a plaintiff in review. A defendant in review may, perhaps, plead a release of the right of review."

Objections as in Appellate Practice. — A supplemental answer which seeks to make issues or make a defense which was available only in the original action will not be allowed. Such defenses only are proper as would have been available had an appeal been taken from the original judgment instead of review sought. *Kiley v. Murphy*, 7 Ind. App. 240.

Insolvency Since Original Judgment. — The original defendant in a writ of review cannot, in his defense thereto, avail himself of a discharge in insolvency obtained in pursuance of proceedings commenced since the rendition of the original judgment against him. *Foster v. Plummer*, 3 Cush. (Mass.) 381. But it would be otherwise if proceedings in bankruptcy had been commenced during the pendency of the original action, and a continuance to await the discharge had there been asked for. *Todd v. Barton*, 117 Mass. 291. See *Whitton v. Bicknell*, 3 Allen (Mass.) 472.

Brief Statement in Defense — General Issue. — When an action is reviewed, the defendant cannot, upon the review, file a brief statement of matter in defense arising since the original judgment. But if the new matter avoids the plaintiff's cause of action from the beginning, it may be given in evidence under the general issue filed in the

original action. *Barker v. Wendell*, 12 N. H. 119.

Real Action — Subsequently Acquired Title. — On review of a real action, the demandant must recover on the state of his title at the time of the commencement of the original suit, and not at the time of the commencement of the action of review. *Berry v. Whitaker*, 58 Me. 422.

Betterments. — The merits which were originally tried are alone to be tried on the review; a claim for betterments cannot be set up. *Hart v. Johnson*, 7 Mass. 472.

New Steps in Original Action. — In proceedings to review no new steps can be taken in the original action. *Ex p. Kiley*, 135 Ind. 225; *Keeper v. Force*, 86 Ind. 81; *Leech v. Perry*, 77 Ind. 422; *Brown v. Keyser*, 53 Ind. 85. 1. *Bush v. Bush*, 46 Ind. 70; *Smith v. Noe*, 30 Ind. 117; *Foster v. Potter*, 24 Ind. 363. And see generally article AMENDMENTS, vol. 1, p. 458.

The Amendment of the Complaint is proper where it fails to make out a case authorizing a review. *Foster v. Potter*, 24 Ind. 363.

Pleadings Treated as Amended. — Where there is a variance between the case made by the pleadings and that made by the proof, and the pleadings could have been amended so as to correspond with the proof, such amendment will be presumed, on appeal, to have been made. *Evansville, etc., R. Co. v. Maddux*, 134 Ind. 571.

2. *Gale v. French*, 16 N. H. 95; *Colebrook v. Merrill*, 49 N. H. 213.

Security for Costs. — Where the amendment of a writ of review in the particular of mere form is a matter of right, the court has no discretion to require a plaintiff in review to furnish security for costs as a condition of the amendment. *Gale v. French*, 16 N. H. 95.

Under the Earlier Massachusetts Statutes no amendments in the pleadings could be allowed. See *Bowditch Mut. F. Ins. Co. v. Winslow*, 3 Gray (Mass.) 415.

3. **Defective Service.** — Where there

As Respects Parties. — Amendments which will make a change in the parties to be affected by the final determination will not be allowed.¹

b. OF ORIGINAL PLEADINGS. — As to the amendment of the pleadings in the original action the authorities differ. Thus in *Indiana*, where the review is instituted by complaint, it has been held that the original pleadings cannot be amended;² but in *New Hampshire* such amendments have been allowed,³ though not for the purpose of changing the form or cause of action.⁴

7. Trial — Review of Original Evidence. — On the review proper, in the absence of any statutory provision to the contrary, and if no facts have been agreed to which would restrict a presentation of the whole case, all the original evidence and all the evidence which would have been competent on the original trial may be introduced, in the like manner as on an ordinary trial of an action at law.⁵

are two defendants in review, one of whom was supposed both in the original writ and in the writ of review to be an inhabitant of a town within the state, it was held that a service of the writ of review upon their attorney who had appeared in the cause was insufficient. And it was further held that if at the time of such service both the defendants were in fact inhabitants of another state, affidavits showing that fact could not cure the defect of service, though they might furnish a ground for leave to amend the writ of review in such manner as to make the service good. *Tilton v. Parker*, 4 N. H. 142. In this case, upon an affidavit showing that the defendant had in fact removed from the state, an amendment to the writ was allowed upon terms so as to describe him as a nonresident.

1. Restoration of Name Stricken Out. — In *Fling v. Trafton*, 13 Me. 295, on motion of the plaintiff's attorney in the original writ, one of the two defendants named was stricken therefrom, and the court refused to permit the restoration of the name so stricken out, at the trial of the review, on the motion of the original plaintiff.

Guardian and Ward. — Where a petition for a review of the judgment and proceedings in partition has been presented in the name of a guardian and in behalf of certain minors, and notice has been ordered thereon, and the opposing party has appeared, it cannot be amended so as to make the minors the petitioners by such person as their guardian. *Elwell v. Sylvester*, 27 Me. 536.

2. Amendment by Defendant. — The defendant cannot be permitted to amend his pleadings in the original action. *Leech v. Perry*, 77 Ind. 422.

3. Knox v. Knox, 12 N. H. 352.

An Amendment of the Declaration may be permitted on review. *Frost v. Chesley, Smith* (N. H.) 202.

Regarded as New Action. — For the purpose of amendment an action of review may be regarded as a new action. *Cahoon v. Coe*, 57 N. H. 556; *Zollar v. Janvrin*, 49 N. H. 114; *Burley v. Burley*, 6 N. H. 204. See also *Frost v. Chesley, Smith* (N. H.) 202.

A Declaration for Goods Sold and Delivered, and goods bargained and sold, may be amended by adding a count for not accepting and paying for the goods. *Bailey v. Smith*, 43 N. H. 409.

4. Edgerly v. Emerson, 4 N. H. 147; *Pearson v. Smith*, 54 N. H. 65.

5. Wilbur v. Dyer, 39 Me. 169.

A Deposition Used on the Original Trial is admissible on the review although the deponent has become a party to the suit as administrator of the original defendant. *Gold v. Eddy*, 1 Mass. 1.

Trial upon Original Pleadings. — By the provisions of the *New Hampshire* statute in force in 1845, actions of review were to be tried upon the pleadings in the original action, such pleadings being amendable in the discretion of the court. *Otis v. Currier*, 17 N. H. 463.

An Auditor's Report in the Original Suit is admissible on a trial of the same action on review. *Pickering v. De Rochemont*, 60 N. H. 179.

Copies of Papers Used at Trial. — The

Retrial of Issues of Law and Fact. — All issues of law or fact which were tried in the original action, or the raising of which was omitted therein without fault of the petitioner, are to be retried as if no judgment had been rendered.¹

The Judgment Originally Rendered Cannot Be Used at the trial on the review as *prima facie* evidence of any facts necessary to be established at such trial.²

Stipulations and Agreements made in the original action are not binding on the parties in the trial by way of review, unless it is apparent that it was not intended that such a stipulation should be effective and confined in its operation to the original cause only.³

requirement of a statute that the plaintiff in review shall produce copies of all papers used at the trial will not entitle the adverse party to use a copy of a paper which was in evidence at the trial, if the production of the original is within his power. *Belknap v. Wendell*, 31 N. H. 92.

Failure to Produce Copies of Original Papers. — Where it is provided by statute that the party reviewing shall produce attested copies of the writ, pleadings, judgment, and all papers used and filed at the former trial, otherwise a nonsuit shall be entered, it is not a peremptory ground for a nonsuit against a plaintiff who has produced the usual copies, certified to be copies of all papers used and filed upon the former trial, that a paper known to have been so used is not copied. The court may allow time to supply the omission. *Belknap v. Wendell*, 31 N. H. 92.

Evidence at Former Trial. — By the *Massachusetts* statute of 1786, c. 66, § 1, each party in an action of review was entitled to all the evidence used at the former trial which at that time was not liable to any legal objection, or which at the review might not be obtained from the same source in a better or more authentic form. *Gold v. Eddy*, 1 Mass. 1.

In Indiana the cause is tried by the record alone. *Evansville, etc., R. Co. v. Maddux*, 134 Ind. 571.

Matters Apparent. — If the insufficiency of the original complaint becomes apparent on review, the judgment of the trial court will be upheld, where it appears that there was a discussion below by counsel as to the sufficiency of the complaint, although attention was not called to the particular defect. The reviewing court will

not ignore matters apparent which will prevent a reversal of the judgment. *Travelers' Ins. Co. v. Prairie School Tp.*, 151 Ind. 36.

1. *Fuller v. Storer*, 111 Mass. 281 [citing *Perry v. Goodwin*, 6 Mass. 498; *Hart v. Johnson*, 7 Mass. 472; *Good v. Lehan*, 8 Cush. (Mass.) 299; *Anderson v. Brown*, 10 Gray (Mass.) 92].

Province of Court and Jury. — The issues in law are to be tried by the court and the issues of fact by a jury. *Perry v. Goodwin*, 6 Mass. 498.

Trial de Novo. — "Upon review, the action is to be tried as if no verdict had ever been rendered — in the same manner as if no judgment had been 'rendered thereon;' therefore, nothing can be done here, in the way of correcting an error in the former judgment, but by a trial of the cause anew, and opening the merits of the whole action." *Johnson v. Atlantic, etc., R. Co.*, 43 N. H. 410.

2. *Messer v. Swan*, 4 N. H. 481, wherein a statute requiring causes to be tried on review in the same manner as if no judgment had been rendered therein was construed to mean that the first judgment should have no weight in the second trial nor be evidence of the facts of the case for or against either party.

Execution of Note. — Upon the trial of a review of an action on a note, the original judgment in favor of the plaintiff is not *prima facie* evidence of the due execution of the note. *Good v. Lehan*, 8 Cush. (Mass.) 299.

3. **Agreement "for the Purpose of This Suit."** — A review is a new action; and if the parties in the original suit make an agreed case "for the purposes of this suit," it will not be evidence in a jury trial of the review. *Page v. Brewster*, 58 N. H. 126.

8. Verdict. — The verdict must be sufficient to serve as the foundation of a proper judgment.¹ Like other verdicts, it may be corrected, or, in a proper case, set aside.²

9. Judgment — *a.* IN GENERAL. — The object of proceedings to review is to do complete justice between the parties to the controversy, by correcting errors or irregularities in the original action, upon consideration of matters which might properly have been presented therein, but which, without fault of the complaining party, were not so presented. Therefore, the judgment required to be rendered on the review, though usually prescribed by statute, should in effect be such a judgment as is warranted by the circumstances, and should, so far as practicable, place the parties in the position they would have occupied as the result of the original action, if no error or irregularity had occurred therein, and if all the matters justifying a recovery or constituting a defense had been presented thereon.³

Binding Effect on Legal Representatives. — Upon review, a stipulation made upon granting a review to an insane person under guardianship, that the respondent may testify without objection, is binding upon the legal representative of the petitioner, who has since died. *Austin v. Dunham*, 65 Me. 533.

Limiting Effect of Agreement. — Where the case does not show that an agreement made in the original action and relating to the amount of recovery therein was intended by the parties thereto to relate to that action only, evidence of that agreement is competent, in an action of review, upon the question of the amount in controversy. *Russell v. Babbitt*, 60 N. H. 373.

Settlement Between Principal and Surety. — Where one surety recovers of his cosurety his proportion of the whole sum paid, and afterwards receives of the principal the sum so paid, and the cosurety reviews the action, evidence of the sum paid by the principal, though it might have been introduced in evidence on the original trial to reduce the damages, is not admissible for that purpose upon the trial of the review. *Messer v. Swan*, 4 N. H. 481.

1. Comparison of Verdicts. — In an action of review commenced by the defendant in the original action, when the jury has first found in favor of the original plaintiff the amount of damages which he is justly entitled to recover, it may then take into consideration the former verdict, and ascertain the amount of it; and if the estimated damages are less than the former ver-

dict by a merely nominal difference, it may, in its discretion, return a verdict for the amount of the former one. *Carpenter v. Pierce*, 13 N. H. 403. See also *Swett v. Sullivan*, 7 Mass. 346. And see generally article VERDICTS.

2. Correction by Judgment. — The jury may find a verdict for the original defendant, or for the original plaintiff, with greater or less damages than he recovered at the former trial; and upon comparing the two verdicts, any error will be corrected by the judgment on the review. *Swett v. Sullivan*, 7 Mass. 346.

Reference to Correct Verdict. — Where it is suggested that the increased damages awarded by a verdict on review was for accrued interest, unless the parties agree the question will be referred to a judge at nisi prius, to determine what part of the excess, if any, was interest, and to make an equitable deduction. *Crehore v. Pike*, 47 Me. 435.

Setting Aside. — The judge may set the verdict aside for any reasonable and just cause, directing a new trial. *Ruggles v. Freeland*, 6 Mass. 513.

3. Substitution of New Judgment. — In *Dunlap v. Burnham*, 38 Me. 112, under a statute providing that on review such judgment should be rendered as law and justice might require, without regard to the former judgment, except as is specially provided, it was held that the judgment on review should be substituted for the former judgment, making that judgment a nullity. See also *Stevens v. Sabin*, 20 N. H. 529.

Similar Judgment. — Where final judg-

b. FORM AND SUFFICIENCY. — The form of the judgment, unless it is prescribed by statute, is unimportant, and all that is necessary is that the intent of the reviewing court in making its

ment has been rendered on a petition for partition, and on review precisely the same partition and judgment are had as were originally had, the former judgment is not affected by the proceedings in review. *Dyer v. Wilbur*, 48 Me. 287.

Reversal in Part. — Independently of any statutory provision, a former judgment may be reversed in part on a review. *Galloway v. Pitman*, 3 Mass. 408.

In *Indiana* "the court may reverse or affirm the judgment, in whole or in part, or modify the same, as the justice of the case may require." *Alsop v. Wiley*, 17 Ind. 452.

In *Maine*, where a judgment on review is not a mere affirmation or reversal of the original judgment it should be rendered as required by the merits of the former judgment, except as otherwise prescribed by statute, *i. e.*, where the damages of the former judgment are reduced below or increased above those awarded on the review, in which case the judgment may be rendered or offset so as to do final and complete justice between the parties. *Dunlap v. Burnham*, 38 Me. 211.

The former judgment cannot be reversed in whole or in part; but if wrong, the plaintiff in review will have judgment to recover back the money erroneously recovered in the former suit; or, if right, the defendant in review will recover his costs of review, and may execute his former judgment if not already satisfied. *Curtis v. Curtis*, 47 Me. 525; *Dyer v. Wilbur*, 48 Me. 287.

Under the *Massachusetts Statutes* the judgment in review may affirm, reverse, or modify the former judgment in whole or in part, or may make such other disposition of the case as may be necessary to secure the just and legal rights of all parties. *Safford v. Knight*, 117 Mass. 281.

In *New Hampshire*, if the plaintiff in review prevails, he is entitled to a judgment for such damages as will correct the error of the first judgment. If he was originally plaintiff, and failed in the suit, he has judgment for the damages found by the jury on the

review, and which it is thus made to appear he ought to have recovered in the first instance; and costs are added. If he was originally defendant and judgment was obtained against him, he has judgment for such damages as will restore to him the amount which it appears was wrongfully recovered against him in the first instance, with his costs. *Knox v. Knox*, 12 N. H. 352; *Otis v. Currier*, 18 N. H. 85.

In a *Real Action*, if the plaintiff has obtained judgment, the defendant, on recovery upon review, has judgment for the land or for so much of it as he appears to be entitled to. *Andrews v. Foster*, 42 N. H. 376. And see *Otis v. Currier*, 18 N. H. 85.

On the *Review of Foreclosure Proceedings*, if it appears that the mortgage was invalid, the defendant will have a judgment to recover the possession of the land. The foreclosure cannot avail unless the judgment stands unaffected, for it is founded upon the judgment. If it appears on the review that the plaintiff recovered his conditional judgment for too great a sum, the foreclosure fails in like manner, and a corresponding conditional judgment must be rendered, that if the defendant shall pay the amount then found to be due, within the usual term, a writ of possession shall issue to restore the possession to him. Rents and profits cannot be deducted from the sum found due, upon the review. *Otis v. Currier*, 18 N. H. 85.

Reversal of Satisfied Judgment. — A defendant who, after satisfying a judgment against him, reviews and wholly reverses it, is entitled to the sum which the plaintiff recovered in damages and interest thereon from the time of such payment and satisfaction to the time of judgment in review. *Ordway v. Haynes*, 54 N. H. 346.

Reduction of Original Recovery. — Where the plaintiff's verdict on review is less than his verdict in the original action, the defendant is entitled to judgment for the difference between the verdicts and interest on the difference for the time between the verdicts, irrespective of the question whether he has paid the former judgment. *Shepard v. Hatch*, 54 N. H. 96.

determination shall be apparent, and that the rights to which he has shown himself entitled shall be accorded to the prevailing party.¹

c. EFFECT — (1) *On Original Proceedings.* — In *Indiana*, if the party prosecuting the review is successful, the original judgment is reversed, but the original cause is not finally disposed of and may be proceeded with *de novo*.²

In *Maine*, *Massachusetts*, and *New Hampshire* neither the proceedings to review nor the judgment rendered on such proceedings, although the judgment is a new one fixing the rights of the parties, will affect the original proceedings, or reverse, nullify, or render void the original judgment *ab initio*, whether or not a different result from that on the first trial is reached; nor will the judgment on review invalidate acts done under the former judgment.³

1. **Special Judgment.** — The court is limited to no form of judgment, but will render such special judgment as the just and legal rights of the parties require. *Shaw, C. J., in Carrique v. Bristol Print Works*, 8 Met. (Mass.) 446. And see *Whitton v. Bicknell*, 3 Allen (Mass.) 472.

Judgment for Plaintiff. — In *Leech v. Perry*, 77 Ind. 422, a judgment that "Final judgment is rendered for the plaintiff, and the defendant L. pay all costs," was held to be a sufficient, though informal, judgment of reversal.

Following Ruling on Demurrer to Complaint for Review. — "If the copy of the record and proceedings, with the complaint, is a complete and true copy, the ruling on the demurrer to the complaint to review raised every question presented by the assignment of error for review, and judgment should have followed the ruling of the court upon the demurrer, unless the appellant answered matters arising after the rendition of the judgment or such errors as would have been available as cross-errors on appeal." *Kiley v. Murphy*, 7 Ind. App. 239.

2. **Setting Aside Original Judgment.** — It is not the purpose of a judgment in proceedings to review, to dispose finally of the action. The effect of the judgment is to reverse and set aside the judgment in the original action, leaving that action to proceed as if no trial had taken place. *Leech v. Perry*, 77 Ind. 422.

Similarity to Proceedings for New Trial. — When a complaint for review is based on the ground of new matter discovered after the rendition of the

original judgment, it does not differ materially from, and its effect is the same as, the setting aside of a judgment on motion for a new trial; in either case the result is the setting aside of the judgment and allowing a new trial of the cause. *Hoppes v. Hoppes*, 123 Ind. 397. The same rule will apply in reviewing an action of the lower court when the judgment on the review has been rendered and a new trial granted as in the case of granting a new trial on motion. *Hornady v. Shields*, 119 Ind. 201.

Excessive Recovery in Original Action. — Where the finding in an action to review for material new matter simply shows an excessive recovery in the original action, the original judgment should not be reversed, but should be modified. *Francis v. Davis*, 69 Ind. 452.

3. *Crehore v. Pike*, 47 Me. 435. And see *Safford v. Knight*, 117 Mass. 281; *Foster v. Plummer*, 3 Cush. (Mass.) 381; *Gifford v. Whalon*, 8 Cush. (Mass.) 428; *Brown v. Brigham*, 5 Allen (Mass.) 582; *Fuller v. Storer*, 111 Mass. 281.

Under the New Hampshire Revised Statutes there is no technical reversal of the first judgment, but a new judgment is entered which determines and fixes the rights of the parties to the controversy as they then appear. *Otis v. Currier*, 18 N. H. 85. See also *Haynes v. Ordway*, 52 N. H. 284.

Liability of Bail on Original Writ. — In *Swett v. Sullivan*, 7 Mass. 342, it was held that a judgment in review was not a final judgment upon the original writ within a statute providing

(2) *On Rights Vested under Original Judgment.* — Under some circumstances rights of the original judgment creditor, or of third parties, which have accrued or become vested under the judgment originally obtained are not affected by a judgment on review which reverses the original judgment in part.¹

(3) *On Parties Not Joining in Review.* — Where one of several unsuccessful litigants prosecutes a review, the judgment on review may be so framed as to protect such of the parties as did not join in such prosecution,² as well as to preclude them from taking

that bail upon an original writ shall not be holden unless scire facias against them shall be served on them within one year next after the entering up of final judgment against the principal.

In Maine the former judgment cannot be reversed in whole or in part. *Curtis v. Curtis*, 47 Me. 525; *Dyer v. Wilbur*, 48 Me. 287. And see *Dunlap v. Burnham*, 38 Me. 112.

Review and Error Distinguished. — A review is not a writ of error, by which a judgment is reversed, nullified, and rendered void *ab initio*. It is a remedial process to enable the party to correct wholly or in part a former judgment by means of a new one. *Dyer v. Wilbur*, 48 Me. 287.

Restitution. — Where a judgment is reversed upon a writ of review, as a general rule there is no remedy by way of restitution except against a party to the record. *Little v. Bunce*, 7 N. H. 485.

Attorney's Lien on Original Judgment. — Where the original judgment has been nullified by the judgment on review, the attorney who secured it has no lien thereon which he can recover by action. *Dunlap v. Burnham*, 38 Me. 112.

Increased Recovery. — When a writ of review is sued out by the defendant, the plaintiff, if his damages are increased, is entitled to judgment for the excess and costs upon review. *Andrews v. Foster*, 42 N. H. 377.

Where a defendant who had filed a set-off had a verdict of which he remitted all but ten cents and took judgment for that amount, and upon a review by the original plaintiff the defendant had a verdict for more than the original amount, it was held that the remission by the defendant in the original action did not bind him, but that he was entitled to execution for the amount of the second recovery,

less ten cents. *Dame v. Twombly*, Smith (N. H.) 262.

Where the Original Judgment Has Been Satisfied by a Levy upon real estate, the levy is valid and conveys a good title, although afterwards, on review, the original defendant recovers a judgment against the original plaintiff for a sum equal to the whole amount of the former judgment. *Curtis v. Curtis*, 47 Me. 525.

A levy to satisfy a judgment on review, made on premises which have been previously levied on under the original judgment, is of the same effect as the levy on a judgment recovered in an ordinary action. *Haven v. Libbey*, Smith (N. H.) 109; *Hodgdon v. Lougee*, Smith (N. H.) 104.

1. A Partial Reversal on review will not affect the original judgment so as to preclude a suit thereon. The first judgment remains good, though the execution may be set off. *Hart v. Little*, Smith (N. H.) 52.

Levy of Execution. — A partial reversal on review of the original judgment will not affect a levy made thereunder. *Haven v. Libbey*, Smith (N. H.) 109; *Hodgdon v. Lougee*, Smith (N. H.) 104; *Webber v. Sargent*, 5 Dane's Abr. 220.

An Action of Debt Will Lie upon the Original Judgment although it has been partially reversed on review. *Hart v. Little*, Smith (N. H.) 52.

Dower Right. — In *Drew v. Munsey*, Smith (N. H.) 317, judgment was recovered against two persons and execution was levied on real estate of one. Upon review the judgment debtors recovered judgment against the original plaintiff for the greater part of the amount included in the original judgment and levied their execution on the same real estate. It was held that the widow of the original plaintiff was entitled to dower in the land.

2. In *Emerson v. Pattee*, 1 Mass.

thereunder benefits which they did not seek.¹

(4) *On Provisional Remedies.* — Where the parties in the original cause have availed themselves of provisional remedies, as attachment or the like, or have issued execution or levied under an execution issued in the original action, such rights as have been thus acquired are not affected by the review nor by the judgment therein where it substantially follows the original judgment, unless at the time of the institution of such proceedings provision was made or conditions were imposed relative thereto.²

10. *Costs.* — It is difficult to determine who is the prevailing party on review because of the peculiar nature of the proceedings and because the statutes require, in effect, that such a judgment shall be given as the merits of the case upon the law and the evidence appear to require. If a party succeeds in reversing the judgment originally obtained against him, or, because of the

482, one of the original defendants instituted and prosecuted a review in the name of all the defendants, and there was a verdict for the plaintiff for a sum greater than that originally recovered, after which the defendant who did not prosecute the writ was called and did not appear. It was held that judgment should be entered against the sole prosecutor upon the verdict, with costs of the review against the prosecutor, and that the former judgment should be affirmed as a joint judgment against all the defendants.

1. Where, in an action to review a judgment foreclosing a mortgage, the decree in the review proceedings sets aside the judgment in foreclosure as to parties holding junior incumbrances, such reversal of the judgment in part does not vacate the judgment in foreclosure as to the remaining judgment defendants in the foreclosure proceedings, the result of a successful application to review a judgment being the same as a successful appeal. *Wright v. Churchman*, 135 Ind. 683.

To Whom Benefits of Review Inure. — *Stevens v. Sabin*, 20 N. H. 529, was an action by a second attaching creditor against a deputy sheriff for not safely keeping the property attached. It was held that a judgment obtained by the first attaching creditor against the deputy for the same misfeasance was not conclusive upon the plaintiff as to the damages to which he was entitled, and that upon the judgment being reduced upon a review brought by the defendant, the plaintiff was entitled to the

benefit of the exoneration of the property thus effected by the review, though he had no agency in prosecuting it. Furthermore, it was held that the plaintiff, not having caused the review to be prosecuted, could not be charged with any of the expenses incurred by the defendant in so doing, by way of reduction of damages.

2. *Attachment.* — Property attached upon the original writ is released by a judgment in favor of the defendant, or by a neglect of the plaintiff for thirty days after a judgment in his favor to levy upon it; and in either case no claim can be made upon the sheriff, or any one who may have received it from him, and receipted for it, to have it forthcoming to be applied in satisfaction of a judgment rendered in review. *Badger v. Gilmore*, 37 N. H. 457. See also *Haven v. Libbey, Smith* (N. H.) 109.

Levy under Execution. — A reversal in part or in whole of the judgment originally rendered will not affect a levy made to satisfy that judgment. *Haven v. Libbey, Smith* (N. H.) 109; *Hodgdon v. Lougee, Smith* (N. H.) 104; *Webber v. Sargent*, 5 Dane's Abr. 220.

Effect on Replevin Proceedings. — The grant of a review and a supersedeas of execution after a judgment for the defendant in replevin will not discharge the replevin bond, at least not without a special order for that purpose, made on filing a proper bond as substitute; but the bond for review is not a substitute. *Brown v. Brigham*, 5 Allen (Mass.) 582.

failure of the plaintiff in review to change the first decision, obtains a judgment substantially the same as that which was rendered in the first instance, or succeeds in increasing the amount of damages originally awarded to him, he is entitled to recover the costs of the review.¹

Reduction of Amount of Recovery. — A party to the review who by reducing the amount of the original recovery against him obtains a result more favorable to him than the result of the original action is, as a rule, entitled to recover such costs as may be prescribed by statute.²

1. *Andrews v. Foster*, 42 N. H. 377; *Knox v. Knox*, 12 N. H. 352. And see generally article COSTS, vol. 5, p. 100.

Statutory Right to Costs. — The court has no authority to withhold costs from the party prevailing in a review granted on his petition, unless terms as to costs were imposed on him at the time when his petition for a review was granted. *Williams v. Hodge*, 11 Met. (Mass.) 266.

Nonsuit. — A defendant in review may recover the costs of the review of a plaintiff who is nonsuited because he was not legally entitled to a review. *Treat v. Hathaway*, 7 Mass. 503.

Reversal by Bankrupt. — One who by means of certificate in bankruptcy obtains in effect a reversal of the original judgment against him, is not entitled to costs under the *Maine* statute. *Foster v. Hinckley*, 40 Me. 54.

A Judgment on a Writ of Review for the Same Amount as the original judgment with the costs of review is erroneous. The original judgment should be affirmed, and execution should issue for the costs of review only. *Tyler v. Erskine*, 78 Me. 91.

Where One Plaintiff Prevails. — In *Durgin v. Leighton*, 10 Mass. 56, which was trespass against three, judgment was rendered against all, and on a review by them a verdict was rendered against two only, and the third was allowed to tax the costs of travel and attendance for himself and all the witnesses used in defense, both on the first trial and on the review.

Interest should not be allowed on the costs of review. *Whittaker v. Berry*, 64 Me. 236.

2. *Billerica v. Carlisle*, 2 Mass. 158; *Lincoln v. Goulding*, 3 Mass. 234; *Johnson v. Wetherbee*, 3 Pick. (Mass.) 247; *New Haven, etc., Co. v. Northampton*, 102 Mass. 116; *Williams v. Hodge*, 11 Met. (Mass.) 266; *Dodge v. Reed*, 40 Me. 331; *Knox v. Knox*, 12 N. H. 352.

Reducing Verdict. — In *Johnson v. Wetherbee*, 3 Pick. (Mass.) 247, the verdict was for two hundred and seventy-five dollars, and judgment was rendered for that sum with interest, in all three hundred and eight dollars. On review the original plaintiff had a verdict for three hundred dollars and took judgment for that sum with costs. It was held that the award of costs was erroneous, and that the plaintiff in review, the original defendant, was entitled to the costs of the review.

Reduction of Judgment by Default. — The *Massachusetts* statute which provides that if the sum recovered by the plaintiff in the original suit is reduced on review by the original defendant he shall recover the difference "with his costs" applies to cases where the original judgment was by default through the mistake of counsel or otherwise. *Williams v. Hodge*, 11 Met. (Mass.) 266.

Reduction of Damages on Replevin. — Where the defendant in an action of replevin obtains a judgment for a return and for damages, and upon a review the plaintiff obtains a reduction of the defendant's damages, the defendant, and not the plaintiff, is entitled, as the prevailing party, to the costs. *Bruce v. Learned*, 4 Mass. 614.

Reduction by Set-off. — In *Williams v. Williams*, 133 Mass. 587, the defendant filed an answer containing a general denial, and also filed a declaration in set-off. Subsequently he was defaulted and judgment rendered against him for \$1,398.83 and costs. Thereafter he brought a writ of review, and on the trial thereof the original plaintiff recovered a verdict of one dollar. It was held that the defendant in the original action was entitled to costs, notwithstanding the original recovery was reduced by set-off upon the review.

Reduction of Value of Land in Real Action. — Where, upon the review of a

Liability of Indorsers and Recognizers. — The indorser of the original writ is not liable by reason of the indorsement for the costs which may be recovered on review,¹ but a recognizer for a review will become absolutely liable for such costs if the plaintiff in review is successful.²

Costs of Original Trial. — The allowance of the costs of the former trial as a part of the recovery on review to be included in the judgment, when not regulated by statute, is either a matter of discretion or is dependent on the measure of recovery.³ In *New Hampshire*, however, it seems that a defendant who reviews never recovers back in that proceeding, either as costs or as damages, the costs recovered in the original action by the adverse party.⁴

real action, the land and improvements are estimated by the jury at a sum less than that fixed by the former verdict, and the defendant elects to abandon the land, the tenant is entitled to the costs of the review. *Erving v. Pray*, 1 Me. 255.

Upon Obtaining Correction of Error. — If the plaintiff in review fails to support his demand for a more favorable judgment than he procured in the original action, he is not entitled to costs, but they will be recoverable by the party in whose favor an error is corrected, as the prevailing party. *Bruce v. Learned*, 4 Mass. 614.

If the plaintiff in review succeeds in correcting an error in the former verdict against him, he is entitled to a judgment for the costs of the review, though by the accumulation of interest the verdict on review is larger than the original verdict. *Kavanagh v. Askins*, 2 Me. 397.

Title to Real Estate in Question. — If, in trespass *quare clausum fregit*, the title to real estate not being brought in question, the plaintiff's costs are limited, and the defendant reviews and reduces the damages, the plaintiff cannot have full costs of the original suit, although, upon the review, the title to real estate is in question. *Woodbury v. Parshley*, 10 N. H. 392.

1. *Sandford v. Candia*, 54 N. H. 421.

2. A Recognizer for a Review Becomes Absolutely Liable for the costs occasioned by the review to the extent of his recognizance; and to charge him, no execution need be issued against the principal debtor, nor need any effort be made to collect the judgment of him. Though property was attached the result is the same, since the remedies of the creditor, as well as the

liabilities of the officer and of the recognizer, are distinct and independent. Therefore a receiptor who takes an assignment from the judgment creditor may recover of the recognizer upon his recognizance in the creditor's name. *Smith v. Ingraham*, 22 Vt. 414.

3. Maine Statute. — In *Brown v. Cousins*, 51 Me. 301, which was the review of an action brought by a married woman, after the statute of limitations had run, the court rendered a judgment against the original plaintiff for the debt, costs, and interest, but refused in addition to enter judgment for such further sum as the original defendant would have been entitled to recover as costs in the original cause, such costs being authorized by statute when, in the opinion of the court, justice requires such an allowance.

Partial Reversal. — Where it is provided by statute that an original defendant who reviews an action wherein judgment has been rendered against him, if he shall obtain a reversal of such judgment in part, shall be entitled to the costs of the review and to a restoration of so much of the damages paid by him in satisfaction of the former judgment as that judgment may have exceeded the judgment upon the review, there can be no restoration of any part of the costs of the former trial unless the judgment is wholly reversed. *Billerica v. Carlisle*, 2 Mass. 158; *Lincoln v. Goulding*, 3 Mass. 234; *Johnson v. Wetherbee*, 3 Pick. (Mass.) 247.

4. New Hampshire Statute. — *Taylor v. Gilman*, 61 N. H. 636, wherein *Smith, J.*, said: "The judgment to which the defendant is entitled is defined by the statute, which has stood without substantial change since 1838.

X. APPEAL AND ERROR — Appealable Judgments. — The determination on the review proper is not necessarily final. An appeal will lie from the judgment, or a writ of error may be sued out in a proper case.¹

When on review the defendant reduces the damages recovered in the original action, he is entitled to judgment for the amount of the reduction and costs. Gen. Stat., c. 215, § 11. No costs can be recovered except those accruing on the review. When the defendant reviews, he can recover no more costs than the amount of the reduction of damages, unless the original judgment is wholly reversed. Gen. Stat., c. 215, § 13. The defendant has wholly reversed the judgment recovered by the plaintiff in the original action, and therefore by the statute is entitled to a judgment for the whole amount of the reduction * * * and costs of review," and interest upon the amount of the reduction as damages for the detention of the money, from the time interest was computed on the same sum in the original action.

Stay until Payment of Costs. — It seems that the defendant cannot obtain a stay of execution on the original judgment until he has paid the costs and filed a bond. See *Taylor v. Gilman*, 61 N. H. 636.

Action to Recover Back Costs. — Where a non-negotiable promissory note was deposited as collateral security and the holder of the note brought suit on it against the maker in the name of the payee, and recovered judgment, which was paid to the plaintiff, and thereafter the defendant maker reversed the judgment on proceedings in review, it was held that he could not subsequently maintain an action to recover from the plaintiff in the original suit the costs paid to him, but that his remedy, if any, was against the payee of the note in whose name the suit was brought. *Little v. Bunce*, 7 N. H. 485.

Recovery by Plaintiff of Increased Damages. — A statute providing that in all actions of review which shall "hereafter" be commenced and prosecuted in any suit commenced after the passage of this act, neither party shall recover any costs except such as accrued in said action or review, etc., and that in all cases where the plaintiff in the original action sues out a writ of review for the purpose of recovering increased damages, he shall recover no more costs than the amount by which

said damages may be increased, has no application to an action commenced prior to the act, and in which on review the plaintiff recovered a larger verdict than that on the first trial; but the plaintiff is entitled to recover the costs of the review and also the full costs of the former trial, those having been limited. *Avery v. Holmes*, 10 N. H. 574, *distinguishing* *Woodbury v. Parshley*, 10 N. H. 392, an action of trespass *quare clausum fregit* wherein it was held that if the plaintiff recovers, but, the title not being in question, is limited in his costs, if the case is reviewed, and upon the second trial the defendant reduces the damages, the plaintiff cannot have full costs of the original suit, even if the title was put in question in the trial upon the review. If the defendant reviews and merely succeeds in reducing the damages a small amount, the court in its discretion may limit his costs.

1. An Unauthorized Judgment on a writ of review may be reversed by a writ of error. *Hall v. Wolcott*, 10 Mass. 218.

In *Indiana* a judgment in a proceeding to review a former judgment, either granting or refusing a review, puts an end to the action for a review and is a judgment from which an appeal will lie to the Supreme Court. *Brown v. Keyser*, 53 Ind. 85, *followed* in *Keepfer v. Force*, 86 Ind. 81, wherein it was contended that on a complaint to review where the plaintiff is successful, an appeal will not lie to the Supreme Court; that the effect of the judgment of review was simply to grant a new trial, and that the original cause stood for trial again as though no trial had been had; and further that the proceedings therein, if tested in the Supreme Court, must come up with an appeal from a final determination of a new trial of the original cause. But this contention was not sustained, the court deciding that if in proceedings to review a judgment for error or law the judgment is reversed, an appeal from such judgment of reversal will lie to the Supreme Court.

Review for Error of Law. — Where, in a proceeding to review a judgment for error of law, the judgment is reversed, an appeal from such judgment of re-

Questions Within Discretion of Court. — It is discretionary with the judge or court to whom a petition for a review is presented to grant or refuse a review upon questions of fact. No exception will lie to the exercise of a legal discretion in that regard, nor can there be a revision of the determination so made.¹

Questions Reviewable on Appeal. — Where, however, in granting or refusing the application, some opinion is expressed, or some direction, decision, or judgment is given in a matter of law, *e. g.*, upon questions of jurisdiction or in the application of the statute of limitations, the allowance of amendments, the reception or exclusion of evidence, or the like, objections or exceptions may be made and considered on appeal or error.²

versal lies to the Supreme Court. *Keefe v. Force*, 86 Ind. 81.

Cause Commenced in Justice's Court. — In *Murray v. Ulmer*, 5 Me. 126, it was held that in an action of trespass *quare clausum*, originally commenced before a magistrate and there accidentally defaulted, and afterwards tried, upon review, in the Common Pleas, upon a plea of soil and freehold, first filed in that court, an appeal would lie to the Supreme Court.

Unauthorized Appeal. — Where, under the law in force at the time, an appeal would not lie and could not be taken from a judgment of the Circuit Court to the Supreme Court, it was held that a party to the judgment could not, by filing a complaint for review thereof for alleged errors of law thereon and by appeal from the judgment of the court denying him the right to review, bring up to the Supreme Court for consideration and decision the alleged errors of law in the proceedings and judgments sought to be reviewed. *Klebar v. Corydon*, 80 Ind. 95.

1. *York, etc., R. Co. v. Clark*, 45 Me. 151; *Scruton v. Moulton*, 45 Me. 417; *Sherman v. Ward*, 73 Me. 29; *Berry v. Titus*, 76 Me. 285; *Moody v. Larrabee*, 39 Me. 282; *Scituate Water Co. v. Simmons*, 167 Mass. 313; *Bowditch Mut. F. Ins. Co. v. Winslow*, 3 Gray (Mass.) 415; *Hayes v. Collins*, 114 Mass. 54; *Boston v. Robbins*, 116 Mass. 313; *Stillman v. Whittemore*, 165 Mass. 234; *Sylvester v. Hubley*, 157 Mass. 306; *Stillman v. Donovan*, 170 Mass. 360.

Discretion in Granting Review. — If the court, upon a proper presentation of the facts, is of the opinion that, in the furtherance of justice, the petitioner is entitled to a review of the proceedings and judgment, and to present facts which, without fault on his part, he

had no opportunity of presenting on the trial, it has discretion to grant a review without passing in advance upon the questions of law which may be involved and to the exercise of this discretion exceptions will not lie. *Boston v. Robbins*, 116 Mass. 313; *Todd v. Barton*, 117 Mass. 291; *Hayes v. Collins*, 114 Mass. 54; *Brewer v. Holmes*, 1 Met. (Mass.) 288; *Hutchinson v. Gurdley*, 8 Allen (Mass.) 23.

Where There Is Evidence of Sufficient Cause for a review the finding or discretion of the court below will not be revised. *Soper v. Manning*, 158 Mass. 381; *Boston v. Robbins*, 116 Mass. 313; *Keene v. White*, 136 Mass. 23.

Apparent Injustice. — No appeal will lie from the action of a judge in granting a review, because of the refusal to grant a continuance on a suggestion of bankruptcy, it satisfactorily appearing that the petitioner has sustained injustice. *Todd v. Barton*, 117 Mass. 291.

Perjury — Ruling on Admission of Testimony. — Where it appears by the petition that the petitioner failed to establish his case because of the perjury of an adverse witness and the exclusion by the trial court of competent evidence to contradict the testimony in question, the refusal to order a review presents no question of law which can be passed on by the appellate court. *Stillman v. Whittemore*, 165 Mass. 234.

In Maine, upon a petition for review under chapter 94 of the statutes of 1859, it was held that the finding of the judge at nisi prius on the questions of fact was conclusive, and could not be revised on exceptions. *Sturtevant v. Randall*, 49 Me. 446.

2. *Scruton v. Moulton*, 45 Me. 417; *Converse v. Carter*, 8 Allen (Mass.) 568; *Davenport v. Holland*, 2 Cush.

(Mass.) 1; Gray *v.* Moore, 7 Gray (Mass.) 215; Bowditch Mut. F. Ins. Co. *v.* Winslow, 3 Gray (Mass.) 415; Weeks *v.* Adamson, 106 Mass. 514; Boston *v.* Robbins, 116 Mass. 313; Todd *v.* Barton, 117 Mass. 291; Hayes *v.* Collins, 114 Mass. 54; Sylvester *v.* Hubley, 157 Mass. 306; Stillman *v.* Whittemore, 165 Mass. 234; Yetten *v.* Conroy, 165 Mass. 238; Dearborn *v.* Mathes, 128 Mass. 195.

Reviewable Questions on Appeal. — The cases in which exceptions will be entertained to rulings on petitions for a review are cases wherein there are questions of law affecting the jurisdiction and powers of the court below over the petition, or the admissibility of evidence at the hearing thereon, which could not have been raised before the verdict. Dearborn *v.* Mathes, 128 Mass. 194.

Refusal of Review on Sufficient Facts. — If the court should find the facts proved to support the petition and should then refuse to grant a review, the petitioner has a remedy by exceptions. Sturtevant *v.* Randall, 49 Me. 446.

Exclusion of Testimony. — Upon the hearing of a petition for a review on the ground of the discovery of new and material evidence, *i. e.*, a supposed lost paper, admitted to have been written by the respondent, as to the contents of which he testified at the trial, the judge, after admitting testimony of the petitioners as to the respondent's evidence in that regard, refused to hear contradictory evidence of the respondent on the same subject, and ordered a review, "being of the opinion that the facts proved and admitted were such as required a review, whatever the evidence offered might be," and it was held that the refusal to admit such testimony was a good ground of exception to the order for review. Richardson *v.* Lloyd, 99 Mass. 475.

Allowance of Amendment. — In Davenport *v.* Holland, 2 Cush. (Mass.) 1, it was held that an order of the Court of Common Pleas allowing an amendment of a petition for review was subject to revision in the Supreme Judicial Court on exceptions.

REVIVAL OF JUDGMENTS.

By S. B. FISHER.

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I. DORMANT JUDGMENTS. — At common law a judgment lost its force as a lien on the judgment debtor's realty, and no execution could be issued thereon when it had lain dormant for a

year and a day.¹ Now, by statute in the various jurisdictions of this country, there is a fixed limitation of the period during which the life of the judgment continues, generally considerably greater than the common-law "year and a day." But these statutes universally provide that a judgment which has become dormant and lost its lien may be revived and regain its original force. This is accomplished by scire facias, action on the judgment, or special statutory proceeding.

II. REVIVAL BY SCIRE FACIAS—1. When Proper—*a.* DORMANT JUDGMENTS. — As a general rule, unless some other remedy is expressly provided by statute for the revival of dormant judgments, scire facias is the method to pursue.²

1. See article EXECUTIONS AGAINST PROPERTY, vol. 8, p. 345 *et seq.* As to the length of time a judgment retains its lien see tit. *Judgments*, Am. and Eng. Encyc. of Law.

2. *Alabama*.—Collingsworth *v.* Horn, 4 Stew. & P. (Ala.) 237; Shelley *v.* Graves, 29 Ala. 385.

Arkansas.—Fowler *v.* Thurmond, 13 Ark. 259; State Bank *v.* Terry, 13 Ark. 389.

Kansas.—State *v.* McArthur, 5 Kan. 280.

Kentucky.—Handley *v.* Fitzhugh, 3 A. K. Marsh. (Ky.) 562.

Maine.—Vallance *v.* Sawyer, 4 Me. 62.

Maryland.—Mitchell *v.* Chesnut, 31 Md. 521; Coombs *v.* Jordan, 3 Bland (Md.) 284, 22 Am. Dec. 236; Elliott *v.* Knott, 14 Md. 121, 74 Am. Dec. 519.

Massachusetts.—Osgood *v.* Thurston, 23 Pick. (Mass.) 110.

Mississippi.—Davis *v.* Helm, 3 Smed. & M. (Miss.) 17; Abbott *v.* Hackman, 2 Smed. & M. (Miss.) 510; Reeves *v.* Burnham, 3 How. (Miss.) 25.

Missouri.—Wilson *v.* Tiernan, 3 Mo. 577.

New Jersey.—Tindall *v.* Carson, 16 N. J. L. 94.

New York.—Harmon *v.* Dedrick, 3 Barb. (N. Y.) 192.

South Carolina.—Grimke *v.* Mayrant, 2 Brev. (S. Car.) 202; Dibble *v.* Taylor, 2 Spears L. (S. Car.) 308, 42 Am. Dec. 368.

Texas.—De Witt *v.* Jones, 17 Tex. 620; Masterson *v.* Cundiff, 58 Tex. 472; North *v.* Swing, 24 Tex. 193.

Vermont.—Carlton *v.* Young, 1 Aik. (Vt.) 332.

Issuance of Execution Within Proper Time. — It is unnecessary to resort to a scire facias to revive judgment where an execution has issued within the

proper time and there has been no change of parties to necessitate such a course. Locke *v.* Brady, 30 Miss. 21; Buckner *v.* Pipes, 56 Miss. 366.

See also Stille *v.* Wood, 1 N. J. L. 139, in which the court said: "There is not a single case to be met with in the books where a scire facias has issued to revive a judgment upon which there was at the time an execution in full existence, under which the property of the defendant was at that very period held. The writ will lie only where there is a judgment to be revived that has [been] suffered to sleep for a year and a day, and upon which no execution has issued; and where an execution has indeed issued which has been spent by a sale of property, the proceeds of which have proved insufficient to discharge the amount of the judgment. In this latter case, also, the writ must be especially *pro residuo*, and this was the doctrine laid down in all the books and precedents upon the subject. The Statute of Westminster (13 Edw. I., st. 1, cap. 45), which is the foundation of this writ, allows this mode of proceeding only where an execution had not been sued out within the year; and the commentary of Lord Coke (2 Inst. 471-2) regards it in this light only. Reason and common sense are equally opposed to the course that has been pursued by the plaintiff, for, by the same principle, he may proceed *in infinitum*, if it be not permitted the defendant to plead the first execution in bar. 1 Richardson's K. B. 207, 287; 2 Compt. 95; Bohun 117, 263, establish the doctrine that the only object of the scire facias is to warrant an execution."

In *Pennsylvania*, however, where the proceedings by scire facias have taken the place of actions of debt on judg-

b. TO CHARGE OR BENEFIT NEW PARTIES. — In the absence of a statute directing another method of proceeding a scire facias is also proper in case of a change of parties where it is sought to benefit or charge a new party by the execution.¹

c. WHERE WHOLE DEBT HAS NOT BEEN LEVIED — *In General.* — A scire facias will lie in every case, it would seem, where the whole debt has not been levied, even though a previous execution has issued.²

ments, it has been held that scire facias may be brought on a judgment after execution issued. *Stewart v. Peterson*, 63 Pa. St. 230.

Proceeding Dismissed Where Execution Issued. — In *Buckner v. Pipes*, 56 Miss. 366, it was held that where an execution has been issued upon a judgment within a year and a day after the rendition thereof, it is unnecessary, under the *Mississippi* statutes, to revive the judgment within seven years after its rendition; and a proceeding by scire facias for that purpose should be dismissed upon the motion of the defendant as a useless addition of costs.

In *Maryland* it has been held that notwithstanding a judgment creditor is entitled to have his execution at any time within twelve years after the date of the judgment, or expiration or removal of a stay thereon, where there has been no change of parties to such judgment by death or marriage, he may resort to a writ of scire facias within the twelve years, as the safer and more effective mode of keeping his judgment alive. *Lambson v. Moffett*, 61 Md. 426.

Suing Out Scire Facias by One Entitled to Immediate Execution. — Where a party unnecessarily sues out a scire facias when he is entitled to and can have an immediate execution, it has been held that the writ is not for that reason void, but that the plaintiff thereby subjects himself to the inconvenience and delay of having a *capias* withheld until he obtains judgment of fiat under the writ to which he has thus without necessity resorted. *Lambson v. Moffett*, 61 Md. 426.

1. *Collingsworth v. Horn*, 4 Stew. & P. (Ala.) 237; *Coombs v. Jordan*, 3 Bland (Md.) 284; *Locke v. Brady*, 30 Miss. 21. See also cases cited in preceding note.

"If execution be not actually sued out within a year and a day after the judgment has been rendered, or if not sued out before the death of the de-

fendant — in either case it is irregular to take it out without a previous revival of the judgment by scire facias; and in the latter case the revival must be against the executor or administrator." *Per Saffold, J.*, in *Collingsworth v. Horn*, 4 Stew. & P. (Ala.) 237.

Death After Execution Issued. — If, after the execution has been issued and before levy, the defendant dies, no revivor of the judgment is necessary, but the execution may be perfected forthwith against his personal representatives. *Collingsworth v. Horn*, 4 Stew. & P. (Ala.) 237; *Thompson v. Ross*, 26 Miss. 198. See also in this connection *Preston v. Surgoine*, Peck (Tenn.) 72; *Black v. Planters' Bank*, 4 Humph. (Tenn.) 367.

So in *Gregory v. Chadwell*, 3 Coldw. (Tenn.) 390, it is held that if the execution issued or is tested before the death of the plaintiff, it may be levied afterwards without revivor.

2. *Stille v. Wood*, 1 N. J. L. 139.

Subsisting Levy on Land No Bar. — In *Trapnall v. Richardson*, 13 Ark. 543, it was held that a subsisting levy upon land is no bar to a revival of the judgment by scire facias to extend its lien, or to substitute a representative on the death of a party to the judgment, the court saying: "Without entering into a discussion of the difference between a levy on land and a levy on goods, as insisted upon by the appellant, a mere levy on lands would not in any case work an absolute satisfaction of the judgment. By our statute, the judgment debtor has the right to select of his property what shall be levied on, and the sheriff is bound to take it if in his judgment sufficient; so also the debtor may direct the order in which he wishes his property levied on to be sold. These provisions of the statute are designed, like the so-called satisfaction by levy, as a protection to the debtor, and being for his advantage he may waive it. The intent of the law is that the creditor having a levy, pre-

Scire Facias Quoad Residuum. — When an execution has issued under which property of the defendant has been levied upon, and there is not sufficient to discharge the debt, a scire facias issued afterwards should be special *quoad residuum*.¹

d. APPLICATION TO PERSONAL AS WELL AS REAL JUDGMENTS. — At common law a personal judgment was presumed to be satisfied within a year and a day from its rendition, and if the plaintiff suffered that time to expire without issuing execution, he could thereafter neither issue execution nor sue out a scire facias to revive his judgment, and was driven to bring a fresh action in which he could offer his judgment in evidence as proof of the debt.² The remedy by scire facias was confined to judgments recovered in real actions,³ and a writ of scire facias to revive a personal judgment was first given by the statute of Westminster II.,⁴ which permitted and required a scire facias in all cases where the plaintiff desired to sue out an execution on his judgment after the expiration of a year and a day from its final recovery.⁵ The provisions of this statute have been re-enacted generally in the various states of this country, though in many, if not in all, the period within which execution may issue has been extended.⁶

sumed in the absence of any proof to the contrary to be sufficient, shall not capriciously abandon it, and so harass the debtor by a further levy against his will. To allow this, where levy is of personal property seized and taken out of the debtor's possession, might be in a high degree oppressive, since by being deprived of the use of the property, he is to that extent deprived of the means of paying the debt." *Overruling* Anthony v. Humphries, 9 Ark. 176.

A Conditional Appropriation by an Auditor to a Judgment Creditor in the distribution of proceeds of a debtor's real estate will not prevent the reviving of the judgment for the whole amount, where no money has been actually received upon it, and the conditions attached to the appropriation have not been fulfilled. *Masser v. Dewart*, 46 Pa. St. 534.

1. *Stille v. Wood*, 1 N. J. L. 139.

2. *Lambson v. Moffett*, 61 Md. 426; *Stewart v. Peterson*, 63 Pa. St. 230; *Von Phul v. Rucker*, 6 Iowa 187.

3. *Stewart v. Peterson*, 63 Pa. St. 230.

4. 13 Edw. I., c. 45.

5. *Lambson v. Moffett*, 61 Md. 426; *Stewart v. Peterson*, 63 Pa. St. 230; *Lafayette County v. Wonderly*, 92 Fed. Rep. 313.

Alternative Remedy with Action of Debt. — The remedy given by this stat-

ute was early held to be in addition to, and not in substitution for, the former remedy by an original action. *Lambson v. Moffett*, 61 Md. 426; *Garner v. Hays*, 3 Mo. 436; *Stewart v. Peterson*, 63 Pa. St. 230; *Lafayette County v. Wonderly*, 92 Fed. Rep. 313.

Pendency of One Proceeding as Defense to the Other. — In *Lafayette County v. Wonderly*, 92 Fed. Rep. 313, it is held that the proceeding by scire facias "is not a substitute for the action of debt upon the judgment, but is an independent, concurrent remedy, of which the creditor may avail himself regardless of such an action. Until payment of the debt has been enforced he may prosecute his action of debt and his proceeding by scire facias at the same time, and the pendency of the one is no defense to the other." See also to the same effect *Carter v. Colman*, 12 Ired. L. (N. Car.) 274.

"This statute is in the affirmative, and therefore it restraineth not the common law; but the party may waive the benefit of the scire facias given by this act and take his original action of debt by the common law." 2 Coke's Inst. 472, quoted in *Lambson v. Moffett*, 61 Md. 426.

6. *Garner v. Hays*, 3 Mo. 436; *Lafayette County v. Wonderly*, 92 Fed. Rep. 313.

In Alabama it was early held that

c. **APPLICABLE IN EQUITY AS AT LAW.** — Though the writ of scire facias will not lie in a court of chancery in the absence of a statute authorizing it,¹ yet as a general rule, it would seem that the revival of decrees, as well as of judgments, by scire facias is authorized in the various states.²

2. What Judgments May Be Revived — In General. — It is a general rule that a judgment, in order to be revived, must be one on which execution could, at some time, have issued.³

although a scire facias may not have lain at common law to revive a judgment in a personal action, where no execution had issued thereon within a year and a day after its rendition, yet the long-continued practice in that state of thus reviving such judgments, before the statute upon this subject, tacitly modified the common law. *Elliott v. Mayfield*, 3 Ala. 223.

1. *Jeffreys v. Yarborough*, 1 Dev. Eq. (N. Car.) 510; *Logan v. Cloyd*, 1 A. K. Marsh. (Ky.) 201; *Curtis v. Hawn*, 14 Ohio 185. In the latter case it is held that the writ of scire facias to revive judgments in personal actions is a statutory remedy unknown to the common law. It is a legal remedy, and has never been introduced into courts of chancery. It cannot be used to revive a decree in chancery against heirs. A decree in case of the death of the respondent is revived against the heirs by a bill of revivor, or a petition in the nature of a bill of revivor.

2. *Curry v. Piles*, 8 Ga. 32; *Isom v. McGehee*, 45 Miss. 712; *Carson v. Richardson*, 3 Hayw. (Tenn.) 231; *West Tennessee Bank v. Marr*, 13 Lea (Tenn.) 108; *Preston v. Golde*, 12 Lea (Tenn.) 267.

Revival of Decrees of Probate Courts. — While it is true that scire facias to revive decrees does not obtain in chancery practice proper, this remedy is appropriate to revive decrees rendered by the Probate Courts, because the transfer to the several Chancery Courts of the unfinished business of the Probate Courts carried with it all the agencies employed by the latter courts in the prosecution of causes therein, among which was a writ of scire facias for the revival and renewal of judgments. In such cases the scire facias is but the continuation of the original proceedings. *Isom v. McGehee*, 45 Miss. 712.

3. *Turner v. Dupree*, 19 Ala. 198.

Statute Authorizing Revival of All Judgments. — In *Missouri* the statutes

authorize the revival of all judgments, and contain no exceptions as to judgments upon which no execution could issue. *Lafayette County v. Wonderly*, 92 Fed. Rep. 313. In this case the court said: "The contention that the judgment of 1885 could not be revived by scire facias, because no execution could be issued upon it and because it was not a lien upon any of the property of the judgment debtor, is met by the fatal objection that the statutes of Missouri authorize the revival of all judgments, and contain no exceptions. The legislature of that state had the undoubted power and right to except from the benefit of this writ judgments upon which no execution could issue, judgments which created no liens, and any other judgments it might specify; and it had the same right and power to authorize the use of the writ to revive all judgments. It exercised this power. It authorized the issue of this writ to revive every judgment, and made no exception. Where the legislature has granted a right or extended a privilege to every member of a class, and made no exception, the conclusive presumption is that it intended to make none, and it is not the province of the courts to do so." *Citing Madden v. Lancaster County*, 65 Fed. Rep. 188, 27 U. S. App. 528; *Robert J. Boyd Paving, etc., Co. v. Ward*, 85 Fed. Rep. 27, 55 U. S. App. 730; *Morgan v. Des Moines*, 60 Fed. Rep. 208, 19 U. S. App. 593.

Judgment in Real Action. — Scire facias will lie to revive a judgment in a real action under the common law of *Maine*. *Kennebec Purchase v. Davis*, 1 Me. 309.

Judgment Removed by Writ of Error. — Scire facias may be issued to revive a judgment which has been removed by a writ of error sued out without bail, and still pending, such a writ of error not being a supersedeas. *Boyer v. Rees*, 4 Watts (Pa.) 201.

Judgment Against Township. — Scire

Void and Erroneous Judgments.—A void judgment cannot be revived by scire facias,¹ but a judgment which is merely erroneous may be so revived.²

3. Nature and Purpose of Proceeding—*a.* **NATURE.**—While a scire facias has been called an action for some purposes, and by some decisions has been apparently treated as a new action, even where its object is the revival of a judgment,³ the better

facias may be brought to revive a judgment against a township, though not owning real estate. The new judgment may be entered for the aggregate sum of debt and interest on the old one as a new principal. *Conyngham Tp. v. Walter*, 95 Pa. St. 85.

Judgment Satisfied on Record.—A judgment which appears of record satisfied cannot be the ground of a scire facias. *Cowan v. Shields*, 1 Overt. (Tenn.) 64. Compare, however, *Arnold v. Fuller*, 1 Ohio 458.

Judgment by Confession.—The right to revive by scire facias does not apply to judgments entered by confession under a warrant of attorney. *Jones v. Dilworth*, 63 Pa. St. 447.

Order for Payment of Alimony.—Scire facias will not lie upon the record of an order for the payment of alimony pending a suit for divorce, when a resort to evidence *dehors* the record would be necessary to ascertain the amount due. *Chestnut v. Chestnut*, 77 Ill. 346.

1. *Ex p. Pile*, 9 Ark. 336; *Frankel v. Satterfield*, 9 Houst. (Del.) 201; *Laurent v. Beelman*, 30 La. Ann. 364; *Mathews v. Mosby*, 13 Smed. & M. (Miss.) 422; *Fogg v. Gibbs*, 8 Baxt. (Tenn.) 467.

Effect of Revival of Void Judgment.—In *Ex p. Pile*, 9 Ark. 336, it is held that the revival of a void judgment on scire facias imparts no validity to it, though the defendant appear and plead to the writ, the whole proceeding being a nullity.

Effect of Scire Facias Issued on Void Judgment.—Where a judgment of a domestic court of record of general jurisdiction is void for want of jurisdiction, apparent upon the record, it is in legal effect no judgment, and is unavailing for any purpose, and a scire facias issued thereon is void. *Frankel v. Satterfield*, 9 Houst. (Del.) 201.

2. *Mathews v. Mosby*, 13 Smed. & M. (Miss.) 422.

In *Fogg v. Gibbs*, 8 Baxt. (Tenn.) 467, it was held that unless void the

judgment would be revived, although erroneous, and that jurisdiction of the subject-matter and person being conceded, every intendment is in favor of a lost judgment.

3. *Gibbons v. Goodrich*, 3 Ill. App. 590; *Burton v. McGregor*, 4 Ind. 550; *Weaver v. Boggs*, 38 Md. 255; *Bish v. Williar*, 59 Md. 382; *Sims v. Nash*, 1 How. (Miss.) 271; *Pickett v. Pickett*, 1 How. (Miss.) 267; *Walsh v. Bosse*, 16 Mo. App. 231; *Cameron v. Young*, (Supm. Ct. Spec. T.) 6 How. Pr. N. Y.) 372; *Alden v. Clark*, (Supm. Ct. Gen. T.) 11 How. Pr. (N. Y.) 209; *Birford v. Alston*, 4 Dev. L. (N. Car.) 351; *State Bank v. Vance*, 9 Yerg. (Tenn.) 471; *F. & M. Bank v. Leath*, 11 Humph. (Tenn.) 515. And see in general article SCIRE FACIAS.

In *Walsh v. Bosse*, 16 Mo. App. 231, it is held that a proceeding by scire facias to revive a judgment is an action, and the judgment thereon is a new judgment. But see *Kratz v. Preston*, 52 Mo. App. 251, wherein it was held that the writ, when used to revive a judgment, is merely a further proceeding in the same action and is based on the original judgment.

In *Mullikin v. Duvall*, 7 Gill & J. (Md.) 355, it is held that a judgment obtained upon a scire facias is a new judgment, and has all the legal attributes of the original on which the scire facias was founded. See as to the form of a judgment on a scire facias to revive, *infra*, p. 1083.

Scire Facias an Action Abolished by Code.—In *Cameron v. Young*, (Supm. Ct. Spec. T.) 6 How. Pr. (N. Y.) 373, it is held that scire facias for the revival of a judgment, being an action, is abolished by the code. See also *Alden v. Clark*, (Supm. Ct. Gen. T.) 11 How. Pr. (N. Y.) 209.

Process in the Nature of Action.—In *Weaver v. Boggs*, 38 Md. 255, it is held that although the writ of scire facias is a judicial process, yet it so far partakes of the nature of an action that the defendant may appear and plead

opinion, and that supported by the weight of authority, is to the effect that a proceeding by scire facias to revive a judgment is not an original proceeding, but a mere continuance of the former suit.¹ It is merely a supplementary remedy to aid in the recovery of the debt evidenced by the original judgment,² and upon

to it in the same manner as to an action founded upon an original writ, and the judgment thereon is considered a new judgment, having all the attributes of the original. *Sims v. Nash*, 1 How. (Miss.) 271, in which it is held that a scire facias to revive a judgment against an executor, etc., is so far in the nature of an original action against him that he cannot make his defense thereto by plea. See also, in this connection, as holding that a scire facias to revive a judgment is treated as a new suit, *Bilbo v. Allen*, 4 Heisk. (Tenn.) 31; *Swancy v. Scott*, 9 Humph. (Tenn.) 340; *State Bank v. Vance*, 9 Yerg. (Tenn.) 471.

1. *Alabama*. — *Baker v. Ingersoll*, 37 Ala. 503.

Arkansas. — *Blackwell v. State*, 3 Ark. 320.

Florida. — *Brown v. Harley*, 2 Fla. 159.

Georgia. — *Dickinson v. Allison*, 10 Ga. 557; *Funderburk v. Smith*, 74 Ga. 515.

Illinois. — *People v. Compher*, 14 Ill. 447; *Smith v. Stevens*, 133 Ill. 183; *Challenor v. Niles*, 78 Ill. 78.

Indiana. — *Bernhamer v. State*, 123 Ind. 577.

Iowa. — *Denegre v. Haun*, 13 Iowa 240.

Maine. — *Adams v. Rowe*, 11 Me. 89, 25 Am. Dec. 266.

Maryland. — *Kirkland v. Krebs*, 34 Md. 93; *Bridges v. Adams*, 32 Md. 577.

Massachusetts. — *Comstock v. Holbrook*, 16 Gray (Mass.) 111; *Gray v. Thrasher*, 104 Mass. 373.

Mississippi. — *Vick v. Chewning*, 31 Miss. 201; *Douthit v. State*, 30 Miss. 133.

Missouri. — *State v. Randolph*, 22 Mo. 474; *Ellis v. Jones*, 51 Mo. 180; *Humphreys v. Lundy*, 37 Mo. 320; *Kratz v. Preston*, 52 Mo. App. 251.

New Jersey. — *Greenway v. Dare*, 6 N. J. L. 305.

New York. — *Dickey v. Craig*, 5 Paige (N. Y.) 283; *Gonnigal v. Smith*, 6 Johns. (N. Y.) 106; *M'Gill v. Perrigo*, 4 Johns. (N. Y.) 259.

Ohio. — *Wolf v. Pounsford*, 4 Ohio 397.

Pennsylvania. — *Eldred v. Hazlett*, 38 Pa. St. 16; *Irwin v. Nixon*, 11 Pa. St. 419, 51 Am. Dec. 559; *Ammon v. Styer*, 14 Lanc. L. Rev. (Pa.) 86.

South Carolina. — *Ingram v. Belk*, 2 Strobb. L. (S. Car.) 207.

Tennessee. — *Carter v. Carriger*, 3 Yerg. (Tenn.) 411, 24 Am. Dec. 585; *Bilbo v. Allen*, 4 Heisk. (Tenn.) 31.

Texas. — *Hopkins v. Howard*, 12 Tex. 7; *Perkins v. Hume*, 10 Tex. 50; *Schmidtke v. Miller*, 71 Tex. 103.

Vermont. — *State Treasurer v. Foster*, 7 Vt. 52.

Virginia. — *Lavell v. McCurdy*, 77 Va. 763.

United States. — *Davis v. Packard*, 7 Pet. (U. S.) 276; *Fitzhugh v. Blake*, 2 Cranch (C. C.) 37; *Hatch v. Eustis*, 1 Gall. (U. S.) 160.

England. — *Adams v. Savage*, 3 Salk. 321.

In *Perkins v. Hume*, 10 Tex. 50, it is held that such a scire facias is not an original suit where no new party is sought to be charged and no relief other than a simple revival is prayed, but a continuation of the former suit.

Scire Facias Against Terretenants. — Although, as against the judgment debtor and his heirs or personal representatives, a scire facias proceeding is a continuation of the original proceedings in which the judgment was obtained, yet, as against terretenants who are entire strangers, a scire facias intended to subject land claimed by them to the payment of a judgment against another must be regarded as so far a new proceeding that everything necessary to coexist to affect their rights must appear in the writ. *Bish v. Williar*, 59 Md. 382.

2. *Lafayette County v. Wonderly*, 92 Fed. Rep. 313; *Ammon v. Styer*, 14 Lanc. L. Rev. (Pa.) 86; *Mower v. Kip*, 6 Paige (N. Y.) 88, 29 Am. Dec. 748.

"A scire facias to revive a judgment is in the nature of original process and also of a declaration. It is process to bring in a new party sought to be charged with the judgment. It is a plaint in so far as it counts on the debt of record, and gives the administrator a day in court to show cause why he

such proceeding the merits of the original judgment cannot be inquired into,¹ and a judgment rendered in such a proceeding is not a new one for the debt and damages, but merely an order that execution shall issue.² It may be said, however, that in all cases it is in the nature of an action, in that the defendant may plead thereto.³

6. PURPOSE. — The purpose of such a proceeding is not to raise the issue of the validity of the original judgment, but to offer the debtor an opportunity to show, if he can, that the former judgment has been paid, satisfied, or released, and if he cannot, to avoid the statute of limitations against the judgment and its lien, and to give the creditor a new right of enforcement from the date of the judgment of revival.⁴

4. Time. — As a general rule, the period within which a scire facias to revive a judgment may be sued out is prescribed by statute. The time varies in the different states, the most usual

should not be so charged." McLeod v. Harper, 43 Miss. 42.

Office of Scire Facias to Revive. — The office of a scire facias to revive a judgment is to reinvest it with all the powers, attributes, and conditions which originally belonged to it and which have been wholly or in part suspended by lapse of time or change of parties. Moore v. Garrettson, 6 Md. 444.

Proceeding Not Barred by Adverse Possession. — In Bernhamer v. State, 123 Ind. 577, it is held that a proceeding by scire facias to revive a judgment in ejectment is not an original suit, but is merely a continuation of the suit in which the judgment was rendered, and is therefore not barred by adverse possession, and the only limitation available is the twenty years statute which bars the judgment itself. See also Smith v. Stevens, 133 Ill. 183.

1. Ammon v. Styer, 14 Lanc. L. Rev. (Pa.) 86.

2. Hanly v. Adams, 15 Ark. 232; Denegre v. Haun, 13 Iowa 240; Murray v. Baker, 5 B. Mon. (Ky.) 172; Locke v. Brady, 30 Miss. 21; Woolston v. Gale, 9 N. J. L. 32; Tindall v. Carson, 16 N. J. L. 94; Whitworth v. Thompson, 8 Lea (Tenn.) 480; McIntosh v. Paul, 6 Lea (Tenn.) 47; Bryant v. Smith, 7 Coldw. (Tenn.) 116; Taylor v. Miller, 2 Lea (Tenn.) 155; Bullock v. Ballew, 9 Tex. 498; Camp v. Gainer, 8 Tex. 372.

3. Hubbard v. Bolls, 7 Ark. 442; Pickett v. Pickett, 1 How. (Miss.) 267; Walsh v. Bosse, 16 Mo. App. 231.

"It is chiefly from the fact that the

defendant may plead to it that it derives its likeness to an ordinary action. But what may he plead? Only those things which go to his discharge since the rendition of the original judgment." Kratz v. Preston, 52 Mo. App. 251.

"Ordinarily the writ of scire facias to revive a judgment is a judicial writ to continue the effect of, and have execution of, the former judgment, although in all cases it is in the nature of an action, as defendant may plead any matter in bar of execution, as, for instance, a denial of the existence of the record or a subsequent satisfaction or discharge. Foster on Scire Facias 13, and cases cited; Tidd's Practice 1090; 2 Sellon's Practice 275." Owens v. Henry, 161 U. S. 642.

4. Lafayette County v. Wonderly, 92 Fed. Rep. 313. See also Taylor v. Harris, 21 Tex. 438; Moore v. Garrettson, 6 Md. 444; Hughes v. Wilkinson, 37 Miss. 482.

In Moore v. Garrettson, 6 Md. 444, it was held that the office of a scire facias to revive a judgment is to reinvest it with all the powers, attributes, and conditions which originally belonged to it, and which have been wholly or in part suspended by lapse of time or change of parties.

The office of a scire facias is to revive and have execution of a judgment, and a judgment of revivor is an award of execution of the original judgment and not a judgment *in numero*; and hence, if the scire facias and revivor be void, they will not destroy or impair the original judgment, but all subsequent

provision being that the judgment must be revived within ten years from its date.¹

When Time Begins to Run.—According to the statutes in some states, the time within which a scire facias to revive a judgment may be sued out, begins to run from the return day of the last execution issued on such judgment.²

proceedings in execution of the original judgment will have the same validity as if no scire facias had been issued or judgment of revivor entered. *Hughes v. Wilkinson*, 37 Miss. 482.

1. See the statutes of the various states, and see *Seibels v. Hodges*, 65 Ga. 245; *Corby v. Tracy*, 62 Mo. 511; *Humphreys v. Lundy*, 37 Mo. 320; *Rogers v. Hollingsworth*, 95 Tenn. 357; *Fogg v. Gibbs*, 8 Baxt. (Tenn.) 464; *McGrew v. Reasons*, 3 Lea (Tenn.) 485; *Central Coal, etc., Co. v. Southern Nat. Bank*, 12 Tex. Civ. App. 337; *Ayre v. Burke*, 82 Va. 338; *Wonderly v. Lafayette County*, 74 Fed. Rep. 702; *Stewart v. Justices*, 47 Fed. Rep. 482.

In *Missouri* it is provided that executions may issue upon a judgment at any time within ten years after its rendition, and that scire facias may be sued out at any time within ten years to revive a judgment, but that none shall thereafter issue. This does not authorize scire facias after the time limited, even though a writ had previously been issued within the time and returned *nulla bona*. *Stewart v. Justices*, 47 Fed. Rep. 482.

No Application to Justices' Judgments.

—It has been held that this limitation applies only to judgments of courts of record, and that a scire facias to revive a judgment rendered by a justice of the peace may issue after the lapse of ten years. *Corby v. Tracy*, 62 Mo. 511; *Humphreys v. Lundy*, 37 Mo. 320.

In *Mississippi*, where no execution has been issued on a judgment within a year and a day after its rendition, it has been held that it must be revived within seven years thereafter by a scire facias. *Buckner v. Pipes*, 56 Miss. 366; *Vick v. Chewning*, 31 Miss. 201.

In *Maryland* a judgment cannot be revived by scire facias after a lapse of twelve years. *Mullikin v. Duvall*, 7 Gill & J. (Md.) 355; *Jones v. George*, 80 Md. 294.

In *Pennsylvania* it is held that a scire facias to revive a judgment should be sued out within five years from the date of the judgment. *Lutz's Appeal*,

124 Pa. St. 273; *Conklin v. Cleveland*, 14 Pa. Co. Ct. 154.

A judgment may be revived against terretenants at any time within the period of five years, notwithstanding there may have been an intermediate revival by scire facias without notice to the terretenant. *Fursht v. Overdeer*, 3 W. & S. (Pa.) 470.

In *Illinois* the judgments in courts of record may be revived by scire facias within twenty years. *Smith v. Stevens*, 133 Ill. 183. So also in *New Jersey*. *Buchanan v. Rowland*, 5 N. J. L. 831.

In *Massachusetts* it has been held that the provision of a statute that decrees of courts of record "shall be presumed to be paid and satisfied at the expiration of twenty years" after the rendition thereof, does not operate as an absolute bar to a writ of scire facias on such a decree, but the presumption may be rebutted by evidence showing that the decree has not in fact been satisfied. *Knapp v. Knapp*, 134 Mass. 353.

2. See *Shackelford v. Miller*, 18 Ala. 675; *Sherrard v. Keiter*, 32 W. Va. 147; *Laidley v. Kline*, 23 W. Va. 565.

Revival After Death of Execution Debtor.—In *Handy v. Smith*, 30 W. Va. 195, the court said: "By our statute, where execution issues within two years, other executions may be issued on the judgment within ten years from the return day of the last execution. But when the execution debtor dies, the right to revive the judgment by scire facias is limited to five years from the qualification of the personal representative of the debtor. Section 11, c. 139, Code. It is therefore clear that if Smith had lived ten years after the return day of the last execution, the plaintiff's right to relief would have been completely barred. But it is insisted by the appellants that as Smith died thirty-three days before the ten years expired, they had, under the second clause of the statute, five years from the date of the qualification of his personal representative to revive their judgment or bring this suit. It is claimed that this provision is a limita-

Computation of Time. — Whatever time may be prescribed within which scire facias may issue to revive a judgment, it will be sufficient to save the bar if such process issue a single day within such time.¹

5. Courts of Issuance. — Since the proceeding by scire facias to revive a judgment is, as has been seen,² merely a continuation of the original suit, jurisdiction of such proceedings is in the court where the original judgment was rendered, without regard to the residence of the parties,³ and the scire facias to revive must issue

tion within itself, independent of the ten years limitation in the first part of the statute; and that 'it matters not whether the five years fall wholly within the ten years, or wholly without the ten years, in cases not barred, or partly within and partly without the same.' This position is plainly untenable. The law is well settled that when to a party capable of suing an action has accrued against a party who may be sued, the statute begins to run unless this be prevented by the case coming within some exception to the statute. After it has begun to run, its running will not be suspended because of the subsequent death of either party, or because of the lapse of time before either has a personal representative. 1 Rob. Pr. (new ed.) 591, 609; Jones v. Lemon, 26 W. Va. 629; Harshberger v. Alger, 31 Gratt. (Va.) 52; Wilson v. Harper, 25 W. Va. 179."

Effect of Stay of Execution. — In *Pennsylvania* it was at one time held that the five years within which it was necessary to sue out a scire facias to revive a judgment under the second section of the Act of April 4, 1798, began to run where there was a stay of execution from the expiration of the period during which the execution was suspended. *Pennock v. Hart*, 8 S. & R. (Pa.) 369. This was, however, altered by the Act of March 26, 1827.

1. *Kirby v. Cash*, 93 Pa. St. 505; *Lichty v. Hochstetler*, 91 Pa. St. 444; *Silverthorn v. Townsend*, 37 Pa. St. 263; *Porter v. Hitchcock*, 98 Pa. St. 625.

Mere suing out of a scire facias is sufficient to continue the lien of a judgment for a period of five years from the date of its issue. True, the writ must, of course, be duly prosecuted, but the plaintiff has five years within which to prosecute it and recover a judgment of revival. *Silverthorn v. Townsend*, 37 Pa. St. 263.

In *Davidson v. Thornton*, 7 Pa. St.

128, it was held that it is sufficient if the writ is issued on the last day, though not served in due time afterwards.

Excluding Day of Entry. — In *Lutz's Appeal*, 124 Pa. St. 273, it is held that the day of entry is to be excluded in the computation of the period within which the judgment is to be revived by scire facias to continue the lien on realty. See also *Green's Appeal*, 6 W. & S. (Pa.) 327.

Where Last Day Falls on Sunday. — Where the last day of the time during which a judgment remains a lien upon realty without a revival falls on Sunday, a scire facias to revive it is in time if sued out on the following Monday. *Lutz's Appeal*, 124 Pa. St. 273.

2. See *supra*, p. 1059.

3. *Schmidtke v. Miller*, 71 Tex. 103.

The Proper Venue is the county in which the judgment was rendered. *Masterson v. Cundiff*, 58 Tex. 472.

Jurisdiction of Federal Court. — In *Wonderly v. Lafayette County*, 77 Fed. Rep. 665, it was held that scire facias to revive a judgment in a federal court being an ancillary proceeding, the court had jurisdiction even though the parties were citizens of the same state. In this case the court said: "The first paragraph of the answer puts in issue the jurisdiction of this court over the parties, for the reason that both are residents and citizens of the state of Missouri. As the proceeding to revive the judgment by scire facias must be instituted and conducted in the court rendering the judgment, it is an ancillary proceeding, and for that reason the plea is not well taken, and the demurrer thereto is sustained."

Effect of Suit Pending on Judgment — Revival in Federal Court. — In *Wonderly v. Lafayette County*, 77 Fed. Rep. 665, it was held that the fact that one is suing in a state court upon a judgment of a federal court will not prevent him from proceeding at the same time in

from the court where the judgment was rendered or to which the record has been removed.¹

6. On What Based. — It has been held that each successive writ of scire facias should be founded upon the judgment which

the federal court to revive the judgment by scire facias. The court said: "The fifth paragraph of the answer pleads the pendency of another suit between these parties respecting said judgment in the circuit court of Lafayette county, Mo. It appears from the answer that the suit pending in said Lafayette county is an action founded on the judgment brought within ten years after its rendition, and its purpose is to obtain a new judgment upon the judgment rendered in this court. While the ultimate effect of the two proceedings may be the same to the plaintiff, yet they are not of the same character, and there is no reason in law why the plaintiff may not resort to both remedies accorded to him by law. If this were otherwise, the matter pleaded constitutes no defense to this action, for the reason that the pendency of another suit between the same parties respecting the same subject-matter in a state court is no bar to this proceeding in the United States Circuit Court. *Holton v. Guinn*, 76 Fed. Rep. 101, and authorities cited. The demurrer to this paragraph is therefore sustained."

1. *Alabama*. — *Barron v. Pagles*, 6 Ala. 422.

Georgia. — *Funderburk v. Smith*, 74 Ga. 515; *Dickinson v. Allison*, 10 Ga. 557.

Indiana. — *Conner v. Neff*, 2 Ind. App. 364.

Iowa. — *Haven v. Baldwin*, 5 Iowa 503; *Carnes v. Crandall*, 4 Iowa 151.

Kentucky. — *Handley v. Fitzhugh*, 3 A. K. Marsh. (Ky.) 562.

Louisiana. — *Martinez v. Vives*, 32 La. Ann. 305.

Maine. — *State v. Brown*, 41 Me. 535; *Vallance v. Sawyer*, 4 Me. 62.

Massachusetts. — *Osgood v. Thurston*, 23 Pick. (Mass.) 110; *Knapp v. Knapp*, 134 Mass. 353.

Michigan. — *McRoberts v. Lyon*, 79 Mich. 25.

Missouri. — *Wilson v. Tiernan*, 3 Mo. 577.

New Hampshire. — *State v. Kinne*, 39 N. H. 129.

New Jersey. — *Tindall v. Carson*, 16 N. J. L. 94.

North Carolina. — *Griffis v. McNeill*, Phil. L. (N. Car.) 175.

Pennsylvania. — *Dougherty's Estate*, 9 W. & S. (Pa.) 189; *Chambers v. Carson*, 2 Whart. (Pa.) 365.

South Carolina. — *Grimke v. Mayrant*, 2 Brev. (S. Car.) 202.

Texas. — *Schmidtke v. Miller*, 71 Tex. 103; *Perkins v. Hume*, 10 Tex. 50; *Hopkins v. Howard*, 12 Tex. 7; *Masterson v. Cundiff*, 58 Tex. 474.

Vermont. — *Gibson v. Davis*, 22 Vt. 374.

In *Nebraska* the county court can revive its own judgments. *Dennis v. Omaha Nat. Bank*, 19 Neb. 675; *Hunter v. Leahy*, 18 Neb. 80.

In *Oregon* only the circuit court can revive a judgment of a justice's court so as to make it a lien on real estate. *Glaze v. Lewis*, 12 Oregon 347.

In *Michigan* it is held that circuit courts may issue a writ of scire facias to revive a judgment under the Michigan constitution, art. 6, sect. 8, which authorizes such courts to issue writs necessary to carry their judgments, etc., into effect. *McRoberts v. Lyon*, 79 Mich. 25.

Issuance to Other Counties. — Under the *Arkansas* statute, it was early held that scire facias to revive a judgment may be issued from the county where the judgment was recovered into any county in the state. *Fowler v. Thurmond*, 13 Ark. 259; *State Bank v. Terry*, 13 Ark. 389.

Direction to Any County Where Defendant May Be Found. — In *Challenor v. Niles*, 78 Ill. 78, it was held that in scire facias to revive a judgment the court has jurisdiction to send its process to any county where the defendant may be found, and a plea in abatement that the defendant does not reside, etc., in such county is not sustainable.

Scire Facias upon Transcript of Justice's Judgment. — In *Stewart v. Eisenhower*, 4 Pa. Dist. 565, it was held that a justice of the peace in Pennsylvania, to whom a transcript of a judgment of a justice in another county has been lawfully delivered, may issue thereon a scire facias to revive.

Change of Venue upon Death of Original Defendant. — For a query as to whether upon the death of the original defendant pending the suit his ad-

immediately precedes, since a recovery upon such a writ is a bar to any subsequent recovery upon the original judgment.¹

7. Parties — *a. PARTIES PLAINTIFF* — (1) *General Rule*. — As a general rule, the plaintiff in a proceeding by scire facias to revive a judgment should be the same person who was the plaintiff in the original judgment, or his legal representative.²

administrator upon scire facias to revive can change the venue to the county wherein he is a freeholder and resident, see *Neeley v. Planters Bank*, 4 Smed. & M. (Miss.) 113.

1. *Collingwood v. Carson*, 2 W. & S. (Pa.) 220; *Custer v. Detterer*, 3 W. & S. (Pa.) 28.

Revival of Judgment Against Deceased — Scire Facias to Bind Lands. — In *Tiers v. Codd*, 87 Md. 447, it was held that where a judgment has been revived against the administrator of a deceased defendant, a writ of scire facias which is subsequently issued for the purpose of binding his lands should be issued upon the original judgment. In this case it was also held that the demurrer to the writ was properly sustained for the reason, among others, that the writ was issued in the case of *William T. Tiers* against *Henry C. Codd*, administrator of *William H. Codd*, whereas in fact it should have been issued in the case of the original judgment against *William H. Codd*.

2. *Alabama*. — *Warren v. Rist*, 16 Ala. 686; *Duncan v. Hargrove*, 18 Ala. 77.

Illinois. — *Challenor v. Niles*, 78 Ill. 78; *Durham v. Heaton*, 28 Ill. 264.

Indiana. — *Armstrong v. McLaughlin*, 49 Ind. 370; *Wyant v. Wyant*, 38 Ind. 48.

Missouri. — *Riley v. McCord*, 24 Mo. 265.

Pennsylvania. — *M'Kinney v. Mehaffey*, 7 W. & S. (Pa.) 276.

Tennessee. — *Gregory v. Chadwell*, 3 Coldw. (Tenn.) 390; *Kimbrough v. Mitchell*, 1 Head (Tenn.) 539; *Keith v. Metcalf*, 2 Swan (Tenn.) 74.

United States. — *Brown v. Wygant*, 163 U. S. 618.

The Administrator de Bonis Non of an estate is a proper person to revive and enforce a judgment belonging to the estate and recover in the name of the deceased administrator in chief. *Warren v. Rist*, 16 Ala. 686; *Duncan v. Hargrove*, 18 Ala. 77.

Revival by Administrator After Revocation of Letters. — In *Weaver v. Reese*, 6 Ohio 418, it is held that a judgment

cannot be revived by a scire facias in the name of an administrator whose letters have been revoked and an administrator *de bonis non* appointed.

Duty of Representative to Insist on Revivor. — In torts, wherever there has been a recovery in the lifetime of the injured party, a claim for damages is merged in the judgment and becomes a debt with which the personal representative is chargeable, and it thus becomes not only the right, but the duty, of the representative to insist on a revivor in the appellate court. *Kimbrough v. Mitchell*, 1 Head (Tenn.) 539.

Where Only Part of Executors Have Qualified. — In a scire facias to revive a decree in favor of the plaintiff's executors, there being three, only one of whom is qualified, all of them should be named in the scire facias. *Carson v. Richardson*, 3 Hayw. (Tenn.) 231.

Revival by Guardian. — If a guardian obtains judgment he may have scire facias thereon, even after the expiration of his office and the appointment of another guardian. *Welker v. Welker*, 3 P. & W. (Pa.) 21.

In Whose Name Issued. — On the death of the nominal plaintiff in a judgment, a scire facias to revive it must issue in the name of such plaintiff's personal representative, and cannot issue in the name of the original parties to the judgment, or of the beneficiary alone. *Baker v. Ingersoll*, 37 Ala. 503.

A scire facias brought by an administrator to revive a judgment in favor of his intestate should be brought in the name of the administrator, but if the writ be issued in the name of the intestate it may be amended by substituting that of the administrator. *Challenor v. Niles*, 78 Ill. 78.

Revival in the Name of Successor of Public Trustee. — In *Mathews v. Mosby*, 13 Smed. & M. (Miss.) 422, it was held that a judgment rendered in favor of a public trustee may be revived by scire facias in the name of his successor when appointed.

Revival in the Names of Distributees

(2) *Assigned Judgments*. — Where a judgment has been assigned the question as to the proper party to sue out scire facias for its revival depends upon the statutes of the different states. Where it is expressly provided that assignees may bring actions in their own names, assignees of a judgment may sue out scire facias for its revival.¹ In those of the code states where scire facias to revive a judgment is still in use, it seems that the assignee may sue out the writ in his own name under the Code provision as to the maintenance of actions by the real party in interest.² In the absence of such statutory authorization, scire facias to revive an assigned judgment should be prosecuted in the name of the assignor.³

(3) *Revival of Judgment for Use*. — In an action by the nominal plaintiff to revive a judgment originally entered "for use," the court will look beyond the mere legal party in order to protect the interests of the *cestui que use*.⁴

b. PARTIES DEFENDANT — (1) *General Rule*. — With regard

and Intestate. — In *Crane v. Crane*, 51 Ark. 287, it is held that a revivor of a judgment in favor of an administrator after his death and after the estate has been settled may be in the names of the intestate's distributees and of an assignee of one of them.

1. *Ware v. Bucksport, etc.*, R. Co., 69 Me. 97; *Murphy v. Cochran*, 1 Hill (N. Y.) 339.

In Maine assignees of the original judgment may maintain scire facias in their own names to revive a judgment under the provisions of chapter 235 of the Act approved March 3, 1874, to the effect that "assignees of choses in action, not negotiable, assigned in writing, are hereby authorized to bring and maintain actions in their own name," etc. *Ware v. Bucksport, etc.*, R. Co., 69 Me. 97.

In New York, prior to the abolition of the remedy by scire facias, it was held that a scire facias to revive a judgment is a suit within the meaning of the statute authorizing assignees in certain cases to sue in their own names. *Murphy v. Cochran*, 1 Hill (N. Y.) 339.

In Michigan a statute which authorizes suit by an assignee in his own name is permissive merely, and the assignee of a judgment is still at liberty to sue in the name of the contracting party. *McRoberts v. Lyon*, 79 Mich. 25. See also to the same effect *Sisson v. Cleveland, etc.*, R. Co., 14 Mich. 496.

Averment that Assignment Was in Writ-

ing. — In *U. S. Bank v. Lyles*, 10 Gill & J. (Md.) 326, it was held that the assignee of a judgment need not recite in a writ of scire facias sued out in his own name that the assignment was in writing.

2. *Wonderly v. Lafayette County*, 74 Fed. Rep. 702.

3. *Macon v. Bibb County Academy*, 7 Ga. 204; *Forbes v. Tiffany*, 4 Ind. 204; *McKinney v. Mehaffey*, 7 W. & S. (Pa.) 276; *Wells v. Graham*, 39 W. Va. 605.

In Indiana it was early held in the case of *Forbes v. Tiffany*, 4 Ind. 204, that where the judgment has been assigned a scire facias may be prosecuted in the name of the judgment plaintiff, under section 15, article 2 of chapter 31, Revised Statutes 1843, providing that in case of the assignment of a judgment execution shall issue in the name of the original plaintiff.

In such a case the defendant cannot complain of the omission of the clerk to indorse upon the writ that it is for the use of the assignee. *Forbes v. Tiffany*, 4 Ind. 204.

Revival by Joint Owner of Judgment. — In *Hopkins v. Stockdale*, 117 Pa. St. 365, it was held that a joint owner of judgment by assignment of part may use the name of the legal plaintiff for its revival, and the revival is then for the benefit of all persons interested. See also in this connection *Dietrich's Appeal*, 107 Pa. St. 174.

4. *Peterson v. Lothrop*, 34 Pa. St. 223.

to the proper parties defendant in a proceeding by scire facias to revive a dormant judgment, it may be laid down as a general rule that all the parties to the original judgment, if living and not discharged, must be parties to the proceedings to renew or revive that judgment.¹

(2) *Joint Judgments* — (a) *Issuance Against All*. — A scire facias to revive a judgment against several joint defendants must, unless the nonjoinder is waived, issue against all of them.² Scire facias must follow the judgment, and if the judgment is joint, so ought the scire facias to be.³

Discontinuance as to Part. — The plaintiff cannot drop one defendant and proceed against the others.⁴ And if he discontinue his scire

1. *Bolinger v. Fowler*, 14 Ark. 27; *Greer v. State Bank*, 10 Ark. 456; *Finn v. Crabtree*, 12 Ark. 597; *Funderburk v. Smith*, 74 Ga. 515; *Bowie v. Neale*, 41 Md. 124; *Grenell v. Sharp*, 4 Whart. (Pa.) 344. See also *U. S. v. Houston*, 48 Fed. Rep. 208.

Assignee for Benefit of Creditors. — An assignee for the benefit of creditors need not be made a party to a scire facias to revive. Notice to the assignor remaining in possession is sufficient. *Matter of Fulton*, 51 Pa. St. 204.

Trustees of an Insolvent. — In *Com. v. Lelar*, 13 Pa. St. 22, it was held that the trustees of an insolvent who have not qualified need not be made parties to a scire facias to revive a judgment against him.

If One of the Defendants Has Removed from the State, he should nevertheless be made a party and served by publication. *Funderburk v. Smith*, 74 Ga. 515. See, however, as to the case of a joint judgment against two executors, one of whom is a nonresident, *Hanson v. Jacks*, 22 Ala. 549.

2. *Arkansas*. — *Bolinger v. Fowler*, 14 Ark. 27; *Greer v. State Bank*, 10 Ark. 456; *Finn v. Crabtree*, 12 Ark. 597.

Indiana. — *Davidson v. Alvord*, 3 Ind. 1.

Kentucky. — *Griffith v. Wilson*, 1 J. J. Marsh. (Ky.) 209; *Gray v. M'Dowell*, 5 T. B. Mon. (Ky.) 501.

Maryland. — *McKnew v. Duvall*, 45 Md. 501.

Mississippi. — *M'Afee v. Patterson*, 2 Smed. & M. (Miss.) 593.

Ohio. — *Zanesville Canal, etc., Co. v. Granger*, 7 Ohio 165.

Pennsylvania. — *Grenell v. Sharp*, 4 Whart. (Pa.) 344; *Dowling v. McGregor*, 91 Pa. St. 410.

Texas. — *Henderson v. Vanhook*, 24 Tex. 358; *Carson v. Moore*, 23 Tex. 450; *Austin v. Reynolds*, 13 Tex. 544; *Baxter v. Dear*, 24 Tex. 17; *Rowland v. Harris*, (Tex. Civ App. 1895) 34 S. W. Rep. 295.

England. — *Panton v. Hall*, 2 Salk. 598.

3. *Tidd's Pr.* 1106; *Bowen v. Bonner*, 45 Miss. 11; *Simpson v. Watson*, 15 Mo. App. 425; *Grenell v. Sharp*, 4 Whart. (Pa.) 344; *Lyon v. Ford*, 20 Wash. L. Rep. 373; *Crumbaugh v. Otterback*, 20 Wash. L. Rep. 164; *Panton v. Hall*, 2 Salk. 598.

In *Grenell v. Sharp*, 4 Whart. (Pa.) 344, the court said: "After issuing the scire facias properly, and obtaining a joint execution, the right of the defendant to use that execution, to enforce his equity as surety, by levying on the property or person of another of the defendants in the execution, is a different question; but certainly he cannot proceed by a scire facias against two out of the three joint defendants, and obtain an award of execution against one of them."

A scire facias issued to revive a joint judgment rendered for a joint and not for a joint and several debt is itself joint and must follow the judgment, and a voluntary discontinuance as to one defendant is a discontinuance as to all. *Crumbaugh v. Otterback*, 20 Wash. L. Rep. 164.

4. *Grenell v. Sharp*, 4 Whart. (Pa.) 344; *Greer v. State Bank*, 10 Ark. 455.

No Revival as to Part. — If one is not made a party and served with scire facias to revive, it will be error to revive the judgment as to the other parties; the whole judgment must be revived and not a part of it. *Funderburk v. Smith*, 74 Ga. 515.

facias as to any of the parties it operates as a discontinuance of the whole proceeding.¹

(b) Joinder of Heirs or Representatives with Survivor — Common-law Rule. — The common-law rule was to the effect that if one joint defendant had died the writ should be against the survivors and the heirs or personal representatives of the deceased,² and, according to numerous decisions, this rule still prevails in many of the states,³ and it is held that a judgment rendered on a scire facias

1. *M'Affee v. Patterson*, 2 Smed. & M. (Miss.) 593; *Simpson v. Watson*, 15 Mo. App. 425; *Crumbaugh v. Otterback*, 20 Wash. L. Rep. 164. And see *Williams v. Fowler*, 3 T. B. Mon. (Ky.) 317.

Discontinuance as to Those Not Served. — In *Hanson v. Jacks*, 22 Ala. 549, it was held that "a writ of scire facias to revive a judgment at law, on which execution has not issued in a year and a day, may be regarded as a suit upon the judgment, and so far as the plaintiff's right to discontinue as to parties not served is concerned the rule would be the same in both cases."

Nol. Pros. a Discontinuance. — In *Morton v. Croghan*, 20 Johns. (N. Y.) 106, it is held that the plaintiff cannot enter a nol. pros. as to those who have appeared and pleaded, and take judgment against such as have made default; such nol. pros. is a discontinuance as to all, and on it the plaintiff must pay costs.

Effect of Appearance and Plea by One Party. — In *M'Affee v. Patterson*, 2 Smed. & M. (Miss.) 593, it is held that in such case if one of the parties appears and pleads, and issue is taken and a verdict rendered, the statute of jeofails cures the consequences of a discontinuance.

Time of Entering the Judgment. — In *Early v. Clarkson*, 7 Leigh (Va.) 83, it was held that upon scire facias to revive a judgment against two persons jointly, it was erroneous to enter final judgment against one before the plaintiff had matured the case against the other also, so that a joint judgment might be entered against both — or had proceeded against him as far as he was able.

2. U. S. v. *Houston*, 48 Fed. Rep. 208.

3. *Delaware*. — *Hallowell v. Brown*, 8 Houst. (Del.) 500.

Kentucky. — *Griffith v. Wilson*, 1 J. Marsh. (Ky.) 209; *Gray v. M'Dowell*, 5 T. B. Mon. (Ky.) 501; *Coleman v. Edwards*, 2 Bibb (Ky.) 595; *Huey*

v. Redden, 3 Dana (Ky.) 488; *Murray v. Baker*, 5 B. Mon. (Ky.) 172; *Holder v. Com.*, 3 A. K. Marsh. (Ky.) 407; *Mitchell v. Smith*, 1 Litt. (Ky.) 243; *Callo-way v. Eubank*, 4 J. J. Marsh. (Ky.) 280.

Maryland. — *Nesbit v. Manro*, 11 Gill & J. (Md.) 261.

Mississippi. — *Bowen v. Bonner*, 45 Miss. 10.

Ohio. — *Zanesville Canal, etc., Co. v. Granger*, 7 Ohio 165.

Pennsylvania. — *Dowling v. McGregor*, 91 Pa. St. 410; *Dingman v. Amsink*, 77 Pa. St. 114; *Stoner v. Stroman*, 9 W. & S. (Pa.) 85; *Edwards's Appeal*, 66 Pa. St. 89; *Com. v. Mateer*, 16 S. & R. (Pa.) 416; *Callahan v. Fahey*, 10 Pa. Co. Ct. 488; *Colenburg v. Venter*, 173 Pa. St. 113, 37 W. N. C. (Pa.) 450; *Grenell v. Sharp*, 4 Whart. (Pa.) 344.

Texas. — *Henderson v. Vanhook*, 24 Tex. 358; *Carson v. Moore*, 23 Tex. 450; *Austin v. Reynolds*, 13 Tex. 544; *Baxter v. Dear*, 24 Tex. 17; *Rowland v. Harris*, (Tex. Civ. App. 1895) 34 S. W. Rep. 295.

United States. — *Erwin v. Dundas*, 4 How. (U. S.) 58.

England. — *Panton v. Hall*, 2 Salk. 598; *Trethewy v. Ackland*, 2 Saund. 51a, note.

Contra. — *Finn v. Crabtree*, 12 Ark. 597; *Vredenburg v. Snyder*, 6 Iowa 39.

"The common-law rule, it must be conceded, is that, if the judgment sought to be revived was rendered against two or more joint defendants, the scire facias must follow the judgment, and all of the defendants, if living, should be made defendants to the writ; and where one has died, the writ should be against the survivors and the heirs or personal representatives of the deceased. 1 Black Judgm., par. 491. This results from the idea, that the legal effect of a judgment on scire facias to revive a judgment, where the judgment remains without process or satisfaction, is to remove the pre-

against the survivor only in such a case will be reversed.¹ If the plaintiff does not wish to proceed against all, his remedy should be by action of debt on the judgment, and not by scire facias.²

(3) *After Death of Original Defendant — Joinder of All Parties Affected by Revival.* — Where the judgment does not affect real estate it would seem that the personal representative alone of a deceased judgment debtor need be made defendant to a writ of scire facias to revive the judgment; but where the realty of the original judgment debtor is affected by the judgment, all those are proper parties who have an interest in the realty, and the heirs and terretenants as well as the personal representatives may, as a general rule, be joined as parties defendant to the writ.³

sumption of payment arising from lapse of time, and that it adds nothing to the validity of the judgment, only leaving it as it was when rendered." *U. S. v. Houston*, 48 Fed. Rep. 207, citing *Ex p. Pile*, 9 Ark. 337.

"If one of several joint defendants in a judgment dies, a scire facias may issue against the survivors and the executor or administrator of the deceased." *Dowling v. McGregor*, 91 Pa. St. 410, citing *Com. v. Mateer*, 16 S. & R. (Pa.) 416.

Joinder of Heirs and Terretenants with Survivor. — In *Griffith v. Wilson*, 1 J. J. Marsh. (Ky.) 209, it is held that to revive a judgment in ejectment against two, one of whom is dead, the scire facias must issue against the heirs of the deceased and the terretenant and survivor.

Representatives of Deceased Surety. — In *Zanesville Canal, etc., Co. v. Granger*, 7 Ohio 165, it was held that the representatives of a deceased party to a judgment, where there is a surviving party, can be proceeded against by scire facias jointly with the survivor, although the deceased was a surety only for the debt.

In *Kansas*, under a statute providing that in all cases of joint obligations suit may be brought against any one or more of those liable, it is held that where one of several joint defendants has died after judgment, the judgment may be revived against his personal representative without joining the other defendants. *U. S. v. Houston*, 48 Fed. Rep. 207.

1. *Henderson v. Vanhook*, 24 Tex. 358; *Austin v. Reynolds*, 13 Tex. 544; *Baxter v. Dear*, 24 Tex. 17.

In *Austin v. Reynolds*, 13 Tex. 544, it is held that where scire facias on a judgment against two, one of whom

was dead, was brought against the survivor within ten years, and on exception after the ten years the representatives of the deceased were made parties, the judgment could not be revived against either.

2. *Carson v. Moore*, 23 Tex. 450.

Continuance of Lien by Amicable Scire Facias. — In *Edwards's Appeal*, 66 Pa. St. 89, it is held that the lien of a judgment against two persons may be continued against one by amicable scire facias.

3. *Wellborn v. Jolly*, 4 Blackf. (Ind.) 279; *Graves v. Skeels*, 6 Ind. 107; *Bryer v. Chase*, 8 Blackf. (Ind.) 508; *State v. Michaels*, 8 Blackf. (Ind.) 436; *Reynolds v. Henderson*, 7 Ill. 110; *Calloway v. Eubank*, 4 J. J. Marsh. (Ky.) 286; *Mitchell v. Smith*, 1 Litt. (Ky.) 243; *Douglas v. Waddle*, 8 Ohio 210; *Rowland v. Harbaugh*, 5 Watts (Pa.) 365.

Joinder of Heirs. — Where a scire facias is sued out to revive a judgment against the intestate the administrator and the heirs are properly joined as defendants. *Reynolds v. Henderson*, 7 Ill. 110.

In *Graves v. Skeels*, 6 Ind. 107, it was held that to a scire facias to revive a judgment after defendant's death, and to obtain execution against the land, his administrator and heirs, if he died intestate, are proper parties. The judgment in such case should be, to make the money first of the assets in the administrator's hands and then of the lands.

In *Riley v. McCord*, 21 Mo. 285, it was held that where scire facias is brought to revive a judgment of foreclosure, after the decease of the mortgagor, it is sufficient to make his personal representative a party, and the heir need not be joined.

In *Tennessee* after return of fi. fa.

Revival Against Heirs and Terretenants Alone. — The decisions as to the necessary parties defendant under such circumstances are not, however, uniform. According to the practice in some jurisdictions, where a sole defendant dies after judgment, such judgment

levied on realty, the sheriff cannot sell it without a *venditioni exponas*. And, therefore, if the owner die after the levy, the land descends to his heirs, and the sheriff, with or without a *venditioni exponas*, cannot make a valid sale until scire facias against the heirs and process thereon awarded against them. *Rutherford v. Read*, 6 Humph. (Tenn.) 423; *Overton v. Perkins*, 10 Yerg. (Tenn.) 328; *Anderson v. Clark*, 2 Swan (Tenn.) 156; *Planters' Bank v. Chester*, 11 Humph. (Tenn.) 578; *Combs v. Young*, 4 Yerg. (Tenn.) 218; *Stockard v. Pinkard*, 6 Humph. (Tenn.) 119; *Green v. Shaver*, 3 Humph. (Tenn.) 139; *Harman v. Hann*, 6 Baxt. (Tenn.) 90. See, however, *Preston v. Surgoine*, Peck (Tenn.) 72; *Bryant v. McCollum*, 4 Heisk. (Tenn.) 511.

Joinder of Personal Representatives. — In *Tiers v. Codd*, 87 Md. 447, it was held that in a writ of scire facias on judgment against terretenants, when the original defendant is dead, it is necessary that the personal representatives of the deceased defendant be made parties to the writ, and a demurrer lies to a writ issued against the terretenants alone. The court said: "Where the original defendant in a judgment is dead and a scire facias is issued to revive the same, it may be issued against the administrator alone, and the judgment thereon can only bind assets, etc., but if it is desired to revive such judgment against the land of the deceased, it is irregular and not a justifiable practice to issue against the terretenants alone, but they must be joined with the personal representative as defendants; not for the same reason, however, that all terretenants must be joined, but because the personal representative is the one best able to defend the suit. This court in *Nesbit v. Manro*, 11 Gill & J. (Md.) 266, has said: 'The principle upon which an original party to the judgment if living, or his representative after his death, is to be made a party to a scire facias, is not that of contribution, as amongst different terretenants. Neither the original defendant nor his heir could claim contribution from terretenants; but they are regarded as

the persons most competent to know, and to prove the satisfaction of the judgment. We think the appellants might well demur to this scire facias, as manifestly insufficient on its face, to authorize the plaintiff to enforce his execution against them alone.' " To like effect are *Warfield v. Brewer*, 4 Gill (Md.) 265; *Bish v. Williar*, 59 Md. 382; *Bowie v. Neale*, 41 Md. 134.

Contra — Joinder Improper. — In *New York* it has been held improper to join personal representatives and heirs as parties defendant to a scire facias to revive a judgment. *Strong v. Lee*, (Supm. Ct. Spec. T.) 44 How. Pr. (N. Y.) 60.

In *Mississippi* also it has been held that where a judgment has been recovered, and the defendant therein has executed a forthcoming bond with surety, and the surety has died, it is error for the plaintiff in the judgment to sue out a scire facias to revive it against the administrator and heirs of the surety in the forthcoming bond; the administrator and heirs cannot legally be thus joined. *Barnes v. McLeMORE*, 12 Smed. & M. (Miss.) 316.

What Property Reached. — In *Adams v. State*, 67 Md. 447, it was held that a scire facias against the heirs and terretenants of the judgment debtor will not reach property never owned by such debtor, but inherited by his children after his death from a third person.

Manner of Designating Representatives. — The scire facias to revive a judgment must designate the representatives by name and state in what capacity they are representatives. *Caller v. Malone*, 1 Stew. & P. (Ala.) 305. The name of a nonresident joint executor may, however, be omitted from the writ, and if he is named, but not served with process, the plaintiff may enter a discontinuance as to him and proceed to judgment against the other. *Hanson v. Jacks*, 22 Ala. 549.

Judgment to be Against Administrator as Such. — In *Breckenridge v. Mellon*, 1 How. (Miss.) 273, it is held that a judgment of revivor against the administrator should be against the administrator as such, and not personally.

may be revived and execution had against his lands by suing out a scire facias against the heirs and terretenants without proceeding against the personal representatives.¹

Revival Against Administrator Alone. — In other states it has been held that a judgment entered against a defendant in his lifetime may be revived after his death for the purposes of lien and execution by scire facias against his administrator alone.²

(4) *Joinder of Terretenants* — (a) *Before Death of Judgment Debtor.* — As to the necessity of making terretenants parties defendant to a scire facias to revive a judgment affecting realty during the life of a judgment debtor, the decisions differ in the various states. According to some decisions, terretenants are necessary parties though the judgment debtor is living.³ According to other

1. *Polk v. Pendleton*, 31 Md. 118; *Tessier v. Wyse*, 3 Bland (Md.) 40; *Walden v. Craig*, 14 Pet. (U. S.) 147.

Scire Facias Against Heirs Alone. — In *Griffith v. Wilson*, 1 J. J. Marsh. (Ky.) 209, the court said: "Where the judgment was against one who has since died, the scire facias may issue against his heirs alone, without the terretenants, or without styling the heirs terretenants. The heirs are liable as tenants, and a scire facias against the terretenants without the heirs would be erroneous; and there could be no judgment against terretenants without the heirs, unless there is a return that there are no heirs or that they have no lands. *Jefferson v. Morton*, 2 Saund-8, note 8; *Bac. Abr.*, Scire Facias, 418. A judgment against one in a personal action must be revived against his personal representatives, or against them and the heirs."

2. *Grover v. Boon*, 124 Pa. St. 399; *Middleton v. Middleton*, 106 Pa. St. 252; *Brown v. Webb*, 1 Watts (Pa.) 411; *M'Millan v. Red*, 4 W. & S. (Pa.) 237; *Righter v. Rittenhouse*, 3 Rawle (Pa.) 273. See also *O'Connor v. Memphis*, 6 Lea (Tenn.) 730; *Cole v. Robertson*, 6 Tex. 356.

Widow and Heirs Not Necessary Parties. — In *Pennsylvania* it is held that it is not necessary that the widow and heirs of the judgment debtor should be made parties to a scire facias to revive and continue the lien of the judgment debtor obtained against him in his lifetime. *M'Millan v. Red*, 4 W. & S. (Pa.) 237; *Middleton v. Middleton*, 106 Pa. St. 252.

Necessity of Joining Representatives. — In *Brown v. Webb*, 1 Watts (Pa.) 411, it was held that a scire facias to revive a judgment after the death of the de-

fendant, must be sued against his executors or administrators; they must be made parties to it. If sued only against the heir in possession of the inheritance it is erroneous. See also to the same effect, *Rowland v. Harbaugh*, 5 Watts (Pa.) 365.

Effect of Erroneous Revival by Scire Facias Against Heirs. — In *Hays v. Shannon*, 5 Watts (Pa.) 548, it was decided that the revival of a judgment against a decedent's administrators by a scire facias against his heirs is erroneous, but that a sale of the decedent's lands under such judgment of revival is not void, and the heirs cannot recover from the sheriff's vendee.

3. *Doub v. Barnes*, 4 Gill (Md.) 1; *Bowie v. Neale*, 41 Md. 124; *Warfield v. Brewer*, 4 Gill (Md.) 265; *Murphy v. Cord*, 12 Gill & J. (Md.) 182; *Walsh v. Boyle*, 30 Md. 262. See also *Morton v. Croghan*, 20 Johns. (N. Y.) 106; *Chahoon v. Hollenback*, 16 S. & R. (Pa.) 425; *Suter v. Findlay*, 6 Pa. Dist. 253.

In *Warfield v. Brewer*, 4 Gill (Md.) 265, it was held that if the design of a scire facias be to make the land of the original defendant, in the hands of his alienees, liable for a judgment, it is the practice in *Maryland* to make both the original defendant and his terretenants parties to the writ by which the judgment is to be revived.

Effect of Failure to Make All Terretenants Parties. — In *Walsh v. Boyle*, 30 Md. 262, it was held that upon a scire facias to revive a judgment, all the terretenants should be made parties to the writ, and if that is not done, any terretenant who is a party may plead the failure so to do in abatement. If the terretenant makes no defense he has acknowledged the debt

decisions, however, where a judgment is revived by scire facias against the original defendant, it is not necessary to make the terretenants parties.¹

(b) **After Death of Judgment Debtor.** — Where, however, the original defendant is dead, the terretenant must, it would seem according to the weight of authority, be made a party to the scire facias to revive.²

(c) **Form of Scire Facias Against Terretenants.** — It has been held that a scire facias against terretenants may be either general against all the terretenants, or against certain named parties as terretenants, and though it is necessary that all be summoned, it is not necessary that they be named in the scire facias.³

8. Leave to Issue Writ. — It is not, as a general rule, necessary to obtain leave of court before issuing a scire facias to revive a

to be due and the land held by him will be liable for the judgment.

Reason for Rule. — In *Doub v. Barnes*, 4 Gill (Md.) 1, it was said that it is upon the ground of contribution that all the terretenants are required to be made parties to a scire facias; and any one tenant who is made a party may plead in abatement that there are other terretenants who are not made parties; if he fail to do this he cannot afterwards have contribution.

In *Pennsylvania*, it is held that the mere issuing of a scire facias within five years after the entry of a judgment, continues the lien thereof for a further period of five years from the time the lien of the former judgment would expire. Where one tenant in common conveys to his cotenant his undivided interest in land which was bound by the lien of a judgment against him, and the grantee fails to put the deed on record, a scire facias to revive said judgment, issued within five years from the date of its entry, will bind the land in the hands of the cotenant, although there was no service upon him as terretenant of the scire facias to revive. *Meinweiser v. Hains*, 110 Pa. St. 468.

Who Are Terretenants Within the Meaning of the Rule. — All who are in possession, deriving title under the judgment debtor, such as heirs, devisees, or alienees, after the judgment, are terretenants within the meaning of the law, whom it is necessary to make parties to the scire facias. *Polk v. Pendleton*, 31 Md. 118. See also *Tessier v. Wyse*, 3 Bland (Md.) 40; *Warfield v. Brewer*, 4 Gill (Md.) 268.

Mere occupants are not held terretenants. *Chahoon v. Hollenback*, 16 S. & R. (Pa.) 425. Nor is a party in possession, holding by title adverse to that of a judgment debtor, or paramount to his, since his rights are in no manner affected by the judgment. *Polk v. Pendleton*, 31 Md. 118; *Jarrett v. Tomlinson*, 3 W. & S. (Pa.) 114.

1. *Von Phul v. Rucker*, 6 Iowa 187; *Jackson v. Shaffer*, 11 Johns. (N. Y.) 513; *Righter v. Rittenhouse*, 3 Rawle (Pa.) 273; *Jackson v. U. S. Bank*, 5 Cranch (C. C.) 1; *Tidd's Pr.* 103.

"Any one purchasing or taking possession after the judgment may be turned out by the sheriff in consequence of his privity with the original defendant. Such tenant is not a necessary party to a writ of scire facias to revive the judgment." *Von Phul v. Rucker*, 6 Iowa 187, citing *Lunsford v. Turner*, 5 J. J. Marsh. (Ky.) 105.

Application to Make Defense by Terretenants. — In *Righter v. Rittenhouse*, 3 Rawle (Pa.) 273, it is held that as long as the defendant in a judgment is alive, a scire facias *quare executio non* may be served on him alone, without notice to terretenants, where there are any. And if terretenants whose interests are at stake know of any defense, the court, upon an application made by them in due time, will permit them to make it.

2. *Von Phul v. Rucker*, 6 Iowa 187; *Jackson v. Shaffer*, 11 Johns. (N. Y.) 513, 2 *Tidd's Pr.* 1171; *Jeffreson v. Morton*, 2 Saund. 7, note 4; *Morton v. Croghan*, 20 Johns. (N. Y.) 106; *Jackson v. U. S. Bank*, 5 Cranch (C. C.) 1.

3. *Hughes v. Wilkinson*, 28 Miss. 600.

judgment.¹ According to some decisions, however, while the scire facias is ordered as a matter of right within a certain time, yet after the lapse of a prescribed number of years, the court may exercise its discretion and allow or refuse the motion as may seem proper in the case.²

9. Application for Writ — *a. PETITION.* — It is held in some jurisdictions that a scire facias to revive a judgment being a judicial writ and issued after the commencement and in continuation of the original suit, a petition is not necessary in order to obtain the writ,³ though it is entirely proper that such petition should be filed.⁴

1. *Edwards v. Coleman*, 2 A. K. Marsh. (Ky.) 249; *Lesley v. Nones*, 7 S. & R. (Pa.) 410; *Chambers v. Carson*, 2 Whart. (Pa.) 365; *Booth v. U. S.*, 11 Gill & J. (Md.) 373.

In *Edwards v. Coleman*, 2 A. K. Marsh. (Ky.) 249, where it was assigned for error that the scire facias issued without permission, the court said: "We entertain no doubt as to the correctness of the decision in refusing to quash the writ. It will be considered, that after the lapse of time which appears to have intervened between the rendition of the judgment by the district court, and the emanation of the scire facias, application to the court for permission to sue out the writ would be required under the rules of practice prevailing in the English courts. But the necessity of such an application arose not from any statutory provision, but must have originated under the rules of those courts adopted and established in the exercise of power with which they consider themselves invested, to regulate their own rules of practice. That it was merely a rule of court that required permission to sue out the writ, is plainly inferable from the circumstance of the statute of England authorizing a revival of judgments in personal actions by scire facias containing no such requisition. As a rule of court, therefore, we apprehend it ought not, and cannot, be imperative upon the courts of this country; and consequently the court properly refused to quash the writ, on account of no permission having been obtained from the court to sue it out."

Order of Court Unnecessary. — In *Seibels v. Hodges*, 65 Ga. 245, it is held that no order of court is necessary to authorize the issuance of a scire facias to revive a dormant judgment.

2. *Lansing v. Lyons*, 9 Johns. (N. Y.)

84; *New York Bank v. Eden*, 17 Johns. (N. Y.) 105; *Keith v. Metcalf*, 2 Swan (Tenn.) 74. In all these cases it is held that after the lapse of twenty years there must be a service of notice of the motion and affidavit or a rule to show cause, and that the court has discretion to grant or refuse a scire facias.

Judgment of Fifty Years Standing. — In *Pears v. Bache*, 1 N. J. L. 239, it is held that where a judgment is of fifty years' standing a scire facias issued upon it without permission of the court will be quashed.

3. *Simpson v. Watson*, 15 Mo. App. 425; *Merchants' Mut. Ins. Co. v. Hill*, 17 Mo. App. 590; *Hopkins v. Howard*, 12 Tex. 7. And see generally article SCIRE FACIAS.

4. *Merchants' Mut. Ins. Co. v. Hill*, 17 Mo. App. 590; *Henderson v. Vanhook*, 24 Tex. 358. See also *Brown v. Harley*, 2 Fla. 159.

In *Missouri*, it was at one time required that a petition should be filed in order to sue out a writ of scire facias. *Ellis v. Jones*, 51 Mo. 180. It is now, however, held in that state that a petition is not required pleading nor the foundation of the action in such a proceeding. *Merchants' Mut. Ins. Co. v. Hill*, 17 Mo. App. 590. In this case the court said: "It is entirely proper that a petition should be filed; but it is not a pleading any more than a petition for a habeas corpus or a mandamus is a pleading. The defendant is not permitted to traverse it, but is required to make return to the scire facias, which writ must contain within itself a recital of the essential facts which, if true, are necessary to invoke the judgment of the court reviving the judgment recited therein. The petition is like the petition in a proceeding by habeas corpus, merely a suggestion to the court of the facts upon which the peti-

b. MOTION. — The common-law rule seems to have been that if a judgment were under seven years old, the plaintiff might sue out a scire facias as a matter of course, on a proper *præcipe* without any rule or motion,¹ but if the judgment were of ten years standing the plaintiff could not sue out a scire facias without motion in court.² In the absence of express statutory provision it would seem that the proper procedure is still by motion for the issuance of a scire facias to revive a judgment.³

10. Affidavit — *a. NECESSITY FOR.* — In many of the states it is expressly provided that after the expiration of a certain period the plaintiff, or his legal representative, must support his application for a scire facias to revive a judgment by an affidavit that such judgment is unsatisfied.⁴ In some jurisdictions, however, it has been held that the scire facias to revive a judgment may issue without an affidavit.⁵

b. WAIVER OF. — Although an affidavit is required, an objection on the ground of its omission, or that the affidavit is defective, should be made *in limine*, or it will be held to have been waived.⁶ If no objection is taken below, the defendant will not be heard to make such objection in the supreme court.⁷

tioner predicates his right to have the scire facias issue. For aught we can see, such a suggestion may be made *ore tenus*. It is in no sense a pleading, or the foundation of an action, and is hence not within the reason of the statute which requires a copy of the petition to be delivered in order to effect service of a summons in an original suit. The propriety of these views is emphasized by an examination of the petition and the writ of scire facias in this case. The writ contains precisely the same recital of facts which the petition contains—no more and no less; and it would be nonsense to hold that it was not well served because the sheriff did not deliver to the defendant at the same time the written suggestion of the same facts made to the court in pursuance of which it issued. The writ contains within itself a recital of all the facts against which he was required to show cause and of which he was entitled to notice."

1. 2 Tidd's Pr. (4th Am. ed.) 1105.

2. 2 Tidd's Pr. (4th Am. ed.) 1105; Hardisty v. Barney, 2 Salk. 598; Keith v. Metcalf, 2 Swan (Tenn.) 76.

3. Keith v. Metcalf, 2 Swan (Tenn.) 74. See also New York Bank v. Eden, 17 Johns. (N. Y.) 105.

Suggestion of Death of Original Parties.

— Where the original parties to a judg-

ment have died, the proper practice, in order to revive a judgment, is for the plaintiff to appear in court and make suggestion (supported by proof) of the death of the original parties, and that the present parties are their personal representatives, and thereon to move the court that scire facias issue to revive the judgment. Keith v. Metcalf, 2 Swan (Tenn.) 74.

Suggestion Ore Tenus. — In at least one case it seems to be held that a mere suggestion *ore tenus* of the facts upon which the right to have a scire facias issue is based, will suffice. See Merchants' Mut. Ins. Co. v. Hill, 17 Mo. App. 590.

4. Lansing v. Lyons, 9 Johns. (N. Y.) 84; New York Bank v. Eden, 17 Johns. (N. Y.) 105; Keith v. Metcalf, 2 Swan (Tenn.) 74; Whitworth v. Thompson, 8 Lea (Tenn.) 486; Kincaid v. Griffith, 64 Mo. App. 673, 2 Mo. App. Rep. 1135.

5. Booth v. U. S., 11 Gill & J. (Md.) 373; Lesley v. Nones, 7 S. & R. (Pa.) 410.

6. Fogg v. Gibbs, 8 Baxt. (Tenn.) 469; Whitworth v. Thompson, 8 Lea (Tenn.) 486; West Tennessee Bank v. Marr, 13 Lea (Tenn.) 108; Brewer v. State, 6 Lea (Tenn.) 198.

7. Fogg v. Gibbs, 8 Baxt. (Tenn.) 464. In the latter case the court said: "As to the objection that the present scire facias was issued without affi-

c. **REQUISITES** — **Averment of Lapse of Time.** — An affidavit in support of an application for a scire facias to revive a judgment should aver that the prescribed time has elapsed since the rendition of the judgment.¹

Averment that Judgment Remains in Force and Unsatisfied. — It has also been held that the affidavit should aver that the judgment sought to be revived remains in force and is unsatisfied.²

11. Requisites of Writ — a. **IN GENERAL.** — **Writ a Substitute for Declaration.** — In a proceeding by scire facias to revive a judgment, the writ takes the place and performs the office of a declaration.³

Averment of Facts Sufficient to Authorize Relief. — It should therefore contain everything necessary to constitute a good declaration, and should set forth, at least in substance, any fact upon which the plaintiff's right to have his judgment revived depends.⁴ It

davits after the lapse of twenty years, it may be said that objections of this character if valid might have been cured by amendment if objection had been taken by demurrer or otherwise *in limine*, but cannot be now for the first time assigned as error."

1. *Whitworth v. Thompson*, 8 Lea (Tenn.) 486.

2. *Keith v. Metcalf*, 2 Swan (Tenn.) 74; *Kincaid v. Griffith*, 64 Mo. App. 673, 2 Mo. App. Rep. 1135.

Payments on Judgment. — According to some decisions the affidavit should also state that no part of the judgment in question has ever been paid, or if any part thereof has been paid, it should state how much and what balance is still due on the judgment. *Keith v. Metcalf*, 2 Swan (Tenn.) 74; *Kincaid v. Griffith*, 64 Mo. App. 673, 2 Mo. App. Rep. 1135. Other decisions, however, seem to hold that it is not necessary to set out any payments made, and the balance due. *Whitworth v. Thompson*, 8 Lea (Tenn.) 486, *citing Carson v. Richardson*, 3 Hayw. (Tenn.) 231.

Amount Fixed by Judgment. — In *Watson v. Wehrly*, 11 Lanc. L. Rev. (Pa.) 49, it is held that the plaintiff in a scire facias *sur* judgment need not file an affidavit stating the amount claimed to be due as required under the law of the Lancaster Court of Common Pleas, since the amount is fixed by the judgment on which the scire facias would issue.

Averment of Non-Issuance of Execution. — In *Whitworth v. Thompson*, 8 Lea (Tenn.) 486, it is held that it is not material to aver that execution had not been sued out within the year. See also to the same effect, *Weaver v. Reese*, 6 Ohio 418.

3. *Arkansas.* — *Calhoun v. Adams*, 43 Ark. 238.

Florida. — *Brown v. Harley*, 2 Fla. 159.

Illinois. — *Smith v. Stevens*, 133 Ill. 183; *Farris v. People*, 58 Ill. 26; *Wilson v. School Trustees*, 138 Ill. 285.

Missouri. — *Merchants' Mut. Ins. Co. v. Hill*, 17 Mo. App. 590.

Maryland. — *McKnew v. Duvall*, 45 Md. 501; *Bowie v. Neale*, 41 Md. 125; *Nesbit v. Manro*, 11 Gill & J (Md.) 261; *Bish v. Williar*, 59 Md. 382.

Michigan. — *McRoberts v. Lyon*, 79 Mich. 25.

Ohio. — *Wolf v. Pounsford*, 4 Ohio 397.

Texas. — *Hopkins v. Howard*, 12 Tex. 7.

Tennessee. — *State v. Robinson*, 8 Verg. (Tenn.) 370.

Virginia. — *McVeigh v. Old Dominion Bank*, 76 Va. 267.

England. — *Blake v. Dodemead*, 2 Stra. 775; *Bank of Scotland v. Fenwick*, 1 Exch. 792.

See also the article SCIRE FACIAS.

In *New Jersey* it has been held that in a scire facias to revive a judgment, if the defendant does not appear within four days after the return day, judgment may be taken for the default in not appearing, without a declaration being filed; but if the defendant appears within that time, the plaintiff is required to declare, and the cause proceeds as in other cases. *Forest v. Price*, 37 N. J. L. 177.

4. *Alabama.* — *Miller v. Shackelford*, 16 Ala. 95.

Arkansas. — *Hicks v. State*, 3 Ark. 313.

Florida. — *Union Bank v. Powell*, 3 Fla. 175.

should contain upon its face such a statement of facts as will justify the form in which the process issued, and the persons who are made parties to it, and should show in what right and for what amount it is issued.¹

A Failure of the Writ to Set Forth a Substantial Cause of Action is, according to some decisions, a fatal defect,² which may be taken advantage of by demurrer.³ Even though a judgment of revival on the scire facias be rendered, if all the facts necessary to authorize the relief are not set out in the scire facias, the want of such allegation has been held to be fatal on error.⁴

Illinois. — *Smith v. Stevens*, 133 Ill. 183; *Wilson v. School Trustees*, 138 Ill. 285.

Indiana. — *Graham v. Smith*, 1 Blackf. (Ind.) 414; *Lasselle v. Godfroy*, 1 Blackf. (Ind.) 298.

Kentucky. — *Huey v. Redden*, 3 Dana (Ky.) 488; *Dozier v. Gore*, 1 Litt. (Ky.) 163.

Maryland. — *Nesbit v. Manro*, 11 Gill & J. (Md.) 261; *Warfield v. Brewer*, 4 Gill (Md.) 265.

Ohio. — *Wolf v. Pounsford*, 4 Ohio 397; *McVickar v. Ludlow*, 2 Ohio 246; *Union Bank v. Meigs*, 5 Ohio 312.

Virginia. — *Gedney v. Com.*, 14 Gratt. (Va.) 318; *Evans v. Freeland*, 3 Munf. (Va.) 119.

"The sci. fa. should set forth the grounds upon which it seeks the aid of the court; it is not every unsatisfied judgment which may be made the foundation for such writ. * * * That a party would not be likely to resort to such writ unnecessarily, is no answer to the general rule of law that every party who petitions the court to become active in his behalf must show, *prima facie* at least, that he is entitled to the relief which he seeks, or some relief consistent with his pleadings." *Miller v. Shackelford*, 16 Ala. 95.

Facts Bringing Case Within Statute. — Where the writ is under a particular statute it must set out facts sufficient to show that it comes within the provisions of the statute. *Phelps v. Mott*, *Brayt*. (Vt.) 191.

Informal Scire Facias. — In *Andrews v. Buckbee*, 77 Mo. 428, it is held that a scire facias, though informal, will be good after judgment upon it, if it contains enough to show what judgment is intended to be revived.

1. *McKnew v. Duvall*, 45 Md. 501; *Nesbit v. Manro*, 11 Gill & J. (Md.) 261; *Warfield v. Brewer*, 4 Gill (Md.) 265.

2. *Miller v. Shackelford*, 16 Ala. 95.

3. *Brown v. Harley*, 2 Fla. 159; *Graham v. Smith*, 1 Blackf. (Ind.) 413; *McKnew v. Duvall*, 45 Md. 501; *Nesbit v. Manro*, 11 Gill & J. (Md.) 261; *M'Kinney v. Mehaffey*, 7 W. & S. (Pa.) 276.

"In England as well as in many of the states of the Union, the custom of declaring on scire facias is believed to exist. In Virginia, Kentucky, Tennessee, and some other states, the practice appears to be to plead to the writ. No evil attends this practice; every defense which could be made by way of plea or demurrer to a declaration may also be made to the writ, and unless it contains all the allegations and averments necessary to a valid declaration will be held bad on demurrer. The practice is convenient, because it waives the necessity of a formal declaration and prevents repetition on the record. The form of a declaration in scire facias on judgment is nothing more than a repetition of the writ, with a prayer for execution. The writ cites the defendant to show cause why execution shall not issue. It may be considered substantially in the nature of a prayer for execution." *Brown v. Harley*, 2 Fla. 159.

Omission a Ground for Motion to Quash.

— According to some decisions a failure of the scire facias to set out all the facts that are necessary to show a right to the relief prayed for, will be ground for a motion to quash the same. *Evans v. Freeland*, 3 Munf. (Va.) 119.

4. *Waller v. Huff*, 9 Tex. 530. In this case the judgment was rendered with a stay of execution until the happening of a certain event. The scire facias to revive said judgment and to obtain execution failed to allege that the event had happened, or to state any fact which would avoid the necessity of its happening, and to prove the same. The judgment went by default,

b. AVERMENT OF MATTERS OF DEFENSE — General Rule. — A writ of scire facias to revive a judgment need not aver the performance of all things essential to the validity of the judgment.¹ Thus it is unnecessary to aver that the judgment has been enrolled.² Nor is it necessary to aver specially that execution had not been issued within a year and a day.³

c. RECITAL AND IDENTIFICATION OF ORIGINAL JUDGMENT. — In accordance with the general rule that the scire facias should be exact in its recital of former proceedings,⁴ a scire facias for the purpose of reviving a judgment must correctly recite the original judgment, and must substantially identify it as to parties, date, and amount.⁵

Substantial Description Sufficient. — The rule just laid down is held

but the court in holding that the want of such allegation and proof was fatal in error, said: "If the judgment be revived at all, it must be with all its terms, conditions, and contingencies, unless it be alleged and shown to be now disencumbered. As it stands, the original judgment is ordered to be revived and execution issue, without any respect to that portion of the judgment which stayed execution or any showing why it should be disregarded. * * * The judgment is encumbered with a condition. If revived at all, it must be *cum onere*, or it must be alleged and shown that the ground for the suspension of execution no longer continues."

1. *Commercial Bank v. Kendall*, 13 Smed. & M. (Miss.) 278. See also *Wiley v. Logan*, 5 Blackf. (Ind.) 11; *Rogers v. Denham*, 2 Gratt. (Va.) 200.

2. If the judgment has not, in fact, been enrolled, and such omission is material at all, it should be set up by way of defense. *Commercial Bank v. Kendall*, 13 Smed. & M. (Miss.) 278.

3. *Albin v. People*, 46 Ill. 372. In this case the court said: "It is insisted that this writ of scire facias would not lie, because there had not elapsed seven years from the date of the rendition of the judgment on which execution was sought by this proceeding; and it is said that while the scire facias fails to show the fact, it appears in the record of the original case, that an execution was issued within one year from the date of its rendition. It is one of the most familiar rules of practice that a plaintiff may sue and recover in an action of debt on an unsatisfied judgment. And the practice is equally uniform, that a scire facias may be maintained on a judgment when it has become dormant, so as to have it re-

vived, and obtain execution of the judgment. Upon consulting approved precedents, it is found that the scire facias does not contain an averment that an execution has not been issued within a year and a day. The averment is: 'That although judgment aforesaid, in form aforesaid, is given, execution nevertheless for the debt and damages aforesaid remains to be made to him,' the plaintiff. In this case the usual form is not adopted, but the averment is this: 'Which said judgment remaining unsatisfied and unpaid.' This, we think, is substantially good, although informal, and must be held sufficient to support a judgment." See also *Weaver v. Reese*, 6 Ohio 418.

4. See article SCIRE FACIAS.

5. *Barron v. Tart*, 19 Ala. 78; *Ward v. Prather*, 1 J. J. Marsh. (Ky.) 4; *Wolf v. Pounsford*, 4 Ohio 397; *Dietrich's Appeal*, 107 Pa. St. 174; *Landon v. Brown*, 160 Pa. St. 538; *Arrison v. Com.*, 1 Watts (Pa.) 374; *Richter v. Cummings*, 60 Pa. St. 441; *Davis v. Norris*, 8 Pa. St. 122; *Ernst's Estate*, 164 Pa. St. 87; *Gibson v. Davis*, 22 Vt. 374. See also *Zumbro v. Stump*, 38 W. Va. 325.

Recital of Name of Use Plaintiff Surplusage. — If the sci. fa. to revive recites the names of the legal plaintiff and defendant, the number and term of the judgment, its date and amount, the renewal is valid, although the name of the use plaintiffs are recited in the writ. Such recitals are mere surplusage. *Ernst's Estate*, 164 Pa. St. 87.

Applies to Amicable Scire Facias. — The rule that the scire facias must identify the original judgment with certainty applies to an amicable as well as other scire facias to revive a judgment; it must correctly recite the origi-

to be sufficiently complied with where the original judgment is substantially described,¹ and a mere immaterial variance or irregularity, which does not tend to mislead, will not avoid the scire facias.² But where the variance between the original judg-

nal judgment. *Worman's Appeal*, 110 Pa. St. 25; *Early v. Zeiders*, 137 Pa. St. 457.

Insufficient Identification. — In *Worman's Appeal*, 110 Pa. St. 25, it is held that an amicable scire facias to revive a judgment does not identify the original judgment so as to continue the lien against subsequent lienors, where the term and number of the original judgment, the date of which is incorrectly recited, are not given, and no note of the revival is made on the docket of the original judgment.

Sufficient Recital Against Lands Held by Terretenant. — Where an amicable scire facias describes exactly the names of the parties, the term and number of the case, and the date and amount of the judgment as revived, the lien of the original judgment will be preserved, as against lands in the hands of a terretenant, although the terretenant in signing the amicable scire facias does not designate himself as terretenant, and the entry in the judgment docket does not so designate him, but he is so designated in the caption of the case, in the appearance docket, and in the agreement for revival. *White v. Harden*, 154 Pa. St. 387.

1. *Barron v. Tart*, 19 Ala. 78; *Landon v. Brown*, 160 Pa. St. 538.

Omission to State Amount of Costs. — In *Barron v. Tart*, 19 Ala. 78, it is held that a scire facias to revive a judgment, as to costs, against an administrator, the damages having been paid, is sufficient if it substantially describes the judgment, although it does not state the amount of the costs. In this case the court said: "The scire facias required the plaintiff in error to appear and show cause why the judgment against his intestate should not be revived, as to the costs, against him as administrator, etc., the damages having been paid; and the court awarded execution for the costs in the usual form against an administrator. As the scire facias stated all the matters of substance there was no error in overruling the demurrer. The scire facias did not state the amount of the costs, but the judgment was otherwise substantially described, which was suffi-

cient. The scire facias was but a continuation of the former suit, and the execution awarded can only issue for the costs that were recovered, the amount of which is never, in our practice, stated in the judgment, but they are taxed by the clerk, and if he should commit an error, the remedy is easy. The judgment is affirmed."

Recital as for Gross Amount of Verdict and Costs. — It has been held in *Park v. Webb*, 3 Phila. (Pa.) 32, 15 Leg. Int. (Pa.) 28, that while a scire facias to revive a judgment which recites the judgment as for the gross amount of verdict and costs is sufficient, yet it would be better to recite the costs separately.

2. *Landon v. Brown*, 160 Pa. St. 538; *Early v. Zeiders*, 137 Pa. St. 457.

Names of Parties. — A slight variance in a scire facias, in the names of the parties, by which no one can be misled, does not render it ineffective to continue the lien of the judgment. *Landon v. Brown*, 160 Pa. St. 538. See also *Davidson v. State*, 20 Tex. 649; *Pickett v. Pickett*, 1 How. (Miss.) 267; *Richardson v. Prince George Justices*, 11 Gratt. (Va.) 190.

Objection Formal and Technical. — A substantial variance between the recital in a writ of scire facias and the judgment to be revived would break the continuity of the lien; but if the objection be formal and technical only, it will not affect the lien of the original. *Dougherty's Estate*, 9 W. & S. (Pa.) 189. In this case the court said: "It is objected also that the scire facias did not accurately recite the judgment to be revived; and it is certain that a substantial variance in that matter would break the continuity of the lien. The judgment was for \$4,000, the penalty of a bond with condition to secure a note for \$1,590, and another for \$400; and the award of execution was for \$2,000. Thus the record was described as what it actually though not technically was — a judgment for the real, not the nominal debt; so that the variance, though formal, was unsubstantial. The framing of our writs is injudiciously left to the prothonotaries, who have seldom any knowledge of forms; and all that we can do in these

ment and the writ is material, it will be fatal upon a plea of *nul tiel record*.¹

d. AVERMENT AS TO PLAINTIFF'S TITLE. — Where the judgment sought to be revived is for the recovery of the possession of land, and the nature and extent of the plaintiff's estate in the land is not shown by the original judgment, the writ should show that the title established in the plaintiff at the trial had not expired prior to the issuing of the scire facias, and the estate in the land alleged to have been recovered must be shown by the evidence.² Where, however, the judgment in ejectment recites that the recovery was for the fee simple title, and not for a term of years, a scire facias to revive such judgment need not aver in terms that the title of the plaintiff has not expired.³

matters without injustice to suitors is to hold fast to substance. In *Arrison v. Com.*, 1 Watts (Pa.) 374, the name of a different plaintiff was introduced, and the variance was necessarily held to be substantial; in the case before us the judgment is in substance what it was recited to be."

1. *Dietrich's Appeal*, 107 Pa. St. 174; *Moore v. Garrettson*, 6 Md. 444.

Illustration of Fatal Variance. — In *Moore v. Garrettson*, 6 Md. 444, it was held that if the scire facias recites as an absolute, unconditional judgment one which was rendered subject to the defendant's discharge under the insolvent laws, it is a fatal variance, and the proper mode to take advantage of it is by the plea of *nul tiel record*. "It appears as part of the case, though not as part of the pleadings, that the defendant's discharge was in fact pleaded to the original proceeding, and that the first judgment was rendered subject to that discharge. This being true, there was a fatal variance between the judgment actually rendered and that recited in the scire facias. The first was a qualified, conditional judgment, while that recited in the scire facias was absolute and unconditional; in other words, there was in fact no such judgment of record as the one set out in the scire facias, and the defendant, instead of endeavoring to correct the error by pleading the discharge anew, if he had any redress, should have pleaded *nul tiel record*."

2. *Smith v. Stevens*, 133 Ill. 183. In this case the court said: "In this case the scire facias recites the recovery by the plaintiffs of the defendant, in said ejectment suit, of one messuage, piece or parcel of land, with no averment as

to the nature or extent of the estate established at the trial. In ejectment the recovery is only of the possession, and therefore the recital of the writ applies as well to a recovery where the estate established is only a term for years, as where it is in fee. The only further averment in the writ bearing upon the point under consideration is that 'although said judgment be given as aforesaid, yet that no execution upon said judgment hath ever been made, and that execution of said judgment still remains to be made to the plaintiff.' This by no means excluded the possibility that the recovery may have been only of a term for years, and that no portion of such term 'is yet to come.'"

3. *Wilson v. School Trustees*, 144 Ill. 29. In this case the court said: "The only question presented for our decision is, was the writ of scire facias, upon which said judgment was rendered, sufficient upon its face to entitle plaintiffs below to recover? Appellant's point is, as stated in his motion, that the writ is fatally defective, because it does not 'aver and set forth that the title to the premises therein described, established by the plaintiffs at the trial of said ejectment suit, had not expired prior to the commencement of this proceeding.' It is well settled that a writ like this stands in the place of a declaration, and must aver every material fact necessary to entitle the plaintiff to the judgment of revival asked for. Appellant insists that, under this rule, the writ in question is bad, for the reason above stated, and his counsel rely upon the case of *Smith v. Stevens*, 133 Ill. 192, to support this contention. The writ in this case is

e. AVERMENT THAT JUDGMENT IS IN FORCE AND UNSATISFIED. — Where a party, by delaying execution, has suffered his judgment to become dormant, a legal presumption against its continued validity is raised, which he must take upon himself the burden of meeting and rebutting, and the writ should therefore show not only that he has not had execution of his judgment, but that his damages still remain unpaid, or that his right still subsists.¹ It has been held, however, that a substantial though informal compliance with this rule will be sufficient to support a judgment.²

f. AVERMENT OF DEATH OF JUDGMENT DEBTOR. — A scire facias against an executor to revive a judgment against the testator should contain a suggestion of the death of the judgment debtor.³

g. AVERMENT OF DEFENDANT'S APPOINTMENT AS EXECUTOR. — Such a writ should also, in addition to averring the death of the judgment debtor, show the appointment of the defendant as his executor.⁴

h. AVERMENT OF SURVIVORSHIP. — A scire facias against the administrator of a surviving joint debtor should aver the survivorship.⁵

i. NAMES OF DEFENDANTS — *Heirs and devisees.* — It has been held that a scire facias which issues against the heirs and devisees

materially different from the one held to be defective. * * * The writ in this case avers that, 'at the October term of said court, 1879, the plaintiffs recovered a judgment against the defendant in an action of ejectment for the following piece or parcel of land (describing it), which said court found that said Andrew C. Wilson was guilty of unlawfully withholding; and the said court further found the fee simple title to said premises in the said plaintiffs. And said court further ordered that plaintiffs have a writ of possession for said premises. * * * And whereas said judgment remains in full force and effect, unreversed and unsatisfied, and no writ of possession has ever issued in conformity to the said order of court therein, and although said judgment was given as aforesaid, yet no execution upon said judgment hath ever been made, and that execution of said judgment still remains to be made to the plaintiffs.' These allegations affirmatively show that the judgment sought to be revived not only adjudged the plaintiffs to be entitled to the possession of certain premises, but also adjudged them to be the owners thereof in fee simple; that the recovery was

not for a term of years, but for the entire estate; that such judgment remained unexecuted, and that execution thereof remained to be made to the plaintiffs. There was, therefore, no term recovered by them which could expire."

1. *Smith v. Stevens*, 133 Ill. 183. See also *McVickar v. Ludlow*, 2 Ohio 246; *Wolf v. Pounsford*, 4 Ohio 397; *Union Bank v. Meigs*, 5 Ohio 312.

2. *Albin v. People*, 46 Ill. 372.

Averment of Non-Satisfaction. — A writ of scire facias to revive a judgment stated the time of the rendition of the judgment, that execution remained to be done, and commanded the sheriff to summon the defendant to answer why the plaintiffs should not have execution. It was held that the writ averred, substantially, that the judgment remained unsatisfied. *Davidson v. Alvord*, 3 Ind. 1.

3. *Walker v. Hood*, 5 Blackf. (Ind.) 266; *Graham v. Smith*, 1 Blackf. (Ind.) 414. See also *Keith v. Metcalf*, 2 Swan (Tenn.) 74.

4. *Walker v. Hood*, 5 Blackf. (Ind.) 266.

5. *Graham v. Smith*, 1 Blackf. (Ind.) 414.

of one deceased and does not name them, but only describes them, is not bad on that account.¹

Terretenants. — According to some decisions, in a scire facias to revive a judgment the terretenants ought to be named, and if all be not named in the writ, it may be pleaded in abatement.² According to other decisions, a scire facias against terretenants may be either general against all the terretenants, or against certain named parties as terretenants, and though it is necessary that all be summoned, it is not necessary that they be named in the scire facias.³

j. AVERMENT OF EVENT TO WHICH EXECUTION HAD BEEN STAYED. — Where a judgment has been rendered with a stay of execution until the happening of a certain event, a scire facias to revive should allege either that the event has happened, or some other fact which avoids the necessity of its happening.⁴

k. AVERMENT THAT JUDGMENT OF AFFIRMANCE HAS BEEN CERTIFIED. — In a scire facias to revive a judgment affirmed in the supreme court, it is not necessary to aver that the judgment of affirmance has been certified to the court below.⁵

1. *Seawell v. Williams*, 5 Hayw. (Tenn.) 280. See also *Roberson v. Woollard*, 6 Ired. L. (N. Car.) 90, in which case it was held that a scire facias against heirs and terretenants need not name them, but the judgment must be entered against them by name, and the execution follows the judgment in this respect.

2. *Chahoon v. Hollenback*, 16 S. & R. (Pa.) 425. In this case the court said: "The persons summoned were, in fact, not terretenants; nor were they expressly returned as such, and the return was ill, as well for this cause as for want of an averment that they were terretenants of all the lands that were bound (*Jefferson v. Morton*, 2 Saund. 7, note 7); for being entitled to contribution among themselves, all must be named; and therefore, if the plaintiff attempt to name them in the writ, and omit the name of some of them, the omission may be pleaded in abatement."

3. *Hughes v. Wilkinson*, 28 Miss. 600. In this case the court said: "Several objections to the judgment in this case have been presented in behalf of the plaintiff in error; but as the merits of the case will probably be determined by two of the points, we deem it unnecessary to consider the others. The first of these points is, that the scire facias, under which the execution was awarded by virtue of which the land in controversy was

sold, was void, because it did not contain on its face the names of the heirs and terretenants of Rutherford, the original defendant in the judgment; nor did it show the lands of which they were alleged to be heirs and terretenants. It appears that the names of the heirs and terre-tenants, though not mentioned in the scire facias, were entered by the clerk on the back of it, as the parties to be summoned, and that they were summoned by the sheriff. It is held that a scire facias against terretenants may be either general against all the terretenants, or against the terretenants, naming them; and though they must all be summoned by the sheriff, it is not necessary that they should be named in the writ. *Lord Raymond*, 669; *Bac. Abr.*, tit. *Scire Facias*, c. 5; *M'Elderry v. Smith*, 2 Har. & J. (Md.) 74. The same principle appears to apply to heirs."

4. *Waller v. Huff*, 9 Tex. 530.

5. *Duncan v. Hargrove*, 18 Ala. 77. In this case it was held that an averment that the judgment of the Circuit Court was affirmed, etc., "as by the record and proceedings thereon, remaining in the said Circuit Court, will more fully appear," is sufficient on general demurrer. The court said: "It is now contended for the defendant in error, that the declaration should have averred that the clerk of the Supreme Court had certified the judgment of that court to the Circuit Court."

1. CITATION TO SHOW CAUSE. — A writ of scire facias to revive a judgment should, in conclusion, call upon the defendant to show cause why execution should not issue against him.¹

12. Amendment. — A writ of scire facias for the purpose of reviving a judgment may be amended as in the case of other such writs, and its amendment is governed by similar rules.²

The declaration avers the recovery of the judgment in the Circuit Court; the writ of error; that the writ of error was by the Supreme Court dismissed, and that the judgment of the Circuit Court was here affirmed and judgment rendered accordingly, 'as by the record and proceedings thereon, remaining in the said Circuit Court, will more fully appear,' etc. It is settled that the scire facias to revive this judgment was issued correctly from the Circuit Court, in which alone the judgment could be revived. *Baron v. Pagles*, 6 Ala. 422. The judgment of this court, in such cases, is to be certified to the Circuit Court. The record of this court is thus removed, so far as necessary in this proceeding, into the Circuit Court. The declaration refers to the record of this court remaining in the Circuit Court, by the words, 'as by the record,' etc., quoted above. The objection made by the demurrer in this case is not, therefore, that the record is not there, or that there is no such record, but it is that it is not stated that it went there by certificate. However material the certificate might be upon some questions, we think it is not material on a demurrer, and more especially a general demurrer, under the statute."

1. *Alexander v. Steel*, 13 Ark. 392; *Hicks v. State*, 3 Ark. 313; *Brown v. Harley*, 2 Fla. 159; *Davidson v. Alvord*, 3 Ind. 1.

Command to Sheriff to Summon Defendant, etc. — In *Davidson v. Alvord*, 3 Ind. 1, it was held that, in accordance with the common-law practice, the writ should command the sheriff to summon the defendant to answer why the plaintiff should not have execution.

Command to Sheriff to "Make Known," etc. — In *Alexander v. Steel*, 13 Ark. 392, it was held that under the *Arkansas* practice the scire facias is in the nature of a writ of summons which calls upon the defendant to show cause, etc., and need not command the sheriff that, "by honest and lawful men," he should "make known" to

the defendant that he should appear, etc., according to the old form.

Writ in Nature of Prayer for Execution. — In *Brown v. Harley*, 2 Fla. 159, it is held that the writ "may be considered substantially in the nature of a prayer for execution."

2. *Whitworth v. Thompson*, 8 Lea (Tenn.) 487; *Bryant v. Smith*, 7 Coldw. (Tenn.) 113; *Davidson v. Alvord*, 3 Ind. 1; *Wonderly v. Lafayette County*, 74 Fed. Rep. 702; *Garey v. Sangston*, 64 Md. 31. And see in general article SCIRE FACIAS.

Amendment After Argument of Cause. — A writ of scire facias to revive a judgment with notice to terretenants may be amended at any time, so as to make it conform to the original judgment; it may be amended after the counsel have argued the cause to the jury. *Maus v. Maus*, 5 Watts (Pa.) 315.

Amendment by Former Judgment. — In *Patrick v. Woods*, 3 Bibb (Ky.) 232, it was held that a scire facias may be amended so as to conform to the instructions given to the clerk, or may be amended by the former judgment. The court said: "This is a writ of error with supersedeas to a judgment awarding execution upon a scire facias to revive a former judgment obtained by Woods against Patrick. The scire facias purported to be issued upon a judgment against Patrick and wife, and upon the motion of Woods was amended by striking out the name of the wife. The only question is, whether the amendment was permissible or not. We have no doubt that it was. Woods had given to the clerk written instructions to issue the scire facias against Patrick only; and where a writ does not conform to the instructions as given to the clerk it may be amended thereby, according to the universal practice of this country and the precedents in the English books. But the amendment in this case was also justified by the former judgment; for a scire facias may be amended by the record in the original action. See

13. Proceedings Between Issuance of Writ and Judgment.—The practice concerning the service of the writ, the return thereof, the alias writ, defenses and objections to the writ, replication, and trial, on a scire facias to revive a judgment, is, as a rule, the same as on scire facias for other purposes, and will be found fully treated in the article SCIRE FACIAS.

14. Judgment — *a. FORM* — *In General.* — In most of the states, as has been seen, a scire facias to revive a judgment is not an original but a judicial writ, founded on some matter of record to enforce execution of it, and, properly speaking, is only the continuation of an action; ¹ the proper entry of judgment, therefore, upon such writ, is an award of execution for the amount of the original judgment, with interest from its rendition, and costs. ² It

Com. Dig., title Amendment, letter D., and the authorities there cited."

In *Whitworth v. Thompson*, 8 Lea (Tenn.) 487, it is held that the scire facias may be amended, and if the evidence of the original judgment is objected to on the ground of variance, the scire facias may be amended to conform to the judgment. See also *Bryant v. Smith*, 7 Coldw. (Tenn.) 113.

Parties. — A writ of scire facias to revive a judgment in the name of one person for the use of an assignee, may be amended to read in behalf of such assignee. *Wonderly v. Lafayette County*, 74 Fed. Rep. 702.

Amendment of Titling of Writ. — In *Garey v. Sangston*, 64 Md. 31, it was held that the court may permit the amendment of the titling of a scire facias to revive a judgment so that the rights of the real parties in interest may appear on the record by an appropriate entry to their use, the judgment having been assigned.

In *New York* it was held that on leave to amend a scire facias, the plaintiffs were not at liberty to add new parties, the necessity for whose joinder existed previous to the issuing of the writ, especially where as against such new parties the statute of limitations had attached. *Willink v. Renwick*, 22 Wend. (N. Y.) 608.

1. See *ante*, p. 1059; *Brown v. Harley*, 2 Fla. 159.

2. *Florida.* — *Brown v. Harley*, 2 Fla. 159.

Iowa. — *Denegre v. Haun*, 13 Iowa 240; *Von Phul v. Rucker*, 6 Iowa 187; *Vredenburg v. Snyder*, 6 Iowa 39.

Kentucky. — *Murray v. Baker*, 5 B. Mon. (Ky.) 172.

Maryland. — *Huston v. Ditto*, 20 Md. 305.

Mississippi. — *Locke v. Brady*, 30 Miss. 21; *Hughes v. Wilkinson*, 37 Miss. 482; *Vick v. Chewning*, 31 Miss. 201.

Missouri. — *Humphreys v. Lundy*, 37 Mo. 320; *Sappington v. Lenz*, 53 Mo. App. 44.

Montana. — *Haupt v. Burton*, 21 Mont. 572.

New Jersey. — *Woolston v. Gale*, 9 N. J. L. 32.

South Carolina. — *Adams v. Richardson*, 32 S. Car. 139.

Tennessee. — *Rogers v. Hollingsworth*, 95 Tenn. 357; *Lain v. Lain*, 3 Baxt. (Tenn.) 30.

Texas. — *Bullock v. Ballew*, 9 Tex. 498; *Bridges v. Samuelson*, 73 Tex. 522.

Virginia. — *Lavell v. McCurdy*, 77 Va. 763.

"The form of the judgment upon scire facias in such a case, on a return of scire feci, where the defendant pleaded thereto in bar of execution, is thus given in Tidd. App. 515: 'Therefore it is considered that the said plaintiff have his execution against the said defendant of the damages aforesaid, according to the force, form, etc. And it is also considered by the court here that the said plaintiff do recover against the said defendant for his costs and charges by him laid out about his suit in this behalf, on occasion of the said defendant having pleaded to the said writ of scire facias, by the court here adjudged,' etc. If it is upon two returns of nihil, then that fact is stated and the default recorded, and execution being awarded there is no judgment for the costs of the suit and proceedings therein." *Barrow v. Bailey*, 5 Fla. 9.

Illustrations of Proper Form of Judgment.

should not be a judgment of recovery,¹ and according to these decisions, it will be ground for error if the court renders a new judgment, instead of simply reviving the old one subject to the proper credits for payment.²

ment. — In *Brown v. Harley*, 2 Fla. 159, it was held that a judgment on a writ of scire facias for a specific sum in damages and costs was erroneous, and that it should have been, "Let execution issue, according to the force, form, and effect of the judgment" originally rendered.

In *Murray v. Baker*, 5 B. Mon. (Ky.) 172, it was held error to enter judgment for debt or damages on a scire facias, and that the judgment should be, that plaintiff have execution of the debt or damages, etc., in the scire facias mentioned. See also the case of *Sappington v. Lenz*, 53 Mo. App. 44, in which it is held that the judgment of revivor in such a proceeding should simply declare that the judgment revived is still in force for the amount remaining unpaid thereon; that, while it should not find the aggregate amount of principal and interest due on the judgment at the date of the revivor, yet when it does so, such additional finding will not invalidate it, but will be treated as surplusage.

"With All the Force and Effect of the Former Recovery." — In *Adams v. Richardson*, 32 S. Car. 139, where the order, to the effect that "the judgment herein be revived," contained in addition the words "with all the force and effect of the former recovery," it was held that such additional words added nothing to the effectiveness of the order.

1. *Von Phul v. Rucker*, 6 Iowa 187.

Judgment of Quod Recuperet Improper.

— A judgment on scire facias to revive a judgment should be an award of execution and not *quod recuperet*. *Locke v. Brady*, 30 Miss. 21.

Effect of Failure to Provide for Execution. — In *Fitzgerald v. Evans*, 53 Tex. 461, it was held that a judgment of revivor which simply recited and verified the rendition of the former judgment, but which made no provision for the issuance of execution to enforce the collection of the amount formerly ascertained to be due, was not a final judgment.

2. *Rogers v. Hollingsworth*, 95 Tenn. 357. In this case the court said: "It is next insisted the court erred in giv-

ing a new judgment instead of simply reviving the old one subject to the credit, and awarding execution thereon. This assignment is well taken. The proper practice in cases of scire facias to revive former judgments is to order their revivor and award execution, to bear interest from the date when originally rendered, and not to give a new judgment for the amount of the original one and interest. It is not the case of a suit upon the original judgment, which might have been brought. *Lain v. Lain*, 3 Baxt. (Tenn.) 32; *Fogg v. Gibbs*, 8 Baxt. (Tenn.) 464. The judgment of the Circuit Court should have been such as the justice ought to have rendered, namely, that the original judgment stand revived and plaintiff have execution with interest and costs of the scire facias subject to the proper credit, and execution should have issued without *procedendo*." *Citing Whitworth v. Thompson*, 8 Lea (Tenn.) 487.

Merger of Original Judgment. — In Vermont, Rev. Laws of 1842, § 1443, provides that "in actions of scire facias commenced to revive or enforce the execution of a judgment, the court shall, unless cause is shown to the contrary, render judgment in favor of the plaintiff for the amount of the original judgment with interest and costs on the scire facias." In the case of *Slayton v. Smilie*, 66 Vt. 197, the court, in holding that this section changed the character of the judgment to be rendered in such scire facias proceedings, said: "By this act the court is required to render a new judgment for damages and costs, and the execution is for the enforcement of the new judgment. The new judgment is not, as in scire facias at common law, that the plaintiff may have execution on the original judgment, but that he is to have and recover a different amount of damages, an amount ascertained by adding the costs to the damages in the original suit, and deducting therefrom what has been paid or satisfied, if anything, and computing interest on the sum thus found from the rendition of the original judgment."

Judgments Informal but Substantially

In Pennsylvania, however, a scire facias to revive a judgment is held to be the equivalent of an action of debt,¹ and a judgment thereon is *quod recuperet*, and not, as elsewhere, merely an award of execution.²

Joint Scire Facias. — It has been held that a joint scire facias to revive a judgment does not require necessarily a joint judgment, but the judgment that the plaintiff have execution may be several against each,³ and in fact should be so where one is liable individually and the other in a representative character.⁴

b. AMENDMENT. — It appears that the general rules pertaining to the amendment of judgments in general apply to a judgment on scire facias to revive a judgment.⁵

Correct. — In *Waller v. Huff*, 9 Tex. 530, it was held that a judgment on a scire facias to revive, which recited that the judgment be revived and that the plaintiff do recover the amount for which the execution had issued, was substantially correct.

In *Parker v. Singer Mfg. Co.*, 9 Ill. App. 383, it was held that a judgment on a scire facias that the defendant "be made party to the judgment rendered" at a certain time, "and that an execution issue thereon," though not strictly formal, was valid until regularly reversed.

1. *Hopkins v. Stockdale*, 117 Pa. St. 365; *Owens v. Henry*, 161 U. S. 642.

2. *Hopkins v. Stockdale*, 117 Pa. St. 365; *Stewart v. Peterson*, 63 Pa. St. 232; *Duff v. Wynkoop*, 74 Pa. St. 305; *Custer v. Detterer*, 3 W. & S. (Pa.) 28; *Buehler v. Buffington*, 43 Pa. St. 278; *Owens v. Henry*, 161 U. S. 642.

Subsequent Recovery on Original Barred. — In *Pennsylvania* it is held that a recovery on a scire facias to revive a judgment is in itself a new substantive judgment and a bar to any subsequent recovery on the original judgment as against the defendant. *Collingwood v. Carson*, 2 W. & S. (Pa.) 220; *Custer v. Detterer*, 3 W. & S. (Pa.) 28.

But a scire facias may issue upon the original judgment against a terretenant who is not a party to the former judgment of revivor. *Fursht v. Overdeer*, 3 W. & S. (Pa.) 470; *Zerns v. Watson*, 11 Pa. St. 260; *Little v. Smyser*, 10 Pa. St. 381. See, however, *Irwin v. Nixon*, 11 Pa. St. 419; *Grover v. Boon*, 124 Pa. St. 399.

Execution on Original Judgment. — In *Irwin v. Nixon*, 11 Pa. St. 419, the court said: "In England the judg-

ment on the scire facias is, that the original judgment be revived. Here the amount of the debt is ascertained, and judgment given for the sum due; and this unfortunate departure from precedents has given rise to the erroneous notion in the minds of some members of the profession, that the judgment on the scire facias is a new and distinct judgment, and not, as it really is, nothing more than the revival of the original judgment, the sum being ascertained for which execution may issue. If we pay any regard to precedent, the execution ought always to be issued on the original judgment, and not, as is sometimes ignorantly done, on the judgment on the scire facias; an irregularity which ought never to have been tolerated by the courts. But notwithstanding this deviation from the usual practice, it has never yet been imagined that the law was fundamentally changed."

Merger by Confessed Judgment of Revival. — In *Eby's Case*, 9 W. & S. (Pa.) 145, after a judgment had been opened to let the defendant into a defense on the merits, the plaintiff issued a scire facias on which the defendant confessed judgment of revival; it was held that the original judgment was merged and there could be no further proceedings thereon.

3. *Gray v. M'Dowell*, 5 T. B. Mon. (Ky.) 501.

4. *Gray v. M'Dowell*, 5 T. B. Mon. (Ky.) 501.

5. See article OPENING, AMENDING, AND VACATING JUDGMENTS, vol. 15, p. 202.

Amendment — Correction of Erroneous Recital. — A judgment which purports to revive the execution issued on a judgment sought to be revived may be

c. CORRECTION OF ERRORS IN ORIGINAL JUDGMENT. — In a revival of a dormant judgment errors committed in the rendition of the original judgment cannot be corrected,¹ nor has the court the discretion to make the revival conditional upon correction of the error, even though this be one of excess in amount; the judgment must be revived as it stands.²

d. DOCKETING. — In *Pennsylvania* it seems that an amicable scire facias to revive a judgment to be valid must be docketed, and it will not be sufficient that it be filed among the papers of the original judgment and noted upon the docket entry thereof.³

amended so as to make it recite that the judgment itself is revived. *Phillips v. Wait*, 105 Ga. 848.

Error as to Parties. — Where a judgment on a scire facias to revive a dormant judgment names one of the defendants as a plaintiff, this, though merely a clerical error, has been held to require that the judgment should be reformed by reversing it and rendering a proper judgment. *Carson v. Moore*, 23 Tex. 450. In this case the court said: "The judgment of revivor is so imperfectly and erroneously rendered, that it cannot be affirmed. It names one of the defendants in the original judgment as plaintiff. This is a clerical mistake, doubtless, but it would require that the judgment be reformed, by reversing, and rendering the proper judgment, if there were no other irregularity in the proceedings."

1. *Burdell v. Reeder*, 2 Cinc. Super. Ct. 94.

2. *Burdell v. Reeder*, 2 Cinc. Super. Ct. 94. In this case the court said: "It is claimed for the defendant that in the original judgment there was error, in this, that the suit was brought to foreclose a mortgage, and a judgment was rendered to foreclose the mortgage, and also a personal judgment on the note, and this was before the Act of 1864 (61 O. L. 69), authorizing such twofold relief. I do not regard this as error, under the law as it stood prior to 1864. But the note on which this original suit was brought was dated October 26, 1850, for \$5,000, payable in ten years, with interest at ten per cent., until the maturity of the note, according to interest notes given. The ten years expired October 26, 1860. Now, it is clear to my mind that from that time no more than six per cent. per annum was recoverable. But the judgment was rendered for the principal, with ten per cent., and the judg-

ment itself was made in terms to draw ten per cent. per annum. This was erroneous, in my opinion, and I should be glad to correct the error. But when we consider the object of the proceeding to revive a dormant judgment, it appears that it is no part of it to correct errors in the original, but to determine whether there has arisen, since the rendition of the judgment, any cause showing that the judgment ought not to be enforced. The revivor of a judgment seems to be a right which a party has, and which is not dependent upon the discretion of the court. Otherwise we might make the revival of the judgment conditioned upon the change of the judgment in the particular in which it was erroneous. The result is, that the judgment will have to be revived as it stands."

3. *M'Cleary's Appeal*, 1 W. & S. (Pa.) 299. In this case the court said: "Papers in the cases of a prothonotary's office are not notice to a purchaser, unless reference is made to them on the docket; and they are of course not notice to judgment creditors who are put by the statute which limits the lien of judgments on the same footing. Here, the reference from the entry of the original action to the imaginary entry of an amicable scire facias, which was in fact not docketed, could lead to nothing. Besides, the record notice contemplated by the act ought to appear among the docket entries of the preceding five years; for to keep the minutes of each consecutive scire facias, or act of revival, as a part of the original suit, is not sufficient, because a purchaser would not be so apt to find them there as in their proper place. That the agreement for an amicable scire facias and judgment is not itself notice, is a consequence of *Black v. Dobson*, 11 S. & R. (Pa.) 94, in which a *cesset* which had not been

e. **EFFECT OF JUDGMENT — In General.** — A judgment rendered upon a scire facias to revive a judgment is, as in the case of other judgments, binding until properly set aside.¹ A scire facias to revive a judgment irregularly issued, or an execution issued after a year and a day without scire facias, is voidable only, and cannot be called in question in a collateral action.²

f. **EFFECT OF REVERSAL OF ORIGINAL JUDGMENT.** — If the original judgment be reversed, that upon scire facias to revive cannot be supported.³

15. Writ of Error to Judgment. — Where a scire facias to revive a judgment has been sued out and judgment rendered in favor of the plaintiff, an error or defect in the original judgment cannot be inquired into on a writ of error to the judgment on the scire facias.⁴

III. ACTION ON JUDGMENT — 1. Alternative Remedy with Scire Facias. — A party desiring to revive a dormant judgment is not in most jurisdictions confined to his remedy by scire facias, but may sue directly on the judgment.⁵

Substitute for Scire Facias. — And in some jurisdictions the remedy

placed upon the docket was not allowed to hinder the limitation of the lien from beginning to run."

1. *Thomas v. Towns*, 66 Ga. 78; *Von Phul v. Rucker*, 6 Iowa 187; *Greer v. Major*, 114 Mo. 145; *Jackson v. Robins*, 16 Johns. (N. Y.) 537; *Jackson v. Bartlett*, 8 Johns. (N. Y.) 365; *Irwin v. Nixon*, 11 Pa. St. 419; *Lyon v. Cleveland*, 170 Pa. St. 611; *Burke v. Gibson*, 6 Kulp (Pa.) 310.

Effect on Innocent Purchasers. — So far as innocent purchasers are concerned, a judgment on a scire facias conclusively establishes the existence of the original judgment debt, even though in fact the judgment on that scire facias was confessed without authority by an attorney from ignorance, accident, or design, and though satisfaction of the original judgment debt was entered of record years before the judgment of revival was confessed. *Irwin v. Nixon*, 11 Pa. St. 419.

Revival of Judgment Res Judicata. — In *Greer v. Major*, 114 Mo. 145, it was held that the revival of a judgment was *res judicata* in a subsequent action between the same parties or their privies; that such judgment had not been satisfied, and was therefore in force in the absence of subsequent payment thereof.

Impeachment on the Ground of Collusion. — If after a judgment is barred it be revived by scire facias through collusion between creditors and debtor, a

court of equity, in a suit to enforce liens against the debtor's estate, will not give effect to the revival so as to affect the rights of other lien creditors of the debtor, even though it be effectual against himself. *Ayre v. Burke*, 82 Va. 338.

2. *Jackson v. Delancy*, 13 Johns. (N. Y.) 537; *Jackson v. Bartlett*, 8 Johns. (N. Y.) 365; *Jackson v. Robins*, 16 Johns. (N. Y.) 537.

3. *Mills v. Conner*, 1 Blackf. (Ind.) 7; *Eldred v. Hazlett*, 38 Pa. St. 16. In the latter case the court said: "The revival of the original judgment is but a continuation of it. In form the proceeding by scire facias is a distinct action, but in fact is not so. Satisfaction of the original judgment is a satisfaction of the judgment in the scire facias. So a reversal of the former has the same effect on the latter." *Citing Ranck v. Becker*, 12 S. & R. (Pa.) 412.

4. Such errors can be corrected only by a proceeding upon the original judgment through the means of a writ of error or an appeal. *M'Affee v. Patterson*, 2 Smed. & M. (Miss.) 593.

5. See the statutes and codes of the various states. And see *Haven v. Baldwin*, 5 Iowa 503; *McGlassen v. Wright*, 10 Iowa 591; *Carnes v. Crandall*, 10 Iowa 377; *Stewart v. Gibson*, 71 Mo. App. 232; *Wood v. Newberry*, 48 Mo. 322; *Gardner v. Henry*, 5 Coldw. (Tenn.) 458; *Smith v. Pearce*, 2 Swan (Tenn.) 127; *Bridges v. Samuel-*

by scire facias has been abolished and an action on the judgment substituted.¹ Where this is the case a civil action is the proper method of reviving a dormant judgment.²

Proceedings. — As to the form of proceedings in an action to revive a dormant judgment, see article JUDGMENTS, vol. II, p. 1085 *et seq.*

2. Form of Judgment. — In an action for the purpose of reviving a dormant judgment the proper form of judgment if for the plaintiff is *quod recuperet*, and not that execution issue as in the case of revival of scire facias.³

son, 73 Tex. 522; Bullock v. Ballew, 9 Tex. 498. See also article JUDGMENTS, vol. II, p. 1089.

1. Humiston v. Smith, 21 Cal. 129; Hughes v. Shreve, 3 Met. (Ky.) 547; Alden v. Clark, (Supm. Ct. Gen. T.) 11 How. Pr. (N. Y.) 209; Thurston v. King, (Supm. Ct. Spec. T.) 1 Abb. Pr. (N. Y.) 126.

2. Humiston v. Smith, 21 Cal. 129; Hughes v. Shreve, 3 Met. (Ky.) 547; Curry v. Bryant, 7 Bush (Ky.) 302; Haupt v. Burton, 21 Mont. 572; Thurston v. King, (Supm. Ct. Spec. T.) 1 Abb. Pr. (N. Y.) 126; Ireland v. Litchfield, 8 Bosw. (N. Y.) 634; Cameron v. Young, (Supm. Ct. Spec. T.) 6 How. Pr. (N. Y.) 372; People v. Clarke, 9 N. Y. 349; Burns v. Conner, 1 Wash. 6.

Scire Facias Superseded by Action under Code. — In Cameron v. Young, (Supm. Ct. Spec. T.) 6 How. Pr. (N. Y.) 372. it was held that the remedy heretofore given by scire facias to obtain execution of a judgment is superseded by the provisions for an action therefor under the code. In this case the court said: "I can see no difficulty in resorting to the general remedy by action given by the code. The summons may be in the usual form, and the complaint, in stating the facts constituting the cause of action, will state the same facts substantially which were formerly stated in the writ of scire facias. The proper relief will then be demanded, viz., that the plaintiff have execution of the judgment. The defendant by answer can make any defense which he was allowed to make by plea to the writ or the declaration contained in the writ. The judgment in effect will be the same as under the superseded practice, and the lien upon land will be preserved. I see nothing in the system of the code conflicting with this practice. Section 71, prohibiting an action upon a judgment rendered in certain

courts between the same parties, has no application. The parties to this action are not the same parties as those to the judgment." See also to the same effect Thurston v. King, (Supm. Ct. Spec. T.) 1 Abb. Pr. (N. Y.) 126.

In Humiston v. Smith, 21 Cal. 129, it is held that the writ of scire facias is a remedy unknown to the Californian practice, and cannot be employed for the revival or enforcement of a judgment. In this case the court said: "There is some discussion in the briefs as to whether the remedy by scire facias is a part of the common law as adopted in this country, but in the view taken this question is immaterial. It is a remedy unknown to our practice, or if known is not applicable in a case of this character where appropriate remedies are expressly provided. The courts of New York have frequently determined that the code of that state, the provisions of which are similar to those of our Practice Act, abolished and superseded the writ of scire facias. The subject was fully considered in Cameron v. Young, (Supm. Ct. Spec. T.) 6 How. Pr. (N. Y.) 372, and Alden v. Clark (Supm. Ct. Gen. T.) 11 How. Pr. (N. Y.) 209, and an examination of these cases will show that they are directly in point upon the question before us."

Application to All Judgments. — In Hughes v. Shreve, 3 Met. (Ky.) 548, it is held that the code provision concerning the revival of judgments applies to all judgments whether rendered before or after it took place.

3. See article JUDGMENTS, vol. II, p. 1167.

In Bullock v. Ballew, 9 Tex. 498, it was held that in effect the action brought to revive a judgment is not materially different from a scire facias brought to revive a judgment, the difference being in the form of the judg-

IV. REVIVAL ON MOTION AND NOTICE — 1. In General. — In some of the states it is provided by statute that a dormant judgment may be revived in the same manner as is prescribed for reviving actions before judgment — by conditional order of the court on motion with notice to the adverse party.¹

Alternative Remedy with Action on the Judgment. — As a general rule, this remedy is not substituted for, but is in addition to, a civil action on the judgment.²

ment. In an action for debt the judgment for plaintiff is that he recover his debt, etc.

Effect of Revival. — In *Stewart v. Gibson*, 71 Mo. App. 232, the court said: "Again, it is urged that the judgment of revival is in effect a new judgment for the payment of which the defendants are made personally liable. Counsel is in error as to the latter proposition. The statute provides that a judgment may be revived against the heir or devisee of a deceased defendant. It also provides in effect for the issuance of an execution against such heir or devisee, provided the execution concerns real estate received or inherited by him from the ancestor, but not if the levy of the execution concerns personalty. Rev. Stat. 1889, § 6024. This shows conclusively that in such a case the judgment of revivor imposes no personal liability on the heir or devisee."

Judgment for Costs. — In a proceeding in debt upon a dormant judgment, and for costs paid in the original suit, if the judgment be for the plaintiff the judgment should be rendered for an amount which the original judgment with the accrued interest and costs of both suits would aggregate. *Bridges v. Samuelson*, 73 Tex. 522.

1. *Kansas*. — *Baker v. Hummer*, 31 Kan. 325; *Angell v. Martin*, 24 Kan. 334; *Tefft v. Citizens' Bank*, 36 Kan. 457; *Halsey v. Van Vliet*, 27 Kan. 474; *Mawhinney v. Doane*, 40 Kan. 681; *Israel v. Nichols*, 37 Kan. 68; *Lindgren v. Gates*, 26 Kan. 135; *Kothman v. Skaggs*, 29 Kan. 5; *Schultz v. Hine*, 39 Kan. 334.

Montana. — *Haupt v. Burton*, 21 Mont. 572.

North Carolina. — *McLeod v. Williams*, 122 N. Car. 451.

Ohio. — *Bartol v. Eckert*, 50 Ohio St. 31.

Wisconsin. — *Mariner v. Coon*, 16 Wis. 468; *Ingraham v. Champion*, 84 Wis. 235.

United States. — *Brockway v. Oswego Tp.*, 40 Fed. Rep. 612; *Dempsey v. Oswego Tp.*, 51 Fed. Rep. 97; *U. S. v. Houston*, 48 Fed. Rep. 207.

2. *Baker v. Hummer*, 31 Kan. 325; *Burnes v. Simpson*, 9 Kan. 658; *Kothman v. Skaggs*, 29 Kan. 5; *Schultz v. Hine*, 39 Kan. 334; *Haupt v. Burton*, 21 Mont. 572. See also *U. S. v. Ensign*, 2 Mont. 396; *Peters v. Vawter*, 10 Mont. 201; *Bartol v. Eckert*, 50 Ohio St. 31; *Brockway v. Oswego Tp.*, 40 Fed. Rep. 612.

"A dormant judgment may be revived by a formal action brought for that purpose, and upon a notice given by summons; or it may be done in the more summary and informal method of motion and notice prescribed by the code." *Schultz v. Hine*, 39 Kan. 334, citing *Kothman v. Skaggs*, 29 Kan. 5.

In *Haupt v. Burton*, 21 Mont. 572, the court said: "It is doubtless true, the revival of the judgment described in plaintiff's complaint might have been effectually accomplished by motion for leave to issue execution, under section 349 of the Code of Civil Procedure, which authorizes an execution to issue after the lapse of five years from the entry of judgment after obtaining leave of the court upon motion with notice to the adverse party. This procedure was considered in *Peters v. Vawter*, 10 Mont. 201. But the mode of enforcing a judgment by issuing execution under section 349, *supra*, is a cumulative remedy, in no way affecting the right to revive the judgment by suit for that purpose. *Rowe v. Blake*, 99 Cal. 167. The right of revivor by suit is recognized in *U. S. v. Ensign*, 2 Mont. 396, while the right of revivor by motion is sustained in *Peters v. Vawter*, 10 Mont. 201. In the leading case of *Carter v. Colman*, 12 Ired. L. (N. Car.) 274, it was decided that, where there was a dormant judgment, plaintiff might have a scire facias to revive and an action to recover the amount of the judgment,

2. Notice. — Where it is sought to revive a judgment by motion and additional order it is essential that there be notice served upon the adverse party.¹

V. SUMMONS TO SHOW CAUSE — 1. In General. — In at least one state it is provided by statute that a judgment may be revived by the service of summons upon the judgment debtor requiring him to appear at the next term of the court and then and there show cause why the judgment should not be revived.²

both pending at the same time; and that a judgment on the scire facias could not be pleaded in bar of the action of debt. And in *McDonald v. Dickson*, 85 N. Car. 248, upon a case where motion for leave to issue execution had been granted, it was held execution might be had on a judgment, and at the same time action on it could be prosecuted by leave of court. *Freem. Judgm.*, § 440; *Garibaldi v. Carroll*, 33 Ark. 568; 11 ENCYC. PL. AND PRAC., p. 1088."

Revivor Against Personal Representative of One Joint Defendant. — In *U. S. v. Houston*, 48 Fed. Rep. 207, it is held that in case of the death of one joint defendant after judgment it is not necessary to join the other defendants in a proceeding to revive the judgment against his personal representative. Section 1101 of Kansas Gen. Stat. provides that "in all cases of joint obligations and joint assumptions of copartners or others, suits may be brought and prosecuted against any one or more of those who are so liable."

1. Newton v. Arthur, (Kan. 1898) 55 Pac. Rep. 466; *Tefft v. Citizens' Bank*, 36 Kan. 457; *Selders v. Boyle*, 5 Kan. App. 451.

Sufficiency of Notice. — In a proceeding to revive a dormant judgment in the name of the executor of the deceased judgment creditor, a notice properly entitled in the case, containing the matters required to be contained in a notice of an application of revivor, signed by the clerk of the court, and attested by the seal of the court, and containing a command to the sheriff to serve the same upon the defendants therein named, is a sufficient notice, and is sufficiently signed. *Selders v. Boyle*, 5 Kan. App. 451.

Summons a Notice. — In *Schultz v. Hine*, 39 Kan. 334, it is held that where a summons is issued upon application for an order of revivor, which contains substantially all that is required to be stated in the statutory no-

tice of a motion to revive, and the same is served in reasonable time before the hearing, it will be a sufficient notice upon which to base the order of revivor.

Order Without Consent to Be Made Within One Year. — Under Code Kan., §§ 433, 440, the period within which an order reviving a dormant judgment may be made without consent is one year from the time it could have been first made; and where a notice is given two days before the expiration of the year, that an application to revive a judgment will be presented to the court twenty-eight days after the year has elapsed, an order of revivor made upon that notice at the date fixed or at a subsequent date, without the consent of the adverse party, is a nullity. *Tefft v. Citizens' Bank*, 36 Kan. 457.

Effect of Failure to Secure Order Within One Year. — In *Newton v. Arthur*, (Kan. 1898) 55 Pac. Rep. 466, it was held that where a judgment creditor files a motion to revive a dormant judgment and serves notice as required by law, fixing a time for the hearing, but fails to secure an order of revivor until more than one year has elapsed since said judgment became dormant, it is not an error to refuse the motion. In this case the court said: "Where a judgment becomes dormant, and the plaintiff files his motion to revive, and serves notice of the time and place of the hearing thereof, all within the proper time, but neglects to call said motion up and secure an order thereon until after more than one year has elapsed, said judgment cannot then be revived without the consent of the opposing party."

Effect of Order of Revivor. — In *Halsey v. Van Vliet*, 27 Kan. 474, it was held that the order of revivor was not a new and independent judgment, but simply a continuation and restoration to life of the original judgment.

2. Carroll v. Tompkins, 14 S. Car. 223; *Rowland v. Shockley*, 43 S. Car. 246;

2. **Time.** — Where the summons in such proceedings is served on the judgment debtor or his representative within the proper time, the judgment may properly be revived though at the time of the order of revival the period within which the proceedings might be brought has expired.¹

3. **Effect of Failure to Make Defense.** — When a party served

Lawton *v.* Perry, 40 S. Car. 255; McDowall *v.* Reed, 28 S. Car. 466; Leitner *v.* Metz, 32 S. Car. 383; Adams *v.* Richardson, 32 S. Car. 139; Wood *v.* Milling, 32 S. Car. 378; Chester, etc., R. Co. *v.* Marshall, 40 S. Car. 59; Grollman *v.* Lipsitz, 43 S. Car. 329; Babb *v.* Sullivan, 43 S. Car. 436.

By section 309, S. Car. Code Civ. Pro., it is provided that "a final judgment may be revived at any time within the period of ten years from the date of the original entry thereof, by the service of a summons upon the judgment debtor as provided by law, or, if the judgment debtor be dead, upon his heirs, executors, or administrators, or, if he be removed out of the state, by publication of such summons in the manner provided in section 156 for publication of summons on complaint to be filed, to show cause, if any he or they may have, why such judgment should not be revived, and if no good cause be shown to the contrary it shall be decreed that such judgment is revived."

Summons to Show Cause Why Execution Should Not Issue. — In Leitner *v.* Metz, 32 S. Car. 383, it was held that on a summons to show cause why execution on a judgment (describing it) should not be renewed, and under order giving leave to issue a renewal execution on such judgment, the judgment is also revived. In this case the court said: "It is, however, claimed that the judgment was never revived, for the reason that the terms of the summons did not embrace the judgment, but were limited to 'the renewal of the execution.' This identical point was also decided in the case of Adams *v.* Richardson, 32 S. Car. 139, where the court said: 'The judgment and execution on it are very closely connected. The execution is only process to enforce the judgment, and it cannot have active energy unless the underlying judgment has a lien. The law provides the same proceeding — 'summons to show cause' — both to revive the judgment and renew the execution.

The questions as to them are in one sense identical. The claim to renew the execution necessarily involves the right to revive the judgment. The order to renew the execution was entirely without force unless it also revived the judgment,' etc."

See also Lawton *v.* Perry, 40 S. Car. 255, in which it was held that the true course to revive a judgment is to issue a summons under the code to renew an execution, which when granted revived the judgment.

Revival by Service on Executor. — In Chester, etc., R. Co. *v.* Marshall, 40 S. Car. 59, it was held that the provision of the South Carolina Act of 1873 for the revival of a judgment "by service of a summons on the debtor as provided by law" allows revival by service of summons on the executor of the judgment debtor.

1. Adams *v.* Richardson, 32 S. Car. 139; Leitner *v.* Metz, 32 S. Car. 383. See also Wood *v.* Milling, 32 S. Car. 378.

In Leitner *v.* Metz, 32 S. Car. 383, it was held that a judgment obtained in 1867 and revived by default by order passed more than twenty years afterwards, the proceedings to revive, however, having been instituted within the twenty years, retains its lien, and a sale of the debtor's land thereunder is a valid sale.

See also Adams *v.* Richardson, 32 S. Car. 139, in which the court said: "The very object of the statute was to limit the time within which the action could be brought, as appears by the familiar expression 'limitation of actions.' It is true that actions commenced and discontinued do not stop the running of the time; but when a right is asserted by a judicial proceeding, which is continued to judgment, the time stops when the action is commenced. 'When the action is brought before the claim is barred, the plea of the statute will not avail.'" *Citing* Adickes *v.* Allison, 21 S. Car. 245; McBee *v.* Loftis, 1 Strobb. Eq. (S. Car.) 90.

with summons to show cause why a judgment should not be revived and execution renewed fails to make a defense which he has the opportunity of making, he must be held to have formally made such defense and to have been unsuccessful, and he is forever afterwards estopped from setting up that defense.¹

VI. REVIVAL BY AGREEMENT. — In *Pennsylvania* it is provided by statute that a judgment affecting real estate may be revived in one of two ways, either by scire facias or by agreement of the parties and terretenants filed in writing and entered on the proper docket.²

VII. REVIVAL UPON SUGGESTION. — Under a *Mississippi* statute it is held that an administrator *de bonis non* has a perfect right to appear in court and suggest the death of his predecessor, and ask that a judgment recovered by such predecessor be revived in his name as successor in the administration, and he need not resort to the writ of scire facias for that purpose.³

1. *Babb v. Sullivan*, 43 S. Car. 436 [citing *Davis v. Murphy*, 2 Rich. L. (S. Car.) 560; *Jackson v. Patrick*, 10 S. Car. 197; *McNair v. Ingraham*, 21 S. Car. 70; *Crenshaw v. Julian*, 26 S. Car. 283; *Sullivan v. Shell*, 36 S. Car. 578].

In *Babb v. Sullivan*, 43 S. Car. 436, it was held that where a judgment debtor who has been duly summoned does not appear to set up a defense of part payment the question as to payment is *res adjudicata*.

See also, as to the conclusiveness of an order of revivor where all the parties are before the court, *Witherspoon v. Twitty*, 43 S. Car. 348.

2. *Baum v. Custer*, (Pa. 1888) 13 Atl. Rep. 771. In this case the court said: "The Act of 1827 expressly prescribes two modes of revival. The first is by agreement of both parties, the defendant and terretenants; the second is by writ of scire facias. * * * The consent of the terretenant in writing, together with that of the party, is made essential in a revival by agreement. So, also, in *McCray v. Clark*, 82 Pa. St. 461, in which it is held that, where land on which a judgment is a lien has been aliened by the defendant, an amicable revival by the terretenant, to which the original defendant is not a party will continue the lien of such judgment on the land; but the revival by agreement to which the terretenant is not a party will not continue the lien as to him. To the same effect are *Fickes's Appeal*, 71 Pa. St. 449, and *Rudy's Appeal*, 94 Pa. St. 338."

See also *Dreifus v. Denmark*, 11 Phila. (Pa.) 612, 32 Leg. Int. (Pa.) 337, in which it is held that "the Act of Assembly provides that 'no judgment shall continue a lien on such real estate for a longer period than five years from the day on which such judgment may be entered or revived, unless revived within that period by agreement of the parties and terretenants filed in writing and entered on the proper docket, or a writ of scire facias to revive the same be sued out within said period according to the provisions of the act to which this is a supplement.'"

3. *Dibble v. Norton*, 44 Miss. 158. In this case the court said: "Our statute provides that if any executor or administrator should die, resign, or be removed, or his function should cease from any cause, before the estate is finally settled, suits or actions commenced by or against such executor or administrator shall not, for that reason, abate, but the same may be prosecuted by or against his successor in the administration, who may come in and make himself a party to suits or actions commenced by or against his predecessor, by proper suggestion; or if he fails to do so, he may be brought in by the opposite party by scire facias; and all judgments recovered by or against any executor or administrator who has died, resigned, or been removed may be revived for or against his successor in the same way. Rev. Code 456, art. 124. In the case under consideration the

defendant in error appeared in court and suggested the death of his predecessors, and asked that said judgment be revived for him and in his name as successor in the administration of the estate of the said William Norton, deceased. If the successor in the administration fail to appear and make himself a party, then he may be brought in by the opposite party by

scire facias. The successor has, under this statute, an undoubted right to have the judgment revived in his name without scire facias, upon the suggestion of the death of his predecessors. This right, in our opinion, is too clear to admit of a doubt. There is, therefore, no error in reviving the judgment in the name of the defendant in error without scire facias."

REVIVOR OF SUITS AND ACTIONS.

BY S. B. FISHER.

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CROSS-REFERENCES.

See in general articles *BILLS OF REVIEW*, vol. 3, p. 593; *DEATH*, vol. 5, p. 783; *SURVIVAL OF ACTIONS*.

I. IN EQUITY — 1. When Necessary — General Rule. — As a general rule, whenever a suit in equity has abated there must be a revivor in the proper manner before there can be further proceedings therein by which the rights of the parties to the suit are finally adjudicated.¹

Proceedings During Abatement. — Proceedings may, however, be taken during an abatement of the suit for the purpose of preventing injury to the surviving parties where those entitled omit to revive,² to preserve the property which is the subject of the suit,³ or to punish for a breach of injunction as soon as any steps have been taken to revive the suit.⁴

1. 2 Barbour's Ch. Pr. 33; 1 Hoffman's Ch. Pr. 364.

2. 1 Hoffman's Ch. Pr. 389. See also *Griswold v. Hill*, 1 Paine (U. S.) 483.

3. *Washington Ins. Co. v. Slec*, 2 Paige (N. Y.) 368.

4. *Hawley v. Bennett*, 4 Paige (N. Y.) 163. In this case it was held that where a suit abates by the death of a

When a Suit in Equity Abates. — It may be well to note here the distinction that an abatement in equity does not, as in law, amount to a determination of the suit, but only to a present suspension of the proceedings for the want of proper parties capable of proceeding therein.¹ The mere abatement of a suit in equity is a state of suspension with capacity for revival.² It is merely an interruption of the suit, suspending its progress until new parties are brought before the court.³

2. Manner of Revivor in General. — In the absence of statutes, the proper methods of reviving a suit in equity are by bills of revivor, original bills in the nature of bills of revivor, bills of revivor and supplement, and original bills in the nature of revivor and supplement.⁴

3. Bills of Revivor — *a.* **DEFINITION, NATURE, AND PURPOSE** — **Definition.** — A bill of revivor is a bill in equity filed to revive and continue a suit which has abated.⁵

complainant, those who succeed to his rights may apply to the court to punish a breach of an injunction, committed either before or after his death, as soon as they have filed a bill of revivor, or taken any other steps to revive the suit, and without waiting until a decree of revivor is actually obtained.

1. *Clarke v. Mathewson*, 12 Pet. (U. S.) 164; *Zoellner v. Zoellner*, 46 Mich. 511.

2. The death of a party pending a suit does not, where the cause of action survives, amount to a determination of the suit. It might, in suits at common law, upon the mere principles of that law have produced an abatement of the suit which would have destroyed it. But in courts of equity, an abatement of the suit by the death of the party has always been held to have a very different effect, for such abatement amounts to a mere suspension and not to a determination of the suit. It may again be put in motion by a bill of revivor; and the proceedings being revived, the court proceeds to its determination as an original bill. *Clarke v. Mathewson*, 12 Pet. (U. S.) 164; *Zoellner v. Zoellner*, 46 Mich. 511.

3. *Hoxie v. Carr*, 1 Sumn. (U. S.) 173.

Usual Causes of Abatement. — The most common causes of an abatement of a suit in equity are the death of one of the original parties, 2 Daniell's Ch. Pl. and Pr. (6th Am. ed.) 1506; *Brooks v. Jones*, 5 Lea (Tenn.) 244; *Crook v. Turpin*, 10 B. Mon. (Ky.) 243 (and see article DEATH, vol. 5, p. 783), or the marriage of a female plaintiff, *Feemster v. Markham*, 2 J. J. Marsh. (Ky.) 303;

Glenn v. Clapp, 11 Gill & J. (Md.) 1; *Boynton v. Boynton*, 21 N. H. 246; *Peer v. Cookerow*, 14 N. J. Eq. 361; *Quackenbush v. Leonard*, 10 Paige (N. Y.) 131; *Douglass v. Sherman*, 2 Paige (N. Y.) 358; *Stephenson v. Prescott*, 2 Hayw. (N. Car.) 163; *Dodson v. Juda*, 10 Ves. Jr. 31.

4. "In equity a suit became defective during its pendency in various ways, and among others by the death of a party. But where the cause of action survived, it did not abate so that on proper application by the representative it could not continue to be prosecuted for his benefit. The means of supplying the defects of a suit, where it abated by the death of a party, and of obtaining the benefit of it, were by bill of revivor, by bill of revivor and supplement, and by original bill in the nature of a bill of revivor. Mitf. Eq. Pl. 57, 61." *Carter v. Jennings*, 24 Ohio St. 182.

5. According to Mr. Story, a bill of revivor is a continuance of the original bill to bring some new party before the court when, by death or otherwise, the original party has become incapable of prosecuting or defending a suit and the suit is, as it is in equity technically called, abated or is suspended in its progress. Story's Eq. Pl. (10th ed.), § 20.

"When, in the progress of a suit in equity, the proceedings are suspended from the want of proper parties, it is necessary to file a bill of revivor. A supplemental bill is filed on leave and for matter happening after the filing of the bill, and is designed to supply some

Nature. — A bill of revivor is not the commencement of a new suit,¹ but is merely the continuance of the old one.²

The Purpose of a bill of revivor is to bring some new party before the court when the original party has become incapable of prosecuting or defending the suit.³

b. WHEN PROPER — (1) *General Rule.* — A suit in equity may be continued by a bill of revivor whenever it has abated by death and the interest of the person whose death caused the abatement has been transmitted to that representative which the law gives or ascertains, as an heir at law, executor, or administrator, so that the title could not be disputed, at least in the court of chancery, but the person in whom the title vests is alone to be ascertained.⁴ And this principle has also been held to apply to

defect in the structure of the original bill." *Kennedy v. Georgia State Bank*, 8 How. (U. S.) 610.

Distinguished from Original Bill in Nature of Bill of Revivor. — The difference between an original bill in the nature of a bill of revivor and an original bill in the nature of a supplemental bill is this: Under an original bill in the nature of a bill of revivor, the defendant is absolutely bound by the former proceedings in the cause; but under an original bill in the nature of a supplemental bill, he has a right to avail himself of any new equity or defense which has arisen since the original bill was filed, or which he may have a right to urge against the new party coming into the litigation, but which did not exist against the original complainant. *Fulton v. Greacen*, 44 N. J. Eq. 443.

1. *Clarke v. Mathewson*, 12 Pet. (U. S.) 164.

2. *Marlatt v. Warwick*, 19 N. J. Eq. 446; *Fitzpatrick v. Domingo*, 14 Fed. Rep. 216; *Clarke v. Mathewson*, 12 Pet. (U. S.) 164.

The revivor of a suit in equity by or against the representative of the deceased party is a matter of right and a mere continuation of the original suit. *Fitzpatrick v. Domingo*, 14 Fed. Rep. 216.

Does Not Divest the Court of Jurisdiction. — In *Hone v. Dillon*, 29 Fed. Rep. 465, it was held that a bill of revivor is a mere continuation of the original suit, and where the jurisdiction of the court had completely attached to the controversy it cannot be divested by the death of a nonresident defendant, and his executor has the right to defend the suit without regard to his own citizenship. See also in this connec-

tion *Clarke v. Mathewson*, 12 Pet. (U. S.) 164.

3. *Cooper's Eq. Pl.* 62; *Douglass v. Sherman*, 2 Paige (N. Y.) 361.

The Effect of the Bill is to substitute for the incapacitated party in the proceedings the person to whom his interest is transmitted, and the latter is then equally bound by and has advantage of those proceedings. *Douglass v. Sherman*, 2 Paige (N. Y.) 361.

4. 2 *Daniell's Ch. Pl. and Pr.* (6th Am. ed.) 1507. And see to the same effect the following cases:

Alabama. — *Duval v. McLoskey*, 1 Ala. 708; *Bowie v. Minter*, 2 Ala. 412; *Cullum v. Batre*, 2 Ala. 415.

Arkansas. — *Grace v. Neel*, 41 Ark. 165.

Kentucky. — *Feemster v. Markham*, 2 J. J. Marsh. (Ky.) 303; *Gatewood v. Rucker*, 1 T. B. Mon. (Ky.) 21; *Meek v. Ealy*, 2 J. J. Marsh. (Ky.) 329; *Madison v. Wallace*, 2 J. J. Marsh. (Ky.) 588. *Massachusetts.* — *Putnam v. Putnam*, 4 Pick. (Mass.) 139.

Maryland. — *Glenn v. Smith*, 17 Md. 260; *Hawkins v. Chapman*, 36 Md. 83; *Glenn v. Clapp*, 11 Gill & J. (Md.) 1; *Brogden v. Walker*, 2 Har. & J. (Md.) 285.

Michigan. — *Webster v. Hitchcock*, 11 Mich. 56; *Zoellner v. Zoellner*, 46 Mich. 513.

New Hampshire. — *Boynton v. Boynton*, 21 N. H. 246.

New Jersey. — *Ross v. Hatfield*, 2 N. J. Eq. 363; *Peer v. Cookerow*, 14 N. J. Eq. 361.

New York. — *Douglass v. Sherman*, 2 Paige (N. Y.) 358; *Campbell v. Bowne*, 5 Paige (N. Y.) 34; *Randolph v. Dickerson*, 5 Paige (N. Y.) 517; *Pell v. Elliot*, *Hopk.* (N. Y.) 86; *Pendleton v. Fay*, 3 Paige (N. Y.) 205, note.

the demise of a public corporation.¹ So also if the suit is abated by the marriage of a female plaintiff and no act is done to affect the rights of the party but the marriage, no title can be disputed. The person of the husband is the sole fact to be ascertained, and the suit may be continued by a bill of revivor merely.²

What Suits May Be Revived. — It has been held that a suit brought merely for discovery cannot be revived after answer and discovery.³

Revivor for Costs. — So it has been held that a suit cannot be revived for costs merely unless they are taxed and report thereof

North Carolina. — *Stephenson v. Prescott*, 2 Hayw. (N. Car.) 163.

Ohio. — *Curtis v. Hawn*, 14 Ohio 185.

Rhode Island. — *Manchester v. Mathewson*, 2 R. I. 416.

Tennessee. — *Thompson v. Hill*, 5 Verg. (Tenn.) 418.

If the transmission of the estate is by act of the law, as to the personal representative or heir, or the like, it is strictly a bill of revivor, and unless the defendant shows cause against it within the time fixed an order goes to revive. Where the transmission is by the act of the law, as to a devisee, an original bill in the nature of a revivor is to be filed, and a decree made on that to revive, and it will serve to revive the suit, if the validity of the transmission is established. *Anderson v. McNeal*, 4 Lea (Tenn.) 303, *citing Adams's Equity* 406.

United States Rules of Equity Practice. — By rule 56 of the United States rules of practice for courts of equity it was provided that "whenever a suit in equity shall become abated by the death of either party, or by any other event, the same may be revived by a bill of revivor or a bill in the nature of a bill of revivor, as the circumstances of the case may require, filed by the proper parties entitled to revive the same, which bill may be filed in the clerk's office at any time; and, upon suggestion of the facts, the proper process of subpoena shall, as of course, be issued by the clerk, requiring the proper representatives of the other party to appear and show cause, if any they have, why the cause should not be revived. And if no cause shall be shown at the next rule day which shall occur fourteen days from the time of the service of the same process, the suit shall stand revived, as of course."

Alternative Remedy with Original Bill. — According to some decisions, where

the cause of a suit survives against the representative of the defendant who dies before decree, either a bill of revivor or an original bill may be maintained. *Lyle v. Bradford*, 7 T. B. Mon. (Ky.) 111; *Spencer v. Wray*, 1 Vern. 463; *Anonymous*, 3 Atk. 485.

1. *Hemingway v. Stansell*, 106 U. S. 399, holding that where, pending a suit against a levee board, the legislature abolished the board and devolved its duties and liabilities upon the state treasurer and auditor, the plaintiffs might maintain a bill of revivor against these officers.

2. 2 *Daniell's Ch. Pl. and Pr.* (6th Am. ed.) 1507; *Bowie v. Minter*, 2 Ala. 406; *U. S. Mutual Acc. Assoc. v. Weller*, 30 Fla. 210; *Boynton v. Boynton*, 21 N. H. 246; *Douglass v. Sherman*, 2 Paige (N. Y.) 358; *Campbell v. Bowne*, 5 Paige (N. Y.) 34; *Pendleton v. Fay*, 3 Paige (N. Y.) 205 note; *Harrington v. Becker*, 2 Barb. Ch. (N. Y.) 75; *Manchester v. Mathewson*, 2 R. I. 416; *Northman v. Liverpool, etc., Ins. Co.*, 1 Tenn. Ch. 312; *Durbaine v. Knight*, 1 Vern. 318.

Where a Female Plaintiff in Equity Marries pending the suit, the cause cannot proceed on the mere application of counsel. A bill in equity abates by the marriage of a female plaintiff, and cannot proceed without a bill of revivor. *Boynton v. Boynton*, 21 N. H. 246.

Waiver of Bill. — In *Boog v. Bayley*, R. M. Charl. (Ga.) 190, it was held that the necessity of filing a bill of revivor to make a representative of the deceased complainant party to the suit may be waived by agreement between such representative and the defendant, and under such circumstances the replication may be dispensed with.

3. *Horsburg v. Baker*, 1 Pet. (U. S.) 232, holding that since the object had been obtained the plaintiff had no motive for reviving.

is made in the lifetime of the party.¹ This rule, however, has been looked on with disfavor,² and has even been expressly rejected.³

(2) *Concurrent Remedy with Statutory Method of Revivor.* — Although the statutes of many if not most of the states prescribe a summary method of reviving suits, it would seem that the right to resort to a bill of revivor is not thereby taken away.⁴ The two remedies are, it seems, concurrent.⁵

Limitation of Statutory Remedy. — In some jurisdictions it would seem that the statutory provisions authorizing the revival of a suit by a motion or petition extend only to those cases where by the former practice of the court a proceeding could be revived and continued by a simple bill of revivor.⁶

1. *Travis v. Waters*, 1 Johns. Ch. (N. Y.) 85; *Johnson v. Thomas*, 2 Paige (N. Y.) 377; *Jenour v. Jenour*, 10 Ves. Jr. 562; *Dodson v. Juda*, 10 Ves. Jr. 31.

If the Party Dies Before Costs Are Decreed they are lost, the general rule being that the costs die with the person; but if costs have been decreed and the party dies before they are taxed, they may be recovered by his personal representatives, on a bill of revivor. To obtain the costs, however, the executors or personal representatives must be before the court expressly in their character as such; for if the bill of revivor states the plaintiffs to be the heirs and devisees of the party deceased, though some of them, in fact, are executors, yet they can be known only in their former character, and not as executors. *Travis v. Waters*, 1 Johns. Ch. (N. Y.) 85.

2. *Johnson v. Peck*, 2 Ves. 465; *Morgan v. Scudamore*, 3 Ves. Jr. 195; *Glenham v. Stutwell*, 1 Dick. 14.

3. *Owings's Case*, 1 Bland (Md.) 409, wherein the court said: "It is said that in England a suit cannot be revived merely to recover costs not taxed. This, however, has been regarded there as a very odd rule. 2 Mont. Dig. 524. And having met with no instance of its having been acted upon by this court, I feel no hesitation in rejecting a rule which has been so often condemned, and which appears to be now reluctantly tolerated by the tribunal in which it originated." And see *Ridgely v. Bond*, 18 Md. 433.

4. 2 *Barbour's Ch. Pr.* 34; *Hall v. Hall*, 1 Bland (Md.) 130; *Floyd v. Ritter*, 65 Ala. 501; *Pells v. Coon*, *Hopk.* (N. Y.) 450; *Reid v. Stuart*, 20 W. Va. 382.

5. *Floyd v. Ritter*, 65 Ala. 501; *Hall v. Hall*, 1 Bland (Md.) 130; *Benson v. Wolverton*, 16 N. J. Eq. 110; *Carter v. Jennings*, 24 Ohio St. 182; *Foster v. Burem*, 1 Heisk. (Tenn.) 783; *Reid v. Stuart*, 20 W. Va. 382; *Bock v. Bock*, 24 W. Va. 586.

In *Reid v. Stuart*, 20 W. Va. 382, it was held that though in chancery causes may be reviewed by motion or scire facias, the appellate court would not regard as error for which the judgment should be reversed the overruling of the demurrer to a bill of revivor and the revival of the cause in that manner by the court below, it being really unimportant in which mode the cause is revived if the parties asking the revival had a right thereto.

In *Floyd v. Ritter*, 65 Ala. 501, it was held that under the chancery practice which formerly prevailed a bill of revivor was necessary to bring in as a party one upon whom the interest of the deceased party devolved by operation of law pending the suit, and that that practice might still be pursued or might be required by the chancellor.

6. *Douglass v. Sherman*, 2 Paige (N. Y.) 358; *Washington Ins. Co. v. Slee*, 2 Paige (N. Y.) 365; *Ross v. Hatfield*, 2 N. J. Eq. 363. In the latter case the court said: "The Revised Statutes of the state of New York have the same provisions in substance on this subject as ours, and have received the same construction which I have given them. *Douglass v. Sherman*, 2 Paige (N. Y.) 358. These provisions are held to apply only to those cases where by former practice proceedings could be revived and continued by a simple bill of revivor. I refer also, on this subject, to the cases of *Leggett v. Dubois*, 2 Paige

c. **PERMISSION OF COURT TO FILE.** — It would seem that a bill of revivor, when necessary, may be filed of course without any order of the court granting permission.¹

d. **WHO MAY FILE** — (1) *Where Suit Abates by Death* — (a) **General Rule.** — Where a suit in equity has abated by reason of the death of the complainant, the bill of revivor may be filed only by the legal representative of such complainant according to the subject-matter.² Thus if the subject of the suit is personalty, the bill of revivor should be filed by the executors or administrators of the original complainant.³ If, however, the subject of the suit is realty, his heirs alone are the proper persons to file the bill of revivor.⁴

Unwilling Parties Plaintiff Made Defendants. — Where there are several plaintiffs a part only may revive, but all should be made parties;⁵ and if some of the plaintiffs entitled to a bill of revivor refuse to join in it, they may be made parties defendant.⁶

(N. Y.) 212, and to *Wilkinson v. Parish*, 3 Paige (N. Y.) 653."

1. *Pendleton v. Fay*, 3 Paige (N. Y.) 204; *Crook v. Turpin*, 10 B. Mon. (Ky.) 245; *Webster v. Hitchcock*, 11 Mich. 56. See also *Lyle v. Bradford*, 7 T. B. Mon. (Ky.) 111; *Carter v. Jennings*, 24 Ohio St. 182.

In *Webster v. Hitchcock*, 11 Mich. 56, it was held that when a complainant in equity dies, a bill to revive the action by substituting his representative as complainant may be filed without leave of court.

2. *Hawkins v. Chapman*, 36 Md. 83; *Russell v. Craig*, 3 Bibb (Ky.) 377.

3. *Batre v. Auze*, 5 Ala. 173; *Meek v. Ealy*, 2 J. J. Marsh. (Ky.) 329; *Kincart v. Sanders*, 2 A. K. Marsh. (Ky.) 26; *Hawkins v. Chapman*, 36 Md. 83; *Glenn v. Smith*, 17 Md. 260; *Putnam v. Putnam*, 4 Pick. (Mass.) 139; *Miles v. Miles*, 32 N. H. 147.

4. *Webb v. Janney*, 9 App. Cas. (D. C.) 41; *Russell v. Craig*, 3 Bibb (Ky.) 377; *Kincart v. Sanders*, 2 A. K. Marsh. (Ky.) 26; *Jameson v. Smith*, 4 Bibb (Ky.) 307; *Glenn v. Smith*, 17 Md. 260; *Hawkins v. Chapman*, 36 Md. 83; *Lanning v. Cole*, 6 N. J. Eq. 102.

"A revivor is but a continuation of the cause, and can only be had in the name of the representative of him by whose death it abated; and as the heir is as to the real estate the legal representative of a man after his death, the suit can only be revived in his name when land is the subject of litigation. Thus it is held that an assignee or purchaser shall not have a bill of revivor for want of privity. *Dunn v. Allen*, 1

Vern. 426. So a devisee, being but a purchaser, and not representing the devisor, cannot have a bill of revivor. *Hinde's Prac.* 49, 69." *Russell v. Craig*, 3 Bibb (Ky.) 377.

Devisee or Alienee May Not Maintain. — In *Peer v. Cookerow*, 14 N. J. Eq. 361, the court held that "a devisee or alienee cannot bring a bill of revivor for want of privity; and the reason is that the heir or executor may have a right to contest such disposition, and therefore he must bring his original bill, and make the heir or executor a party." *Citing Backhouse v. Middleton*, 1 Ch. Cas. 174, 1 Eq. Cas. Abr. 2, par. 1.

In *Bowie v. Minter*, 2 Ala. 406, it was held that where a suit in equity abates by death or marriage the proper means of restoring vitality to the cause is by bill of revivor by or against the person who comes in in the same right with the original party. See also *Cullum v. Batre*, 2 Ala. 415.

Effect of Improper Joinder of Personal Representatives and Heirs. — In *Batre v. Auze*, 5 Ala. 173, it was held that after the death of a complainant, in a bill by a vendor of land to enforce his lien his personal representatives, and not his heirs, are the proper persons to revive the bill, but if both join the irregularity cannot be first raised on error.

5. *Buchanan v. Malins*, 11 Beav. 52.

6. *Finch v. Winchelsea*, 1 Eq. Cas. Abr. 2, par. 7; *Nicoll v. Roosevelt*, 3 Johns. Ch. (N. Y.) 60; *Fallows v. Williamson*, 11 Ves. Jr. 306.

When Averment of Refusal Unnecessary. — In *Randolph v. Dickerson*, 5 Paige

Partial Revivor. — A suit which has entirely abated may be revived as to a part only of the matter in litigation, or as to a part by one bill and as to the other part by another.¹ Thus, for instance, if the rights of a plaintiff in a suit have become vested upon his death partly in his real and partly in his personal representatives, the former may revive the suit so far as concerns his title, and the personal representatives may revive so far as his demand extends.²

(b) **Revivor by Defendant** — *aa. GENERAL RULE.* — In the absence of statute to the contrary the rule would seem to be that in no case can the defendant, or those claiming under him, revive a suit by bill of revivor before decree,³ on the ground that a defendant, in

(N. Y.) 517, it was held that where the complainant dies, the bill being to set aside a conveyance made by him on the ground of fraud in obtaining it, one of his heirs who is the wife of the defendant may be joined with him as a defendant in a bill of revivor without averring that she refused to be a complainant.

1. 2 Daniell's Ch. Pl. and Pr. (6th Am. ed.) 1541.

2. Mitf. Eq. Pl. 7980; 2 Daniell's Ch. Pl. and Pr. (6th Am. ed.) 1541; *Ferrers v. Cherry*, 1 Eq. Cas. Abr. 4, par. 11. See also *Martin v. Tyree*, 41 Ark. 314; *Grace v. Neel*, 41 Ark. 165.

Where a Decree Has Been Passed Affecting Both Real and Personal Estate, and the case abates by the death of either party, for the purpose of having the decree entirely executed it may be revived by or against the heir as well as the personal representative of the deceased; but it may be partially revived by or against either of them. *Owings's Case*, 1 Bland (Md.) 409. The court said: "Where a decree has been passed * * * affecting as well the real as the personal estate of the parties, and the suit abates by the death of either of them, as the realty passes to the heirs, and the personalty to the administrator or executor of the deceased, in order to embrace the whole subject of the decree, it should be revived by or against both the heirs and personal representatives of the deceased party. But such a comprehensive revival of the suit is not in all cases indispensably necessary, as each class of the representatives of the deceased may revive and prosecute the suit to the extent of their respective interests, and no further." Citing *Ferrers v. Cherry*, 1 Eq. Cas. Abr. 4, par. 11.

No Revival as to Part of Proceedings. — Though a suit may be revived as to part of the matter in litigation, it cannot be revived as to part of the proceedings, and a revivor cannot be made to operate from a particular period of the cause only, but the whole proceedings, bill, answer, and orders made in the cause, must stand revived, since the revivor is, as has been seen, but a continuation of the same suit, and it cannot be such a continuation unless it proceeds from the point where the other left off. 2 Daniell's Ch. Pl. and Pr. (6th Am. ed.) 1542.

3. *Souillard v. Dias*, 9 Paige (N. Y.) 393; *McDermott v. McGown*, 4 Edw. (N. Y.) 592; *Benson v. Wolverton*, 16 N. J. Eq. 110; *Griffith v. Bronaugh*, 1 Bland (Md.) 547; *Reid v. Stuart*, 20 W. Va. 382.

The rule, irrespective of the statute, is that where a sole plaintiff or defendant dies before decree, the suit cannot be revived at the instance of the defendant or his legal representative. *Benson v. Wolverton*, 16 N. J. Eq. 110.

"The general rule is strict, that before a decree or a decretal order by which a defendant becomes entitled to an interest in the further continuance of the suit, neither he nor his representatives can sustain a bill of revivor. And it was formerly held that he could not do so even after decree, except in the single case of a decree to account. *Anonymous*, 3 Atk. 692. It is now established, however, that after a decree the suit may be revived at the instance of a defendant, or his representatives, if the complainants, or those who represent them, neglect to revive it. *Williams v. Cooke*, 10 Ves. Jr. 407; *Horwood v. Schmedes*, 12 Ves. Jr. 316; *Gordon v. Bertram*, 1 Meriv. 154; *Finch*

order to revive, must have a vested interest in the further continuance of the suit under a decree or decretal order.¹

bb. AFTER DECREE. — After a decree has been passed, the suit may be revived by a defendant or the representative of a deceased defendant² where the complainant or his representatives neglect to

v. Winchelsea, 1 Eq. Cas. Abr. 2, par. 7. The Revised Statutes have given some rights to the defendants, and to the survivor of several defendants, in the revival of suits, which they did not before possess. See 2 Rev. Stat. 185, §§ 118 to 131. But none of those provisions appear to extend to the case of an abatement by the death of a sole defendant, or of all the defendants in the suit, before he or they have obtained an interest in the further prosecution of such suit, by a decree, or by a decretal order under which some right has been acquired." *Souillard v. Dias*, 9 Paige (N. Y.) 393.

1. *McDermott v. McGown*, 4 Edw. (N. Y.) 592, wherein the court said: "The chancellor holds the rule to be a strict one that before a decree or decretal order is made by which a defendant becomes entitled to an interest in the further continuance of the suit, neither he nor his representatives can sustain a bill of revivor." Citing *Souillard v. Dias*, 9 Paige (N. Y.) 394.

Remedy of Defendants in Case of Abatement Before Decree. — Where a suit abates by the death of some of the defendants, before decree, the proper course for the survivors, if they wish to speed the cause, is to move for an order that the complainant revive the suit within such time as shall be directed by the court, or that his bill be dismissed with costs. *Harrington v. Becker*, 2 Barb. Ch. (N. Y.) 75.

After a report in favor of the title in a specific performance suit, the defendant died. Upon a motion by his executors and devisees in trust, the court ordered that if the plaintiff did not revive within six weeks, the bill should stand dismissed. *Norton v. White*, 2 De G. M. & G. 678.

Defendant Entitled to Order on Plaintiffs to Revive. — Where a suit abates by the death of one of several plaintiffs, the defendant is entitled to an order upon the surviving plaintiffs that they revive the suit within a limited time, or that the bill be dismissed. And if the plaintiffs do not revive, or proceed in the suit under the statute, within the time limited, they will be precluded

from further proceedings, as well under the statute as by bill of revivor. *Pells v. Coon, Hopk.* (N. Y.) 450.

Where some of several complainants die, and the cause of action does not survive, but continues as to the survivors, the latter cannot be compelled to revive the suit against the representatives of the deceased complainants. They have a right to proceed with their suit. The bill may be dismissed for want of prosecution, but not for a neglect to revive it. It is the privilege of a defendant in such a case to have an order requiring such representatives to show cause why the suit should not stand revived in their names, or that the bill be dismissed so far as their interests are concerned. *Williamson v. Moore*, 5 Sandf. (N. Y.) 647.

2. *Williams v. Cooke*, 10 Ves. Jr. 406; *Devaynes v. Morris*, 1 Myl. & C. 213; *McDermott v. McGown*, 4 Edw. (N. Y.) 592; *Glenn v. Clapp*, 11 Gill & J. (Md.) 1.

Object of Revivor by Defendant. — "The object of revivor by a defendant is merely to substantiate the suit and to bring before the court the parties necessary to see to the execution of the decree, and to be the objects of its operation, rather than to litigate the claims made by the several parties in the original pleadings, except so far as they remain undecided. Parties to the original decree who can neither execute the decree nor be the objects of its operation are not necessary or proper parties to the bill of revivor." *Daniell's Ch. Pl. and Pr.* (6th Am. ed.) 1540. See also *Peer v. Cookerow*, 13 N. J. Eq. 136.

Bill of Revivor So Considered though Styled a Petition. — In *Reid v. Stuart*, 20 W. Va. 382, it was held that if a defendant in a proper case files what he styles a petition, but which has in it all the allegations which it would be necessary to make in a bill of revivor, and prays that the cause may be revived in the names of the proper representatives of the deceased plaintiff, the court will regard this as a bill of revivor.

revive it, but only after their default.¹

In What Kind of Suits. — It was originally, it seems, laid down that a defendant could revive only after a decree to account.² In modern practice, however, the principle has been extended to every case in which the defendant has an interest and can derive a benefit from further proceedings.³

Where Both Parties Have a Right to Revive, if the complainant does not revive the suit within a reasonable time the defendant may revive.⁴

Interest in Prosecution of Suit Essential. — It is essential, however, in

1. *Pell v. Elliot*, Hopk. (N. Y.) 86.

2. *Peer v. Cookerow*, 13 N. J. Eq. 136; *Thompson v. Hill*, 5 Yerg. (Tenn.) 418; *Anonymous*, 3 Atk. 691; *Stowell v. Cole*, 2 Vern. 219, 296.

When, after a decree for an account, the suit has become abated, a defendant who is interested in the account may file a bill to revive the suit and prosecute the decree, although he could not have filed the original bill. *Devaynes v. Morris*, 1 Myl. & C. 213.

3. *Peer v. Cookerow*, 13 N. J. Eq. 136, wherein the court said: "After a decree, the defendants, as well as the plaintiffs, are entitled to a bill of revivor; and although originally the right appears to have been restricted to those cases in which the defendant had, or was supposed to have, a beneficial interest in the decree, yet it is now well settled that if the defendant or his representative have an interest in the further prosecution of the suit, the suit may be revived at his instance. 1 Mitford's Pl. by Jeremy 79, and note *g*; *Stowell v. Cole*, 2 Vern. 219 (Raithby's ed., note 1); *Horwood v. Schmedes*, 12 Ves. Jr. 311. 'The good sense is when the defendant can derive a benefit from the further proceeding, he may revive, unless there is a general rule against it.' *Williams v. Cooke*, 10 Ves. Jr. 406. A defendant's right of appeal cannot be defeated by the complainant's death after the decree. He has the same interest to revive after the decree that the complainant had before, viz., the maintenance of his just rights. It was at one time deemed necessary, where the suit abated after the appeal was taken, to revive the suit in the court below; the practice now is for the appellate tribunal to make the order. 1 Daniell's Ch. Pr. 1648." And see *Ridgely v. Bond*, 18 Md. 433; *Anderson v. White*, 10 Paige (N. Y.) 575; *Pendleton v. Fay*, 3 Paige (N. Y.) 205, note; *Thompson v.*

Hill, 5 Yerg. (Tenn.) 418; *Reid v. Stuart*, 20 W. Va. 384.

A defendant to the original bill is entitled to revive the decree, where it has abated by the death and marriage of some of the parties, in order that his costs and charges may be allowed; a defendant or his representative may revive a suit in every case where he may derive a benefit from further proceedings. *Ridgely v. Bond*, 18 Md. 433. But see as to revivor of suit for costs, *ante*, p. 1099.

As a general rule the plaintiff in a chancery cause can abandon his cause at his pleasure; and if, having this right, he does so, his representatives, heirs, or administrators, or both, to whom his interest survives, may revive the cause either by bill of revivor or by statutory modes; and they alone and not the defendants have a right in such case to have the cause revived. But when the defendants have acquired such an interest in the cause that the plaintiff would not be allowed to dismiss it at his pleasure, as where there has been an order of reference in the cause, such that, if a balance should be found in favor of the defendant, he would be entitled to a decree against the plaintiff, and in that stage of the cause the plaintiff dies, the defendant will have a right to revive by bill of revivor or by statutory modes. *Reid v. Stuart*, 20 W. Va. 382.

4. *Pendleton v. Fay*, 3 Paige (N. Y.) 205, note; *Anderson v. White*, 10 Paige (N. Y.) 575; *Quackenbush v. Leonard*, 10 Paige (N. Y.) 131; *Leggett v. Du-bois*, 2 Paige (N. Y.) 211.

Where the situation of a suit is such that the defendant, as well as the complainant, has the right to have it revived, the court will direct that if the complainant does not procure it to be revived within a specified time, the defendant shall be at liberty to file a bill of revivor. *Pendleton v. Fay*, 3 Paige

order that a defendant may revive, that he shall have an interest in the further prosecution of the suit,¹ and he cannot revive a suit where his only object is to dissolve an injunction.²

Revivor for Purpose of Appeal. — It has been held that a defendant having a beneficial interest may exhibit a bill of revivor for the sole purpose of appealing from a decree.³

(2) *Where Suit Abates by Marriage of Female Plaintiff.* — Where a suit in equity abates by the marriage of a female plaintiff, a bill of revivor may, it seems, be filed by the husband,⁴ or

(N. Y.) 205, note; *Quackenbush v. Leonard*, 10 Paige (N. Y.) 131.

Representatives of Complainant Have First Right. — In *Pell v. Elliot*, Hopk. (N. Y.) 86, the suit abated by the death of the complainant after a decretal order establishing a right in favor of one of the defendants. That defendant filed a bill of revivor within twenty days after the abatement, and before the executrix of the former complainant appeared to have proved the will. It was held that the representatives of the complainant had the first right to revive, and a reasonable time for that purpose was allowed.

1. *Horwood v. Schmedes*, 12 Ves. Jr. 311; *Peer v. Cookerow*, 13 N. J. Eq. 136; *Anderson v. White*, 10 Paige (N. Y.) 575.

Interest Entitling Defendant to Revive. — Where the defendant in an equity suit has acquired such an interest therein as to deprive the plaintiff of the right to dismiss it at his pleasure, as where, for instance, there has been an order of reference under which the defendant might be entitled to a decree against the plaintiff for such balance upon an accounting as might be found to be due from the plaintiff, there, and in such case, if the plaintiff dies, the defendant is entitled to revive the suit; and the form of the proceeding for this purpose is immaterial, whether by bill of revivor, by motion, by scire facias, or by petition. *Reid v. Stuart*, 20 W. Va. 382.

2. *Horwood v. Schmedes*, 12 Ves. Jr. 311; *Thompson v. Hill*, 5 Yerg. (Tenn.) 418, wherein the court said: "Can a suit in chancery be revived by a defendant? The rule is that where a representative has an interest in the further prosecution of the suit, he may revive, otherwise he cannot. *Williams v. Cooke*, 10 Ves. Jr. 406; *Horwood v. Schmedes*, 12 Ves. Jr. 317. Lord Hardwicke in *Anonymous*, 3 Atk. 691, says that the defendant can only revive in

cases of account. See *Stowell v. Cole*, 2 Vern. 219, 296. What interest have the devisees of Green Hill, that Thompson should prosecute this suit? None, but that the injunction should be dissolved, and they have the benefit of the judgment at law; and this is not such interest as will authorize a bill of revivor. *Horwood v. Schmedes*, 12 Ves. Jr. 311. Nor has this court the power to compel Thompson to revive. He may file a new bill if he choose, and never revive. *Spencer v. Wray*, 1 Vern. 463; *Anonymous*, 3 Atk. 486. That the cause cannot be revived upon motion, when the parties applying have the power to revive, is the settled rule of this court, and ought not to be departed from."

3. *Peer v. Cookerow*, 13 N. J. Eq. 136.

Where there is a decree against a defendant, and the suit then abates by the death of the adverse party, the defendant cannot appeal from such decree until the suit is revived. Such defendant has therefore a right to revive the suit, in case the adverse party neglects to revive, for the purpose of enabling him to appeal, if he has no other remedy and an appeal will lie. *Anderson v. White*, 10 Paige (N. Y.) 575.

4. *Bowie v. Minter*, 2 Ala. 406, wherein the court said: "If, in the progress of the suit, a *feme* plaintiff marry, or any other event should occur by means of which the original suit falls to the ground, in consequence of there being no longer before the court any person by or against whom the suit can be continued, the court will, in such case, permit a bill to be filed by or against the person who comes in in the same right as the original party, and whose title cannot be controverted, praying that the suit and proceedings upon it may be restored to the same plight and condition, as for or against the new party, in which it stood with respect to the original party through

by the husband and wife jointly.¹

e. PARTIES DEFENDANT — (1) *General Rule*. — In the case of the death of a party to a suit in equity, the bill of revivor will lie only against his proper representatives, who are, if the subject of the suit is personalty, his executors, if realty, his heirs.²

(2) *Where Suit Abates by Death or Marriage of Complainant*. — Where a suit has abated by the death or marriage of a sole complainant, and is continued by the original complainant's representatives, or by husband and wife, all the defendants to the original bill should be parties.³ The same is true if the abatement arose through the death or marriage of one of several plaintiffs, and the suit was continued by the surviving plaintiffs and the representatives of the deceased plaintiff, or by the husband and wife in conjunction with the other plaintiffs.⁴ If the suit be revived by surviving complainants alone, or by representatives of the deceased complainant alone, the representatives of the deceased complainant in the one case, or the surviving complainants in the other, should be made defendants to the bill of revivor, together with the original defendants.⁵

(3) *Where Suit Abates by Death of Defendant*. — Where a suit abates by the death of one of several defendants, it has been held that it is not necessary, in a simple bill of revivor by a complainant to revive the suit against the representatives of the decedent, to make the surviving defendants parties to such bill.⁶

f. LIMITATION OF TIME FOR REVIVOR. — According to the decisions it would seem that the statute of limitations applies to

whom the abatement was caused. Such bill is termed a bill of revivor, and can only be had by or against the heir, executor, or administrator of a deceased party, or the husband of a *feme* plaintiff; for they alone come in by a title that cannot be litigated. Lube's Eq. Pl. 140."

1. *Boyington v. Boyington*, 21 N. H. 246.

2. See *supra*, I. 3. *d. Who May File*. And see *Frowner v. Johnson*, 20 Ala. 477; *Bettes v. Dana*, 2 Sumn. (U. S.) 383.

Partial Revivor. — In *Andrews v. Scotton*, 2 Bland (Md.) 629, it was held that a suit which has abated as to both real and personal estate by the death of a party may be revived as against either, leaving the abatement to stand as to the other.

3. **Omission of Defendant Who Has Not Answered**. — In *Oxburgh v. Fingham*, 1 Vern. 308, it is held that if a defendant who has not answered is omitted it will not be a ground of demurrer.

4. 2 *Daniell's Ch. Pl. and Pr.* (6th

Am. ed.) 1540; *Cave v. Cork*, 2 Y. & Ch. 130.

5. 2 *Daniell's Ch. Pl. and Pr.* (6th Am. ed.) 1541; *Fallowes v. Williamson*, 11 Ves. Jr. 306.

Tenants in Common. — Thus, where a suit has abated by the death of one of the plaintiffs, tenants in common, and a bill of revivor is filed by his representatives, the surviving tenant in common, if not a coplaintiff, must be made a defendant. *Fallowes v. Williamson*, 11 Ves. Jr. 306. See also *supra*, p. 1101.

6. *Farmers' L. & T. Co. v. Seymour*, 9 Paige (N. Y.) 538. See also *Nicoll v. Roosevelt*, 3 Johns. Ch. (N. Y.) 60; *Bettes v. Dana*, 2 Sumn. (U. S.) 383.

The Same Principle Is Also Applicable to a Supplemental Bill in the Nature of a Bill of Revivor to revive or continue the suit against the devisee or assignee of one of the original defendants. *Farmers' L. & T. Co. v. Seymour*, 9 Paige (N. Y.) 538. See also *infra*, I. 4. *Original Bills in the Nature of Bills of Revivor*.

suits before decree,¹ but that after a decree to account it rests within the discretion of the court to allow a revivor,² and in cases of gross negligence and laches the court may refuse to allow the suit to be revived.³

g. REQUISITES OF BILL — (1) *Must Pursue Original Bill.* — A bill of revivor to revive a suit in equity must pursue the original bill, and if there is any variance between them the defendant may, it seems, demur.⁴

(2) *Statement of Original Bill, Proceedings Thereon, and Abatement.* — A bill of revivor should state the original bill, to such an extent, at least, as to show that the plaintiff is entitled to revive; otherwise it will be demurrable.⁵ It should state the parties to the original bill, its object or prayer, the several proceedings thereon, and the abatement.⁶

(3) *Title of Plaintiff to Revive.* — A bill of revivor should show plainly the title of the complainant to revive, and also that the defendants are the proper persons against whom the suit should be revived.⁷ Thus, for instance, where a bill of revivor is filed by an executor he must show the fact that he has taken probate of the decedent's will,⁸ or the omission will be ground for

1. Hollingshead's Case, 1 P. Wms. 742; Perry v. Jenkins, 1 Myl. & C. 118; Egremont v. Hamilton, 1 Ball. & B. 516; Bland v. Davison, 21 Beav. 312.

2. Hollingshead's Case, 1 P. Wms. 742; Alsop v. Bell, 24 Beav. 451.

On a bill in equity being abated by death, the executor or administrator is barred by statute of limitation, if he does not revive within six years; but not after a decree to account. Hollingshead's Case, 1 P. Wms. 742.

3. Alsop v. Bell, 24 Beav. 451.

4. 2 Barbour's Ch. Pr. 46.

5. Phelps v. Sproule, 4 Sim. 318.

By Rule 58 of the United States Supreme Court it is not necessary in any bill of revivor or supplemental bill to set forth any of the statements in the original suit unless the special circumstances of the case may require it.

6. Mitford's Eq. Pl., c. 1, § 3; 2 Barbour's Ch. Pr. 46.

7. Phelps v. Sproule, 4 Sim. 318; Humphreys v. Ingledon, 1 P. Wms. 752; Vigers v. Audley, 9 Sim. 75; Douglass v. Sherman, 2 Paige (N. Y.) 358. See also Bondurant v. Sibley, 37 Ala. 565.

"A bill of revivor, then, must state the original bill, or rather who were the plaintiffs and defendants to it, and what its prayer or object was, and the several proceedings thereon, and the

abatement. It is, then, necessary to state so much new matter, and no more, as is requisite to show how the plaintiff becomes entitled to revive, and charge that the cause ought to be revived, and stand in the same condition, with respect to the parties to the original bill, as at the time the abatement happened; and it must pray that the suit may be revived accordingly. It may be likewise necessary to pray that the defendant may answer the bill of revivor, as in the case of an admission of assets or account of the personal estate being requisite from the representative of a deceased party. In this latter case, if the defendant does admit assets, the cause may proceed against him upon an order of revivor merely; but if he does not make that admission, the cause must be heard for the purpose of obtaining the necessary accounts of the estate of the deceased party, to answer the demands made against it by the suit; and the prayer of the bill, therefore, in such case, usually is not only that the suit may be revived, but also that in case the defendant shall not admit assets to answer the purposes of the suit, those accounts may be taken; and so far the bill is in the nature of an original bill." Cooper's Eq. Pl. 70.

8. Douglass v. Sherman, 2 Paige (N. Y.) 358.

demurrer.¹

(4) *Charge that Suit Should Be Revived.* — The bill should also charge that the cause ought to be revived and ought to stand in the same condition as regards the parties thereto as with respect to the parties to the original bill at the time when the suit was abated.²

(5) *Prayers — For Revivor.* — The bill should pray that the suit may be revived or that the defendant show cause why it should not be revived.³

Prayer for Answer to Bill of Revivor. — Under some circumstances it may be proper, on a simple bill of revivor, that the bill should pray that the defendant may answer it.⁴

Prayer for Answer to Original Bill. — So, under certain circumstances, it has been held that a bill of revivor should pray that the person against whom it seeks to revive the suit may answer the original bill.⁵

Prayer for Subpœna. — A bill of revivor, if merely to revive the suit, should pray for a subpœna to revive; if requiring an answer, a subpœna to revive an answer should be prayed.⁶

(6) *Signature.* — As in the case of other bills, a bill of revivor should be signed by the counsel.⁷

h. SUBPœNA — Necessity For. — If the plaintiff to the original bill

1. *Humphreys v. Ingledon*, 1 P. Wms. 752; 2 Barbour's Ch. Pr. 47.

Sufficient Averment of Heirship. — Under the practice existing prior to the adoption of the code, an averment in a bill of revivor that the complainants therein are the heirs at law of B. R. G., deceased, intestate, to whom the real estate described in the original bill filed by him descended by the laws of descent, is a sufficiently full allegation of heirship. *Gillett v. Robbins*, 12 Wis. 319.

Effect of Failure to Show Interest of Defendant. — The want of appropriate allegations in a bill of revivor, showing the interest in the litigation of a party against whom process is prayed, and that he be made a defendant, does not prevent him from becoming a party. *Bondurant v. Sibley*, 37 Ala. 565.

2. *Mitford's Pl.* 76; 2 Barbour's Ch. Pr. 47.

3. *Cooper's Eq. Pl.* 70; *Mitford's Pl.* 76; 2 Barbour's Ch. Pr. 47.

4. *Mitford's Pl.* 76; *Brownlow v. Chandos*, Vern. & S. 109; *Douglass v. Sherman*, 2 Paige (N. Y.) 358. As, for instance, in the case of an executor or administrator of a deceased defendant to ascertain whether he has assets to pay the complainant's demand.

Douglass v. Sherman, 2 Paige (N. Y.) 358.

5. "If a defendant to an original bill dies before putting in an answer, or after an answer to which exceptions have been taken, or after an amendment of the bill to which no answer has been given, the bill of revivor, though requiring in itself no answer, must pray that the person against whom it seeks to revive the suit may answer the original bill, or so much of it as the exceptions taken to the answer of the former defendant extend to, or the amendment remaining unanswered." *Cooper's Eq. Pl.* 70.

Effect of Demurrer on Bill of Revivor. — If, after a demurrer to a bill has been put in, the suit becomes abated, the bill filed to revive it must be limited to that object; if it prays any further or other relief, a demurrer lies to the whole bill, and not to that part only which relates to such additional relief. *Phelps v. Sproule*, 4 Sim. 319; *Bampton v. Birchall*, 1 Phil. 568. See also *Andrews v. Lockwood*, 2 Phil. 398; *Byrne v. Byrne*, Flan. & Kel. 446.

6. 3 *Daniell's Ch. Pl. and Pr.* (2d Am. ed.) 1707.

7. See article *BILLS IN EQUITY*, vol. 3, p. 370.

does not voluntarily appear to a bill of revivor, the complainant should proceed by subpoena to obtain his appearance.¹ It is erroneous to revive a cause and proceed to a decree where process has not been served,² unless there has been a waiver by the defendants of all objections to the manner of reviving the suit.³

Service. — A subpoena upon a bill of revivor is to be served in the same manner as an ordinary subpoena.⁴

1. *Lawrence v. Bolton*, 3 Paige (N. Y.) 294; *Stout v. Higbee*, 4 J. J. Marsh. (Ky.) 633; *Sweets v. Biggs*, 5 Litt. (Ky.) 17; *Lewis v. Outlaw*, 1 Overt. (Tenn.) 140.

2. *Sweets v. Biggs*, 5 Litt. (Ky.) 17; *Barnes v. Smith*, 5 J. J. Marsh. (Ky.) 311.

When a defendant in a suit in equity was never served with process and did not appear in the suit, a bill of revivor against his administrator cannot be maintained. *U. S. v. Fields*, 4 Blatchf. (U. S.) 326.

In *Shields v. Craig*, 6 T. B. Mon. (Ky.) 373, it was held that where, in a suit in relation to personal estate claimed by joint heirs, one of them dies intestate and childless, the revivor can be only by bill, and process must be executed before the order of revivor. The court said: "We have no statutory provision that authorizes the revival of a chancery suit by order of court, without bill of revivor in the name of the representatives of the complainant who dies after the suit is commenced; and according to the usual and settled practice in chancery, to authorize a revival of the suit after the death of a complainant it is not only necessary that his representatives who desire to revive the suit should file a bill of revivor, but after the bill is filed by them process should issue thereon and be executed in the same manner as process on an original bill."

3. *Hall v. Johnston*, 5 J. J. Marsh. (Ky.) 284.

4. See article SERVICE OF PROCESS.

Service on Solicitor. — Service of a subpoena on the solicitor of the party in the original cause is insufficient. *Brown v. Lee*, 2 Dick. 545; *Lee v. Warner*, 2 Dick. 546.

Service by Publication. — In *Duguid v. Patterson*, 4 Hen. & M. (Va.) 445, it was held that where a suit abates by the death of an absent defendant, it must be revived against his representatives by publication, and an order on such case, when his representatives are

not before the court, will be set aside. The court said: "When a suit abates against a resident party, it cannot be revived unless there is an appearance for him, or process returned executed, and then the order is made, and not before; and so with respect to a non-resident party, on whom process cannot be served, in lieu of which an order of publication is made for two months in a public newspaper; and then, and not before, the suit should be revived; and then, and not before, it should be proceeded in."

In *Yates v. Payne*, 4 Hen. & M. (Va.) 412, it was held that in case of the death of the plaintiff, where there are absent and home defendants, there must be process of revival against the absent as well as the home defendants, and publication of notice thereupon. In this case it was said: "There has been no instance of an order of publication against an absent defendant without original process, and the practice has always been to issue process to revive as well against the absent as home defendants, and then to make publication, in order to a revival of the suit; and so this case was revived accordingly." See also *Foster v. Burem*, 1 Heisk. (Tenn.) 783, where the court said: "Before the statutory mode of reviving causes in the Court of Chancery by scire facias came in use, the remedy was by bill of revivor, or in the nature of a bill of revivor; and we can see no reason why such a bill cannot be filed in this court when, by reason of the parties being nonresidents, the writ of scire facias cannot be served. The statute authorizing publication in lieu of personal service of process, in certain specified cases, we think is applicable to bills of revivor, and the difficulty of nonresidence may be thereby obviated. Such appears to be the practice in the courts of New York where the parties against whom a revivor is necessary reside beyond the reach of the process of this court. The mode of reviving a cause in the

i. **QUESTIONS RAISED BY BILL.** — Upon a bill of revivor the sole questions before the court are the competency of the parties and the correctness of the frame of the bill to revive.¹ General objections to the original bill grounded on its not showing a proper case for the interference of a court of equity should be reserved until after the revivor of the bill.²

j. **ORDER TO REVIVE — Necessity For.** — Wherever a suit in equity abates, whether the abatement requires merely a bill of revivor or a revivor and supplement, the suit must be revived by an order.³ It is not, in general, regular to wait until the hearing and then revive the suit by decree.⁴

Manner of Preventing Order. — If a defendant desires to show cause against an order to revive, he must either plead or demur to the bill,⁵ and if he fails to plead or demur within the proper time, the complainant may obtain an order that the suit stand revived.⁶

Answer Insufficient. — The defendant cannot, by putting in an answer, prevent an order to revive.⁷

Effect of Failure to Obtain Order. — After a bill of revivor has been filed and no order to revive has been obtained, the defendant may move that the plaintiff shall obtain such order within a certain time or that the bill may be dismissed.⁸ So where a plaintiff has filed a bill of revivor after decree and neglects to revive, it would seem that the defendant may be allowed to revive.⁹

Supreme Court of the United States, Rule 28, is by motion, order, and publication of the order." And see in general article PUBLICATION, vol. 17, p. 26.

1. *Bettes v. Dana*, 2 Sumn. (U. S.) 383; *Sharon v. Terry*, 36 Fed. Rep. 337, wherein it was said: "The only questions which can then be raised are whether the party in whose name the revival is asked has succeeded to the interests, rights, or claims of the deceased, or has become the legal representative of his estate, so as to enable him to continue the prosecution of the suit, if not already determined, or to revive it so as to enforce the judgment rendered, if not already executed." See also *Fretz v. Stover*, 22 Wall. (U. S.) 198; *Grant v. Chambers*, 7 N. J. Eq. 223; *Pell v. Elliot, Hopk.* (N. Y.) 86.

2. *Bettes v. Dana*, 2 Sumn. (U. S.) 383.

New Defenses Improper. — In *Fretz v. Stover*, 22 Wall. (U. S.) 198, it was held that new defenses, *i. e.*, defenses not named in the answer to the original bill, cannot be first set up in a bill of revivor, as such bill puts in issue nothing but the character of the new party brought in.

3. *Day v. Potter*, 9 Paige (N. Y.) 645; *Pickering v. Walcott*, 1 Ind. 262.

4. *Day v. Potter*, 9 Paige (N. Y.) 645; 3 Daniell's Ch. Pl. and Pr. (2d Am. ed.) 1709.

5. *Pendleton v. Fay*, 3 Paige (N. Y.) 204. And see *infra*, p. IIII.

6. *Harris v. Pollard*, 3 P. Wms. 348; *Langley v. Fisher*, 10 Sim. 345; *Metcalfe v. Metcalfe*, 1 Keen 75.

7. *Harris v. Pollard*, 3 P. Wms. 348; *Lewis v. Bridgman*, 2 Sim. 465; *Codrington v. Houlditch*, 5 Sim. 286; *Pendleton v. Fay*, 3 Paige (N. Y.) 206.

Answer Controverting Title of Plaintiff to Revive. — It has been held, however, that though an answer is not effectual to prevent revival of a suit, the defendant may, if required to answer the bill, controvert in his answer the title of the plaintiff to revive, and if it should appear at the hearing that the plaintiff has no title to revive he cannot have a decree. *Harris v. Pollard*, 3 P. Wms. 348.

8. *Bolton v. Bolton*, 2 Sim. & St. 371; *Troward v. Bingham*, 4 Sim. 483.

9. *Gordon v. Bertram*, 1 Meriv. 154; *Whitebar v. Hughes*, 1 Dick. 283, wherein the court said: "As the cause

Service of Order. — An order for the revivor of a suit should be regularly served, though personal service would not seem to be requisite.¹

2. DEMURRER OR PLEA TO BILL — (1) *In General.* — It may be laid down as a general rule that where a bill of revivor is unnecessarily or improperly filed, the defendant may avail himself of the objection by plea or demurrer.²

If the Objection Is Founded on Matter Extraneous to the Bill, such matter must be stated by way of plea.³

(2) *For What Demurrer Will Lie* — Want of Privity or Interest. — A demurrer to a bill of revivor will lie for want of privity⁴ or for want of sufficient interest in the party seeking to revive.⁵

Sufficient Ground for Revivor. — Such bill is liable to demurrer if it

is in that state that either party might have filed a bill to revive the suit, and as the plaintiff hath neglected to revive, I do not see any inconvenience in permitting the defendant to revive when, by filing a bill of revivor, there is no doubt but that he may carry on the decree under the plaintiff's bill.

* * * And as the defendant may in that case, on neglect of the plaintiff, set down the cause to be heard at his own instance, I do not see any reason why the defendant may not upon the plaintiff's neglect revive in this case."

1. See 3 Daniell's Ch. Pl. and Pr. (2d Am. ed.) 1708.

In *Amyx v. Smith*, 1 Met. (Ky.) 529, it is held that an order of revivor, upon the plaintiff's death, must be served on the defendant like an original summons.

2. *Pendleton v. Fay*, 3 Paige (N. Y.) 204, citing *Lewis v. Bridgman*, 2 Sim. 465. And see in general articles DEMURRERS IN CHANCERY, vol. 6, p. 391; PLEAS IN EQUITY, vol. 16, p. 585.

Supplemental Matter Irrelevant or Improper. — If the matter added by way of supplement to a bill of revivor be irrelevant or improper, the defendant may always avail himself of the objection, either by a plea or by demurrer or by exceptions for impertinence. *Pendleton v. Fay*, 3 Paige (N. Y.) 204.

But if supplemental matter is improperly added to a bill of revivor, the defendant cannot on that account demur to the whole bill, but should demur to the supplemental matter only. *Randolph v. Dickerson*, 5 Paige (N. Y.) 517.

Objection to Right to Revive. — If the plaintiff files a bill of revivor and the defendant objects to his right to revive

the suit, the objection must be taken by demurrer where the ground therefore appears on the face of the bill. *Langley v. Fisher*, 10 Sim. 345; *Metcalf v. Metcalfe*, 1 Keen 75.

Objection for Want of Federal Jurisdiction. — In *Sharon v. Terry*, 36 Fed. Rep. 337, it was held that while the general doctrine is that objections taken to the original bill, or which might have been thus taken, cannot again be made upon a bill of revivor, where the original suit has abated by the death of the plaintiff, yet where the original bill does not contain sufficient facts to give jurisdiction to a federal court a demurrer to the bill of revivor will be sufficient to raise such objections.

3. *Langley v. Fisher*, 10 Sim. 345; *Metcalf v. Metcalfe*, 1 Keen 75.

4. *Cooper's Eq. Pl.* 210, citing *Owen v. Curzon*, 2 Vern. 237, Raithby's note. In this case an administrator who had obtained a decree died before the enrolment thereof, or before any further proceedings were had, and a demurrer to a bill of revivor filed by the administrator *de bonis non* was sustained on the ground that in such case he was not in privity with the administrator who obtained the decree, but was paramount to him.

5. *Cooper's Eq. Pl.* 211, 212; *Mitford's Eq. Pl.* 202; *Williams v. Cooke*, 10 Ves. Jr. 406; *Horwood v. Schmedes*, 12 Ves. Jr. 311.

A Bill of Revivor for Costs Alone will be subject to a demurrer for want of sufficient interest, unless such costs are to be paid out of the estate, *Jenour v. Jenour*, 10 Ves. Jr. 572; or unless the costs have been taxed and the decree enrolled, *Elvard v. Warren*, 2 Ch. Cas. 192.

does not show sufficient ground for reviving the suit, or any part of it, either by or against the person by or against whom it is brought.¹

Frame of Bill. — Any imperfection or defect in the frame of the bill is a ground for demurrer.²

Want of Parties. — While the want of parties may be a ground for demurring to a bill of revivor,³ yet such bill is not demurrable for want of a party who is not before the court at the time of the abatement, even though the suit might have been imperfect without such party,⁴ or for the want of a party who has not appeared to the original bill.⁵

(3) *When Plea Proper.* — Where a Bill of Revivor Is Brought Without Sufficient Cause to revive, and this fact is not apparent on the face of the bill, so that the defendant cannot demur, he may plead the matter necessary to show that the plaintiff is not entitled to revive the suit against him.⁶

Revivor Barred by Limitation. — It would seem, also, that if a person entitled to revive a suit does not proceed in due time he may be barred by the statute of limitations, which may be pleaded to a bill of revivor afterwards filed.⁷

I. ANSWER ⁸ — **Necessity For.** — As has been seen, an objection by answer to a bill of revivor will not prevent the order to revive,⁹ and though, where an answer is called for, the defendant may thereby object to a revivor,¹⁰ yet if the question raised by the

1. 3 Daniell's Ch. Pl. and Pr. (2d Am. ed.) 1709; University College v. Foxcroft, 2 Ch. Cas. 244.

2. Cooper's Eq. Pl. 212, 214; Fallowes v. Williamson, 11 Ves. Jr. 306; Gould v. Barnes, 1 Dick. 133; Griffith v. Ricketts, 3 Hare 476.

3. 3 Daniell's Ch. Pl. and Pr. (2d Am. ed.) 1710.

Where One of Two Tenants in Common Who Instituted a Suit Dies, a bill of revivor by his personal representative which does not make the survivor a party, either as coplaintiff or defendant, will be demurrable. Fallowes v. Williamson, 11 Ves. Jr. 313.

4. Metcalfe v. Metcalfe, 1 Keen 75.

5. Crowfoot v. Mander, 9 Sim. 396. See also Asbee v. Shipley, 5 Madd. 467.

Suit Against Partners. — In a suit in equity against the members of a firm, a demurrer will not lie to a bill of revivor to bring in the representative of a deceased partner. Wilson v. Seligman, (U. S. Cir. Ct. 1880) 10 Rep. 651.

6. 3 Daniell's Ch. Pl. and Pr. (2d Am. ed.) 1710; Harris v. Pollard, 3 P. Wms. 348.

If the Plaintiff Is Not Entitled to Revive the Suit at All, though a title is

stated in the bill so that the defendant cannot demur, the objection may be taken by plea. 3 Daniell's Ch. Pl. and Pr. (2d Am. ed.) 1710; Bettes v. Dana, 2 Sumn. (U. S.) 383.

7. Cooper's Eq. Pl. 302; Mitford's Eq. Pl. 272, 290; Hollingshead's Case, 1 P. Wms. 742.

8. See in general article ANSWERS IN EQUITY PLEADING, vol. 1, p. 863.

9. See *supra*, I. 3. j. *Order to Revive*. In Codrington v. Houlditch, 5 Sim. 286, the court said: "The defendants did not demur to plead to the bill of revivor, but they answered it. The putting in of an answer to a bill of revivor is a sufficient submission to have the suit revived, and, notwithstanding anything that may be contained in the answer, it is a matter of course to draw up the order to revive. Any set of circumstances that might form a reason why the suit should not be revived might and ought to have been brought forward by way of plea. My opinion, therefore, is that the motion to discharge the order to revive is wrong, and that it ought to be refused with costs."

10. 3 Daniell's Ch. Pl. and Pr. (2d Am. ed.) 1711.

bill is simply as to the right to revive, an answer is unnecessary unless expressly required.¹

Form of Answer.—Where an answer is required by the bill, it should be confined to such matters as are called for by the bill, or as would be material to the defense with reference to the order made upon it.² Allegations in an answer which raise a defense not set up in the original bill are impertinent.³

Signature of Counsel.—As in the case of all other pleadings, an answer to a bill of revivor should be signed by counsel, and it may be filed in the same manner as other answers.⁴

m. REPLICATION.—Where a bill of revivor has been filed before decree or before issue joined in the original cause, a separate replication is unnecessary.⁵ But in case of abatement after decree or after issue joined in the original cause a replication should be put in where the answer does not admit the title of the complainant to revive, or where it states any circumstances which the complainant wishes to controvert.⁶

n. HEARING—(1) *When Necessary.*—The necessity for bringing a bill of revivor to a hearing depends upon whether the object of the bill has been accomplished by the order to revive.⁷ Where the bill merely prays that the suit may be revived, a hearing is unnecessary.⁸ Where, however, an answer has been called for, and the defendant in his answer controverts the right of the plaintiff to revive, it is necessary that the revivor suit should be set down for hearing notwithstanding the fact that the order of revivor has been obtained.⁹ So where a bill of

1. 3 Daniell's Ch. Pl. and Pr. (2d Am. ed.) 1711; Harris v. Pollard, 3 P. Wms. 348; Codrington v. Houlditch, 5 Sim. 286; Lewis v. Bridgman, 2 Sim. 465.

2. Wagstaff v. Bryan, 1 Russ. & M. 28; Nanney v. Totty, 11 Price 117.

3. Fretz v. Stover, 22 Wall. (U. S.) 198.

Answer Objectionable for Impertinence.—Statements in an answer are impertinent if they are neither called for by the bill nor material to the defense with reference to the order or decree which may be made on the bill. Wagstaff v. Bryan, 1 Russ. & M. 28. So statements which merely show irregularity and misconduct in the former proceedings in the suit are impertinent. Wagstaff v. Bryan, 1 Russ. & M. 28.

In Nanney v. Totty, 11 Price 117, it was held that where a defendant to a bill of revivor inserted in his answer a variety of matters which, if stated in the answer to the original bill, might have been a good defense to that bill, but were not relevant to the question

of revivor, the answer was to that extent impertinent.

4. See article ANSWERS IN EQUITY PLEADING, vol. 1, p. 868.

5. 2 Barbour's Ch. Pr. 55; 3 Daniell's Ch. Pl. and Pr. (2d Am. ed.) 1712; Catton v. Carlisle, 5 Madd. 427.

6. 2 Barbour's Ch. Pr. 55; 3 Daniell's Ch. Pl. and Pr. (2d Am. ed.) 1712. See generally article REPLICATIONS AND REPLIES, ante, p. 682.

7. 2 Barbour's Ch. Pr. 56.

8. In such case the object of the bill is completely effected by the order of revivor, and under such circumstances if the bill is brought to a hearing the complainant must pay the costs. 2 Barbour's Ch. Pr. 56.

In Pruen v. Lunn, 5 Russ. 3, it was held that it is not necessary to bring to a hearing a suit of revivor instituted by the personal representatives of a defendant, in order to make the order of revivor effectual against both the plaintiffs and the codefendants.

9. 3 Daniell's Ch. Pl. and Pr. (2d Am. ed.) 1713; Harris v. Pollard, 3 P. Wms. 348.

revivor contains supplemental matter as well as matter of revivor, the bill should be set down for hearing both as against the party to the supplemental matter and as against the party to the revivor.¹

(2) *Procedure*. — Where there is an answer contesting the right to revive, the cause should proceed upon the bill of revivor in the same manner as upon other bills, and the matters of fact be ascertained or those of law determined as usual.²

4. **Original Bills in the Nature of Bills of Revivor** — *a*. **DEFINITION AND NATURE**. — An original bill in the nature of a bill of revivor is one which is filed when the death of a party, whose interest is not determined by his death, is attended with such a transmission of his interest that the title to it, as well as the person entitled, may be litigated in the court of chancery.³

Effect of Bill. — An original bill in the nature of a bill of revivor will have so far the effect of a bill of revivor that if the title of the representative substituted by the act of the deceased party is established, the same benefit may be had of the proceedings

1. 3 Daniell's Ch. Pl. and Pr. (2d Am. ed.) 1713.

Where a Bill of Revivor Prays for the Admission of Assets by the representative of a deceased party and assets are admitted by the defendant, the cause may proceed against him merely upon the order of revivor; yet where he does not make such admission it is necessary that the cause be heard in order to obtain the necessary accounts of the deceased party's assets in order to answer the demands made against him. 2 Barbour's Ch. Pr. 57; Mitford's Eq. Pl. 76.

2. See article HEARING, vol. 10, p. 8.

When ripe for hearing the cause is brought on in the usual mode, and if the decision of the court is in favor of the bill, the order pronounced will be that the original suit stand revived and be carried on and prosecuted between the parties in such suit in like manner as between the parties to the original suit. 1 Hoffman's Ch. Pr. 383; 2 Barbour's Ch. Pr. 56.

3. Bouvier's L. Dict.

Distinguished from Bills of Revivor. — The distinction between bills of revivor and bills in the nature of bills of revivor seems to be that the former, in case of death, are founded upon privity of blood or representation by operation of law; the latter upon privity of estate or title by the act of the party. 2 Barbour's Ch. Pr. 81; 3 Daniell's Ch. Pl. and Pr. (2d Am. ed.) 1718.

Distinguished from Original Bill in the Nature of Supplemental Bill. — According to Lord Redesdale, there seems to be this difference between an original bill in the nature of a bill of revivor and an original bill in the nature of a supplemental bill: Upon the first, the benefit of the former proceedings is absolutely obtained, so that the pleadings in the first cause, and the depositions of witnesses, if any have been taken, may be used in the same manner as if filed or taken in the second cause, and if any decree has been made in the first cause, the same decree shall be made in the second; but in the other case a new defense may be made, the pleadings and depositions cannot be used in the same manner as if filed or taken in the same cause, and the decree, if any has been obtained, is not otherwise of advantage than as it may be an inducement to the court to make a similar decree. Mitford's Eq. Pl. 72; 3 Daniell's Ch. Pl. and Pr. (2d Am. ed.) 172.

Why Termed Original. — These bills are said to be original merely for want of that privity of title between the party to the former bill and the party to the latter, though claiming the same interest, which would have permitted the continuance of the suit by a bill of revivor. 2 Barbour's Ch. Pr. 81; 3 Daniell's Ch. Pl. and Pr. (2d Am. ed.) 1719.

upon the former suit as if the suit had been continued by a bill of revivor.¹

b. WHEN NECESSARY. — An original bill in the nature of a bill of revivor is necessary where there are other facts which may be brought in the litigation besides the mere question of the identity of the new party. Where on the abatement of the suit there is such a transmission of the interest of the incapacitated party that the title to it as well as the person entitled may be the subject of litigation in a court of chancery, the suit cannot be continued by the mere bill of revivor by or against the person to whom the interest is so transmitted.² Under such circumstances an original bill in the nature of a bill of revivor is the appropriate process to put the original proceedings again in motion and to give to the complainant the benefit of the former proceedings.³

1. 3 Daniell's Ch. Pl. and Pr. (2d Am. ed.) 1718; Mitford's Eq. Pl., c. 1, § 3; *Clare v. Wordale*, 1 Eq. Cas. Abr. 3, par. 3; *Slack v. Walcott*, 3 Mason (U. S.) 508. See also *Douglass v. Sherman*, 2 Paige (N. Y.) 358.

Where the Validity of Alleged Transmission of Interest Is Established, the party to the new bill will be equally bound by or have advantage of the proceedings on the original bill as if there had been such a privity between him and the party to the original bill claiming the same interest. 2 Barbour's Ch. Pr. 81; Mitford's Eq. Pl. 97; *Houlditch v. Donegall*, 1 Sim. & St. 495.

A Devisee cannot maintain a bill of revivor, but he may maintain an original bill in the nature of a bill of revivor, and thus obtain the benefit of the original proceedings, as well before as after there has been a decree in the original suit. *Pendleton v. Fay*, 3 Paige (N. Y.) 205, note; *Slack v. Walcott*, 3 Mason (U. S.) 508.

2. 2 Barbour's Ch. Pr. 80; 3 Daniell's Ch. Pl. and Pr. (2d Am. ed.) 1718.

Such person, if he succeeds to the interest of a complainant, is entitled to the benefit of the former suit, and if he succeeds to the interest of a defendant, the complainant is entitled to the benefit of the former suit against him. 2 Barbour's Ch. Pr. 81.

3. 3 Daniell's Ch. Pl. and Pr. (2d Am. ed.) 1718; *Story's Eq. Pl.* (10th ed.), § 377; *Welch v. Louis*, 31 Ill. 446; *Russell v. Craig*, 3 Bibb (Ky.) 377; *Pingree v. Coffin*, 12 Gray (Mass.) 288; *Peer v. Cookerow*, 13 N. J. Eq. 136; *Lyons v. Van Riper*, 26 N. J. Eq. 337; *Douglass v. Sherman*, 2 Paige (N. Y.) 358; *Spier v. Robinson*, (Supm. Ct.

Spec. T.) 9 How. Pr. (N. Y.) 325; *Anderson v. McNeal*, 4 Lea (Tenn.) 303; *Slack v. Walcott*, 3 Mason (U. S.) 508; *Atty.-Gen. v. Foster*, 2 Hare 82.

A bill of revivor, properly so called, lies where a death intervenes and it is necessary to bring the proper representatives of the deceased party in the realty or in the personalty before the court. In such case there is no other fact to be ascertained than whether the new party brought before the court as executor or heir at law has the character imputed to him. If he has, the revivor is of course. But if the death of the party is attended with such a transmission of his interest that the title to it as well as the person entitled may be litigated in this court, as in case of a devise of real estate, the suit cannot be continued by a bill of revivor. An original bill in the nature of a bill of revivor upon which the title may be litigated must be filed. *Peer v. Cookerow*, 14 N. J. Eq. 361.

"There are many cases, even when the abatement is by death, to which the simple bill of revivor does not apply. These are cases where other facts may be brought into litigation besides the mere question of the character of the new party. Under such circumstances an original bill in the nature of a bill of revivor is the appropriate process to bring these facts before the court and to put the original proceeding again in motion and to enable the new party to have the benefit of the former proceedings. *Story's Eq. Pl.*, § 377. The ground of distinction is that bills of revivor proper are founded on mere privity of blood or representation by operation of law; and original bills in

Devisee. — Thus a devisee cannot revive a suit by a bill of revivor,¹ but if he wishes to obtain the benefit of the former suit he must do so by filing an original bill in the nature of a bill of revivor.²

Administrator de Bonis Non — Assignee. — It has been held that this is also the proper bill by which to bring in an administrator *de bonis non* when an administrator who was a party dies,³ or to bring in an assignee in bankruptcy or insolvency.⁴

the nature of bills of revivor upon privity of estate or title by the act of the party. Story's Eq. Pl., § 379. And when the validity of the alleged transmission of interest in the latter class of cases is established, the party to the new bill will be equally bound by or have advantage of the proceedings in the original bill as in cases of privity of blood or representation. Story's Eq. Pl., § 380." *Northman v. Liverpool, etc., Ins. Co.*, 1 Tenn. Ch. 317.

Where New Matter Must Be Shown. — If a suit becomes abated, and nothing but the death of the party need be established to show the liability of the survivors, a bill of revivor alone is sufficient; but where a new matter must be shown and proved, there a supplemental bill must be filed. *Ross v. Hatfield*, 2 N. J. Eq. 363.

1. *Russell v. Craig*, 3 Bibb (Ky.) 377; *Pingree v. Coffin*, 12 Gray (Mass.) 288; *Slack v. Walcott*, 3 Mason (U. S.) 508.

2. *Russell v. Craig*, 3 Bibb (Ky.) 377; *Pingree v. Coffin*, 12 Gray (Mass.) 288; *Lyons v. Van Riper*, 26 N. J. Eq. 337; *Brady v. McCosker*, 1 N. Y. 214; *Spier v. Robinson*, (Supm. Ct. Spec. T.) 9 How. Pr. (N. Y.) 325; *Anderson v. McNeal*, 4 Lea (Tenn.) 303; *Slack v. Walcott*, 3 Mason (U. S.) 508; *Clare v. Wordell*, 2 Vern. 548.

In *Clare v. Wordell*, 2 Vern. 548, it was held that a devisee may bring an original bill in the nature of a bill of revivor, and shall have the same advantage of a decree as an heir or executor, and the defendant is not at liberty to make a new defense. The court said: "Where the bill, although original, is only to supply the want of privity, and in all other matters but as a bill of revivor, I think the decree ought to be carried on in the same manner as it would have been upon a bill of revivor if the plaintiff had claimed in privity. There is no reason why the devisee should not have the

same advantage of the decree as an heir or executor, without entering again into the merits of the cause; and the decree ought to be neither longer nor shorter than the first decree."

"That a devisee may have an original bill to assert his right, when it is of a nature to be cognizable in a court of equity, there is no doubt; and where proceedings have been had by a suit in the name of the deviser, if the devisee wishes to obtain the benefit of such proceedings, it is clear that he may do so by an original bill in the nature of a bill of revivor. But according to the well-settled doctrine in courts of chancery, a devisee cannot have a bill of revivor." *Russell v. Craig*, 3 Bibb (Ky.) 377.

"It is well settled that if the complainant in an equity suit brought to set aside a conveyance of land dies, leaving a will devising the land in controversy, and the devisee seeks to revive the original suit, he can only do it in that mode which will give the heirs at law of his testator an opportunity to dispute the validity of the will. This cannot be effected by a simple bill of revivor, for the inquiry there is limited to the ascertainment of the person upon whom the law casts the inheritance on the death of the ancestor. In order, therefore, to bring those facts before the court which are necessary to afford an opportunity to dispute the title of the devisee, an original bill in the nature of a bill of revivor is held to be the appropriate process." *Lyons v. Van Riper*, 26 N. J. Eq. 337, citing Story's Eq. Pl., §§ 377, 378; *Peer v. Cookerow*, 14 N. J. Eq. 361.

3. *Phelps v. Sproule*, 4 Sim. 318; *Huggins v. York Bldgs. Co.*, 2 Eq. Cas. Abr. 3, par. 14.

4. *Harrison v. Ridley*, 2 Comyns 589. Lord Eldon in *Randall v. Mumford*, 18 Ves. Jr. 424, spoke of the bill by which an assignee is made a party as a "bill of revivor or supplemental bill in

c. PARTIES. — An original bill in the nature of a bill of revivor is founded on privity of estate or title by act of the party,¹ and a bill of this nature can be maintained only by or against some person claiming in privity with the party by whose death the abatement was caused.²

d. FORM OF BILL — In General. — An original bill in the nature of a bill of revivor should, generally speaking, set out the same facts as a bill of revivor.³

Manner of Transmission of Interest. — The bill should state the manner in which the decedent's interest has been transmitted.⁴

Statement of Rights Accruing by Transmission. — The bill should charge the validity of the transmission and state the rights accruing thereby.⁵

Prayer. — The prayer is that the suit be revived and that the plaintiff have the benefit of the former proceedings therein.⁶

e. QUESTIONS RAISED BY BILL. — While in the case of a bill

the nature of a bill of revivor." See *Lowry v. Morrison*, 11 Paige (N. Y.) 327.

"Perhaps it may be more appropriately termed an original bill in the nature of a bill of revivor and supplement. It is an original bill in the nature of a bill of revivor so far as it seeks to revive or continue the former proceeding in the name of a new complainant upon whom the right to continue the proceedings is not cast by the operation of law merely, but one upon whom the right is conferred by the operation of law in connection with an alleged act of the former complainant, the validity of which act may be controverted by the defendant. And it is certainly supplemental in its nature so far as it seeks to supply defects in a suit." *Sedgwick v. Cleveland*, 7 Paige (N. Y.) 287. See also *Webster v. Hitchcock*, 11 Mich. 56; *Griggs v. Detroit*, etc., R. Co., 10 Mich. 117; *Brewer v. Dodge*, 28 Mich. 359.

Supplemental Bill. — It has been held, however, that bankruptcy only renders a suit defective, but does not abate it, and that consequently it is to be continued by a supplemental bill. *Collateral Security Bank v. Fowler*, 42 Md. 393; *Johnson v. Fitzhugh*, 3 Barb. Ch. (N. Y.) 360; *Lee v. Lee*, 1 Hare 617; *Robertson v. Southgate*, 5 Hare 223.

1. 2 *Barbour's Ch. Pr.* 82; *Story's Eq. Pl.* (10th ed.), § 379.

2. 3 *Daniell's Ch. Pl. and Pr.* (2d Am. ed.) 1720; *Oldham v. Eboral*, 1 Coop. Sel. Cas. 27; *Rylands*

v. Latouche, 2 Bligh 585; *Tonkin v. Lethbridge*, Coop. t. Eld. 43; *Slack v. Walcott*, 3 Mason (U. S.) 508.

Necessity of Bringing in All Parties to Original Suit. — In an original bill in the nature of a bill of revivor, as in the case of a bill of revivor filed by a person who is not a party to the original suit, all the surviving parties to the original suit who have any interest in the further proceedings to be had therein must be made parties either as complainants or as defendants. *Farmers' L. & T. Co. v. Seymour*, 9 Paige (N. Y.) 538.

3. 3 *Daniell's Ch. Pl. and Pr.* (2d Am. ed.) 1720; *Story's Eq. Pl.* (10th ed.), § 386. See *supra*, I. 3. *g. Requisites of Bill.*

4. 3 *Daniell's Ch. Pl. and Pr.* (2d Am. ed.) 1720; *Pingree v. Coffin*, 12 Gray (Mass.) 319, wherein the court said: "When, upon the death of the sole plaintiff in a bill in equity, his interest has been transmitted to another as devisee of his estate, such devisee must come in by a bill in the nature of a bill of revivor. Such bill must allege the newly acquired interest, and this allegation may be litigated. The bill should state the manner in which the interest of the party deceased has been transmitted." *Citing Story's Eq. Pl.* 386; *Mitford's Eq. Pl.* 97.

5. *Mitford's Eq. Pl.* 97; *Story's Eq. Pl.* (10th ed.), § 386; *Phelps v. Sproule*, 4 Sim. 318.

6. 2 *Barbour's Ch. Pr.* 83; 3 *Daniell's Ch. Pl. and Pr.* (2d Am. ed.) 1721; *Phelps v. Sproule*, 4 Sim. 318.

of revivor nothing can be contested except whether or not the party is heir or personal representative,¹ yet in the case of an original bill in the nature of a bill of revivor the nature and operation of the entire act by which the privity of an estate or title is created is open.²

f. DEMURRER, PLEA, OR ANSWER. — Demurrers or pleas to original bills in the nature of bills of revivor may be put in as in the case of original bills or bills of revivor, and the practice with regard to demurring, pleading, and answering them is the same as the practice upon original bills.³

g. HEARING. — An original bill in the nature of a bill of revivor must be brought on for hearing in the same manner as in the case of original bills, in order that any benefit may be derived from it.⁴

h. DECREE. — On an original bill in the nature of a bill of revivor, the revivor can be obtained only by decree, and not by an order to revive.⁵

5. Bills of Revivor and Supplement — *a.* DEFINITION AND NATURE. — A bill of revivor and supplement is a compound of a supplemental bill and a bill of revivor, and not only continues the suit which has abated by the death of the plaintiff, or the like, but supplies any defects in the original bill arising from subsequent events, so as to entitle the party to relief on the whole merits of his case.⁶

The Supplemental Matter must have been newly discovered and should be verified by affidavit.⁷

1. See *supra*, I. 3. *i.* Questions Raised by Bill.

2. 3 Daniell's Ch. Pl. and Pr. (2d Am. ed.) 1719; 2 Barbour's Ch. Pr. 82; Slack v. Walcott, 3 Mason (U. S.) 508.

3. 3 Daniell's Ch. Pl. and Pr. (2d Am. ed.) 1721. See in general articles DEMURRERS IN CHANCERY, vol. 6, p. 391; PLEAS IN EQUITY, vol. 16, p. 585.

4. 2 Barbour's Ch. Pr. 84; 3 Daniell's Ch. Pl. and Pr. (2d Am. ed.) 1721. See article HEARING, vol. 10, p. 8.

5. 2 Barbour's Ch. Pr. 84.

6. Bouvier's L. Dict.; Barbour's Ch. Pr. 88; Westcott v. Cady, 5 Johns. Ch. (N. Y.) 334; Bampton v. Birchall, 5 Beav. 330. And see to the same effect Pendleton v. Fay, 3 Paige (N. Y.) 205, note; Quackenbush v. Leonard, 10 Paige (N. Y.) 131; Harrington v. Becker, 2 Barb. Ch. (N. Y.) 75; Westcott v. Cady, 5 Johns. Ch. (N. Y.) 334; Eastman v. Batchelder, 36 N. H. 141; Bowie v. Minter, 2 Ala. 406.

Effect Of. — A bill of revivor and supplement not only revives the original suit, but supplies defects arising from events subsequent to filing the original

bill, so as to entitle the plaintiff to relief commensurate with the merits of the case. Westcott v. Cady, 5 Johns. Ch. (N. Y.) 334; Eastman v. Batchelder, 36 N. H. 141.

In Bampton v. Birchall, 5 Beav. 330. it was held that such a bill will not cure a defect which is apparent upon the face of the original bill.

Time of Filing. — It would seem that a bill of revivor and supplement may be filed at any time as a matter of right within the ordinary periods of limitation. Young v. Kelly, 3 App. Cas. (D. C.) 296.

7. Pendleton v. Fay, 3 Paige (N. Y.) 204, note; Quackenbush v. Leonard, 10 Paige (N. Y.) 131; Harrington v. Becker, 2 Barb. Ch. (N. Y.) 75; Bowie v. Minter, 2 Ala. 406, the court saying: "Where a complainant has a right to revive a suit, he may add to the bill of revivor such supplemental matter as is proper to be added. But the supplemental matter must have been newly discovered and verified by affidavit, and may be demurred to by the defendant." Citing Westcott v. Cady, 5

b. WHEN PROPER. — Where a suit becomes abated, and the rights of the parties are affected by any act besides the event by which the abatement happens, as, for instance, by a settlement or a devise, under certain circumstances, in order to bring before the court the whole matter necessary for its consideration, the parties must, by a supplemental bill added to and made a part of the bill of revivor, show the settlement or devise, or any other act by which their rights are affected.¹

c. FORM OF BILL — In General. — A bill of revivor and supplement being, as has been seen, merely a compounding of the two species of bills mentioned, it should be framed in the same manner.²

Introduction of New Matter. — It is held that new matter may be introduced into a bill of revivor and supplement so that defects in the original bill arising from subsequent events will be supplied, provided the original bill shows a case for the complainant, otherwise not.³

d. DEMURRER, PLEA, OR ANSWER. — A bill of revivor and supplement must be proceeded upon in the same manner as bills of revivor or supplemental bills.⁴ Such bills are liable to the same description of defense to which the bills, if separate, would be subject;⁵ and where matters contained in the bill are irrelevant or improper, the defendant may avail himself of the objection either by a plea or demurrer or by exceptions for impertinence.⁶

Johns. Ch. (N. Y.) 334; Douglass v. Sherman, 2 Paige (N. Y.) 360; Pendleton v. Fay, 3 Paige (N. Y.) 205, note; Randolph v. Dickerson, 5 Paige (N. Y.) 517.

1. 3 Daniell's Ch. Pl. and Pr. (2d Am. ed.) 1722; Merrywether v. Melish, 13 Ves. Jr. 161; Rylands v. La Touche, 2 Bligh 566.

If any other event which occasions an abatement is accompanied or followed by any matter necessary to be stated to the court, either to show the rights of the parties or to obtain the full benefit of the suit, beyond what is merely necessary to show by or against whom the cause is to be revived, such matter must be set forth by way of supplemental bill added to the bill of revivor. 2 Barbour's Ch. Pr. 89; Mitford's Eq. Pl. 70; Bowie v. Minter, 2 Ala. 406; Harrington v. Becker, 2 Barb. Ch. (N. Y.) 75; Westcott v. Cady, 5 Johns. Ch. (N. Y.) 334; Russell v. Sharp, 1 Ves. & B. 500; Bampton v. Birchall, 5 Beav. 330.

Where a suit abates by the death of one of the original defendants, and a third party subsequently acquires the interest of the deceased party by purchase from his heirs before the revival

of the suit against such heirs, the suit must be revived by a bill of revivor and supplement against the purchaser. Harrington v. Becker, 2 Barb. Ch. (N. Y.) 75.

2. 2 Barbour's Ch. Pr. 89; Cooper's Eq. Pl. 84.

3. Eastman v. Batchelder, 36 N. H. 141. In this case the court said: "New matter may be introduced into a bill of revivor and supplement, so that defects in the original bill arising from subsequent events may be supplied. Westcott v. Cady, 5 Johns. Ch. (N. Y.) 334; Pendleton v. Fay, 3 Paige (N. Y.) 204. But this cannot be done with any effect where there is nothing in the original bill by which it may be sustained. 3 Daniell's Ch. Pr. 1722; Bampton v. Birchall, 5 Beav. 330. The original bill must show a case for the complainant, otherwise the new matter would be a new cause in court."

4. 3 Daniell's Ch. Pl. and Pr. (2d Am. ed.) 1722; Story's Eq. Pl. (10th ed.), § 387; Cooper's Eq. Pl. 84. See also Pendleton v. Fay, 3 Paige (N. Y.) 205, note.

5. 2 Barbour's Ch. Pr. 89.

6. Pendleton v. Fay, 3 Paige (N. Y.) 205, note.

e. HEARING. — In all cases of bills of revivor and supplement, the case should be set down for hearing against all the parties, even though the bill is only a bill of revivor against one and an order to revive has been obtained.¹

6. Original Bills in Nature of Revivor and Supplement. — Where the subject-matter of a suit in chancery is assigned by the complainant, the suit can no longer be prosecuted in his name after the assignment is brought to the notice of the court,² and the only mode in which the assignee can revive or get the benefit of the original suit is by filing an original bill in the nature of a bill of revivor and supplement.³ Where a defendant in such original suit is entitled to revive the proceedings therein, he must do so by a similar bill.⁴

7. Modern Statutory Substitutes — *a.* IN GENERAL. — In many of the states at the present time are to be found substitutes for the bill of revivor, such as revivor by motion, by petition, by scire facias, by suggestion, by orders of revivor, and by amendment.⁵ As has already been stated, these statutory methods,

Demurrer to Supplemental Matter Improperly Inserted. — In *Randolph v. Dickerson*, 5 Paige (N. Y.) 517, it was held that the improper insertion of supplemental matter in a bill of revivor and supplement does not authorize the defendant to demur to the whole bill; he should demur to the supplemental matter only.

1. 3 Daniell's Ch. Pl. and Pr. (2d Am. ed.) 1723; *Lake v. Austwick*, 4 Jur. 314.

2. *Webster v. Hitchcock*, 11 Mich. 56; *Mason v. York*, etc., R. Co., 52 Me. 82.

3. *Webster v. Hitchcock*, 11 Mich. 56; *Perkins v. Perkins*, 16 Mich. 162; *Fulton v. Greacen*, 44 N. J. Eq. 443; *Anderson v. White*, 10 Paige (N. Y.) 575; *Douglass v. Sherman*, 2 Paige (N. Y.) 358; *Brady v. McCosker*, 1 N. Y. 214; *Van Hook v. Throckmorton*, 8 Paige (N. Y.) 33; *Sedgwick v. Cleveland*, 7 Paige (N. Y.) 287; *Manchester v. Mathewson*, 2 R. I. 416.

Where a sole complainant, suing in his own right, transfers his whole interest in the subject-matter of the litigation, the complainant being no longer able to prosecute the suit for want of interest, and his assignee claiming by a title which may be litigated, the benefit of the former proceedings cannot be obtained by a mere supplemental bill, but must be sought by an original bill in the nature of a supplemental bill. *Fulton v. Greacen*, 44 N. J. Eq. 443.

"Generally, when, by the death of a party, the suit abates, and his interest

in the property in controversy is transmitted by a devise, or in any other manner, so that the title as well as the person entitled may be questioned, the suit cannot be continued by a bill of revivor. In such cases an original bill in the nature of a bill of revivor and supplement must be filed, in which the title may be litigated." *Manchester v. Mathewson*, 2 R. I. 416.

4. *Anderson v. White*, 10 Paige (N. Y.) 575.

5. Revivor by Motion or Petition. — In *New York*, before the adoption of the Code of Civil Procedure, the proper method of reviving a suit in equity was either a bill of revivor or a motion or petition by the proper representative. *White v. Buloid*, 2 Paige (N. Y.) 475; *Douglass v. Sherman*, 2 Paige (N. Y.) 358; *Bornsдорff v. Lord*, 41 Barb. (N. Y.) 211; *Leggett v. Dubois*, 2 Paige (N. Y.) 211; *Wilkinson v. Parish*, 3 Paige (N. Y.) 653.

"The proper course to be adopted by the heirs or personal representatives of a deceased complainant to revive the suit, under the 115th section of the Revised Statutes before referred to, is for them to apply to the court upon a petition or affidavit, stating the death of the complainant and showing that they in fact sustain the character in which they claim the right to revive." *Douglass v. Sherman*, 2 Paige (N. Y.) 358.

In *New Hampshire* "no proceeding in equity shall be abated if the person

while providing substitutes for the bill of revivor, do not deprive a party of the right to resort to such a bill should he desire to do so.¹

b. REVIVOR ON MOTION OR PETITION — (1) Who May Maintain. — A personal representative of the complainant in the original suit may revive on motion or petition.²

(2) *Form of Petition.* — A petition for the revival of a suit should as a rule contain the substance of what is required to be stated in a bill of revivor, though such petition may be very short.³

(3) *Notice of Application.* — Due notice of the application should be given to other parties who have appeared in the cause and who do not join in the application, so as to give them an opportunity to be heard as to the right of the applicants to revive.⁴

(4) *Order of Revivor.* — The order of revivor upon petition

who shall become interested shall, on his petition, briefly setting forth his relation to the cause, be admitted to prosecute or defend as a party thereto; nor if such person, upon petition of the adverse party, briefly stating his relation to the cause, shall be by order of the court duly notified to appear therein. If the person so notified shall neglect to appear, the bill shall be taken as against him as confessed." Chancery Rule 28, 38 N. H. 610.

In *Indiana*, under the former practice, if a defendant in chancery died before he had answered, the suit could be revived only by a bill of revivor; but if he died after the answer was filed, the suit might be revived by virtue of the statute on motion of the complainant without such bill. *Aldridge v. Dunn*, 7 Blackf. (Ind.) 249.

Revivor by Scire Facias. — In *Virginia* it was held that a bill of revivor is unnecessary where a mere revival of the suit is sought, a scire facias being sufficient. *Vaughan v. Wilson*, 4 Hen. & M. (Va.) 480, the court saying: "The sci. fa. is given by an act of the assembly, and a bill is not necessary, where nothing but the mere revival is sought. But the defendant may plead or demur to the sci. fa., as he might, before the act, to a bill of revivor; and so at the hearing, if the party do not entitle himself to revive, the suit may be dismissed."

Revivor by Amendment. — In *Maine* "bills may be revived in proper cases by an amendment filed with the clerk, on which a subpoena and other process may issue and be served as in case of

an original bill; and the appearance shall be entered and the like proceedings be had as on original bills, so far as they have not before taken place, or in the manner provided by the statute." Chancery Rule 21, 37 Me. 590.

Orders of Revivor. — In *England*, by statute 15 & 16 Vict., c. 86, § 52, on the abatement of a suit by death, marriage, or otherwise, an order of revivor may be obtained from the court as of course. Similar provisions have been adopted in the following states: *Alabama*, Rule 96, R. C. 837; *Arkansas*, Mansf. Dig. (1884), § 5240; *Kentucky*, Bullitt's Civ. Code (1895), § 500 *et seq.*; *Michigan*, How. Stat. (1882), § 5656; *Nebraska*, Code Civ. Pro., §§ 458, 472; *New Jersey*, Gen. Stat., p. 2.

1. See *supra*, p. 1100. And see *Reid v. Stuart*, 20 W. Va. 392; *Bock v. Bock*, 24 W. Va. 586.

2. *White v. Buloid*, 2 Paige (N. Y.) 475.

3. *Wilkinson v. Parish*, 3 Paige (N. Y.) 653.

The Proper Course to Be Adopted by the Heirs or Personal Representatives of a deceased complainant to revive a suit under the statute is for them to apply to the court upon a petition or affidavit stating the death of the complainant, and showing that they in fact sustain the character in which they claim the right to revive; and if they claim the right to revive as executors it should appear that they have taken probate of the will. *Douglass v. Sherman*, 2 Paige (N. Y.) 358.

4. *Douglass v. Sherman*, 2 Paige (N. Y.) 358.

should state the particular character in which the applicants are permitted to revive and continue the suit, and the cause is to be entitled accordingly in all subsequent orders and petitions therein.¹

II. AT COMMON LAW AND UNDER CODES AND PRACTICE ACTS —

1. Common-law Rule as to Abatement of Actions. — At common law, on the death of a party, the action, as respects his interest, absolutely abated, and although the cause of action survived, it could be made available to his representative only by the commencement of a new action.² The subject of abatement of actions by the death of a party is fully treated in the article DEATH, vol. 5, p. 786.

Abatement by Marriage. — As to the effect at common law upon a pending action of the marriage of a female plaintiff thereto, see the article HUSBAND AND WIFE, vol. 10, p. 234.

2. Statutory Changes — In General. — In order to obviate the inconvenience resulting from the common-law rule as to the abatement of actions by the death or other disability of a party statutes have been enacted in England and in the various states of the American Union providing a summary mode for making the proper representatives of the deceased or disabled party parties to the action where the cause thereof survives.³

1. *Douglass v. Sherman*, 2 Paige (N. Y.) 358.

Service of Order. — The service of an order to revive where the application has been made by petition should be on the same parties upon whom it would be necessary to serve a subpoena if a bill of revivor was filed. Such parties are also allowed to appear and answer the petition and object to the complainant's right to revive the suit against him. *Wilkinson v. Parish*, 3 Paige (N. Y.) 653.

2. *Carter v. Jennings*, 24 Ohio St. 182; *Gould v. Carr*, 33 Fla. 523; *Brown v. Parker*, 15 Ill. 307; *Ela v. Rand*, 4 N. H. 54.

"At common law the death of a sole plaintiff in real actions before judgment abated the suit. * * * Upon the death of the ancestor the legal title under the common-law rule descends to the heir at law, and thereupon a new cause of action arises in his favor to recover real estate withheld from him. If the suit of an ancestor can be revived, upon his death, in the name of the heir, it must be done under legislative authority." *Gould v. Carr*, 33 Fla. 537, citing *Green v. Watkins*, 6 Wheat. (U. S.) 260; *Macker v. Thomas*, 7 Wheat. (U. S.) 530; *Cutts v. Haskins*, 11 Mass. 56; 2 Tidd's Pr. 117.

3. *Gould v. Carr*, 33 Fla. 523; *Brown v. Parker*, 15 Ill. 307; *Ela v. Rand*, 4 N. H. 54; *Moore v. Hamilton*, 44 N. Y. 666; *Heinmuller v. Gray*, 35 N. Y. Super. Ct. 196; *Carter v. Jennings*, 24 Ohio St. 182; *Elliot v. Teal*, 5 Sawy. (U. S.) 188. And see article DEATH, vol. 5, pp. 786, 796, 820.

"This inconvenience occasioned the passage of statutes relating to the abatement of suits, which provided that a suit should not abate by the death of either party, where the cause of action survived to or against his legal or personal representative, but that the proper representative might be made a party, and the suit be prosecuted to final judgment." *Brown v. Parker*, 15 Ill. 307.

What Actions Revivable. — In *North Carolina* it was early held that "the act for continuing suits on the death of either party extends only to such cases where, before the act, the executors by a new suit might sue or be sued after the abatement of the former action, not to those cases where, after the abatement by death, no new suit could be maintained by or against them." Anonymous, 1 Hayw. (N. Car.) 500.

Action Merely Suspended and Not Abated. — "Section 121 of the code provides that no action shall abate by

The Usual Provisions of These Statutes are to the effect that an action does not abate by the death or any disability of the party, or by the transfer of any interest therein, if the cause of action survives or continues, but that in case of the death or disability of a party the court may, upon proper application within the prescribed time, allow the action to be continued by or against the representative or successor in interest of the deceased or disabled party.¹ In some of the states it is provided that in the case of a sole plaintiff or a sole defendant, if the cause of action survives or continues, the court must, upon proper application, allow the action to be continued by or against the representative or successor in interest.²

Application to Proceedings in Error. — These statutory provisions as to the continuance of an action upon the death of a party plaintiff or defendant are equally applicable to proceedings in error as in the case of actions pending.³

the death of a party, if the cause of action survive and continue. The legal effect of this provision, in its application to the case of the death of a defendant, generally, is that the action is not abated, but merely suspended, by such death, if an action for the same cause may be maintained against the personal representatives of the deceased." *Heinmuller v. Gray*, 35 N. Y. Super. Ct. 196.

1. See the codes and statutes of the various states.

2. Code Civ. Pro. N. Y., § 757; Rev. Stat. Fla., §§ 990, 991; Starr & Curt. Annot. Stat. Ill. (1896), c. 1, par. 10; Pub. Stat. Mass., c. 165, §§ 5, 6; Stat. Vt., § 2456.

Where All but One of Several Defendants Have Died. — In *Coit v. Campbell*, 82 N. Y. 509, it was held that where all but one of several defendants have died, and the right of action has survived against him, he is a sole defendant within the meaning of the provision; and upon his death the action may be revived against his representatives. In this case the court said: "We think it would be placing too restricted a construction upon the section to limit it to an action originally brought by a single plaintiff or against a single defendant, and that no relief could be afforded under it when all of several parties on one side of the litigation died. If all of several defendants but one had died, and the right of action had survived against that one, he would then have become the sole defendant, and we think that, upon his death, a motion under section 757 could

be resorted to for the purpose of reviving the action against his representatives. But such is not this case." See also to the same effect *Palen v. Bushnell*, 51 Hun (N. Y.) 423.

Where Both Sole Plaintiff and Sole Defendant Are Dead. — In *Holsman v. St. John*, 90 N. Y. 461, it was held that Code Civ. Pro. N. Y., § 757, providing for the continuance of an action "in case of the death of a sole plaintiff or a sole defendant," when the cause of action survives, applies where both the sole plaintiff and the sole defendant are dead. A revivor may be granted on motion, and the application is not defeated by lapse of time.

3. *Valley R. Co. v. Bohm*, 29 Ohio St. 633; *Foresman v. Haag*, 37 Ohio St. 143; *Williams v. Englebrecht*, 38 Ohio St. 97; *Pavey v. Pavey*, 30 Ohio St. 600; *Black v. Hill*, 29 Ohio St. 87.

"By the 407th section of the Code of Civil Procedure, when the plaintiff in an action dies, and his right has passed to his heirs or devisees, who could support the action if brought anew, the revivor must be in their names. By analogy we have no hesitation in saying this provision is applicable to proceedings in error." *Valley R. Co. v. Bohm*, 29 Ohio St. 633.

A proceeding in error is not properly an action within the meaning of the code. But the provisions of the code for reviving or continuing actions in favor of or against the successor in interest of a party, or the representatives of a deceased party, may be applied to proceedings in error. Hence the court is authorized, on the application

3. Necessity for Revivor — *a. IN GENERAL.* — It would seem to be a general rule, applicable to all cases where the death of a sole party takes place during the pendency of an action, though the cause of action continue in favor of or against some one else, that nothing further can be done in the action until the person in whose favor or against whom the cause of action survives is brought before the court by some proper proceeding.¹

b. EFFECT OF FAILURE TO REVIVE. — As a general rule, in all cases where the representatives of a deceased complainant are not made parties, according to the statutory provision, within the prescribed time after the suggestion of the death, the suit will abate as to the deceased party and the interest of his representatives therein, and the cause will proceed in favor of and against the survivors.² And it is usually provided that if, on

of the representatives of a deceased party, to allow them to become parties, and the proceedings in error to be carried on in their names, although more than a year may have intervened from the death of the original party to the time of the application. *Black v. Hill*, 29 Ohio St. 86.

1. *La Pointe v. O'Malley*, 46 Wis. 39; *Moore v. Rand*, 1 Wis. 245; *Harteaux v. Eastman*, 6 Wis. 410; *Durbin v. Waldo*, 15 Wis. 352; *Stephens v. Magor*, 25 Wis. 533; *Tarbox v. French*, 27 Wis. 651; *Mannix v. Elder*, 1 Ohio Cir. Ct. 59, 1 Ohio Cir. Dec. 36; *Sargeant v. Rowsey*, 89 Mo. 617; *Rogers v. Tucker*, 94 Mo. 346.

Entry of Order Striking Out Answer. — In *Reed v. Butler*, (C. Pl. Gen. T.) 11 Abb. Pr. (N. Y.) 128, it was held that when the plaintiff had moved to strike out the defendant's answer, and died between the hearing of the motion and the granting of the order by the court, the entry of the order striking out the answer, before an order had been obtained reviving the suit in the name of the proper party, was not only unauthorized but void.

Rendition and Entry of Judgment. — Where a plaintiff has died before the rendition of judgment upon a referee's finding in his favor, the cause should be properly revived before judgment; and if this is not done the Supreme Court, in affirming the judgment, may remand it for such revivor. *Botsford v. Sweet*, 49 Mich. 120.

If a party dies before the rendition of a judgment, the action must be revived in the name of his representative or successor, before the entry of the judgment. If, however, before the

party dies, the case is fully submitted to the court for decision, and held under advisement, the court may, even at a future term, cause its judgment to be entered by a *nunc pro tunc* order as of the day and term when the case was submitted. *Mannix v. Elder*, 1 Ohio Cir. Ct. 59, 1 Ohio Cir. Dec. 36.

Waiver of Defect. — Where the plaintiff in an action to have a deed of trust given to him declared a prior lien died pending suit, there should have been a revival in the name of his administrator. But where the amended petition set out the death of the original plaintiff, and alleged that the plaintiffs therein were his only heirs at law, and no objection was made by demurrer on the ground of defect of parties plaintiff, the defect was thereby waived. *Rogers v. Tucker*, 94 Mo. 346.

Death of Nominal Plaintiff. — "Where a suit is commenced in the name of one person for the use of another, and the nominal plaintiff dies, the suit may be prosecuted without a revivor, as if the death had not happened." Annot. Code Tenn. (1896), § 4578. If the nominal plaintiff dies pending the suit, the death must be suggested, although there is no need of a revivor. *Hargis v. Ayres*, 8 Verg. (Tenn.) 467; *Anderson v. Bradie*, 7 Verg. (Tenn.) 297. This statute has, however, no reference to courts of equity, and such suits must be revived in the name of the personal representative of the nominal plaintiff. *Morrison v. Deaderick*, 10 Humph. (Tenn.) 342; *East Tennessee, etc., R. Co. v. Henderson*, 1 Lea (Tenn.) 5.

2. A failure to make all the representatives of a deceased plaintiff and a deceased defendant parties to the suit,

the death of a sole plaintiff or defendant, the action is not revived within the prescribed time in favor of or against the personal representative, the suit will be abated on motion.¹

4. **Parties** — *a.* BY WHOM ACTIONS MAY BE REVIVED — (1) *Representatives of Plaintiff* — (a) **Personal Representatives.** — Upon the death of the plaintiff in an action, such action, under the provisions of the codes and statutes in the various states, may be revived or continued in the name of his representative or representatives to whom his right has passed.² Where his right

on or before the third term after the suggestion of the deaths, will cause the suit to abate only as to those representatives not made parties. *Farrell v. Brennan*, 25 Mo. 88.

"Where one or more of several plaintiffs, not partners, dies, the person entitled to represent the decedent may revive, by motion, at any time before the cause is tried or abated. But if the suit is not thus revived, * * * the defendant may revive or elect to proceed to trial with the surviving plaintiff, or abate the suit if revivor is necessary." Annot. Code Tenn. (1896), § 4573.

1. *Phoenix Ins. Co. v. Moog*, 81 Ala. 335; *Brooks v. Jones*, 5 Lea (Tenn.) 245; *Young v. Officer*, 7 Yerg. (Tenn.) 137; *Holland v. Harris*, 2 Sneed (Tenn.) 68.

In *Phoenix Ins. Co. v. Moog*, 81 Ala. 335, the court said: "The motion made in the court below to have the present suit declared abated, because it was not revived within eighteen months after the death of A. Moog, was based on section 2908 of the Code of 1876. That section makes provision for two classes of cases. Its first and main object is to provide for cases where a sole plaintiff or sole defendant dies, or all the plaintiffs or all the defendants die, leaving the suit without a party of record, either plaintiff or defendant. This, if not cured, causes an abatement; for a suit cannot exist without antagonizing parties. In such case, if the cause of action survive, the statute allows eighteen months, and only eighteen months, within which to revive in the name of or against the successor or representative of the deceased party. Failing, the suit abates." *Citing* *Rupert v. Elston*, 35 Ala. 79; *Dumas v. Robbins*, 48 Ala. 545; *Pope v. Irby*, 57 Ala. 105; *Brown v. Tutwiler*, 61 Ala. 372; *Evans v. Welch*, 63 Ala. 250; *Glenn v. Billingslea*, 64 Ala. 345; *Ex p. Sayre*, 69 Ala. 184.

No Application to Action by Partnership. — The provision just set out as to the abatement of actions in case of failure to revive does not apply to an action brought by a partnership, which may be prosecuted in the name of the surviving partner alone, the death of the other being suggested on the record, without any revivor in favor of his administrator. *Phoenix Ins. Co. v. Moog*, 81 Ala. 335; *Davis v. Davis*, 93 Ala. 173.

As to the nonabatement by death of actions by partners, see article DEATH, vol. 5, p. 818.

Revivor at Any Time Before Abatement.

— The personal representative may appear, and on motion revive the cause, appeal, appeal in error, or writ of error which the decedent was prosecuting, at any time before the order abating the same has been actually made and entered of record. *Churchwell v. East Tennessee Bank*, 1 Heisk. (Tenn.) 780; *Brooks v. Jones*, 5 Lea (Tenn.) 245; *Young v. Officer*, 7 Yerg. (Tenn.) 137; *Holland v. Harris*, 2 Sneed (Tenn.) 68.

A revivor will be allowed notwithstanding a motion to abate has been made but not acted upon. *Churchwell v. East Tennessee Bank*, 1 Heisk. (Tenn.) 780; *Brooks v. Jones*, 5 Lea (Tenn.) 245; *Erwin v. Foster*, 6 Lea (Tenn.) 188.

Continuation of Right to Revive. — The right to revive a suit, appeal, appeal in error, or writ of error continues through the whole of the second term after the suggestion and admission or proof of death entered of record, and no order of abatement can be made until the third term. *Churchwell v. East Tennessee Bank*, 1 Heisk. (Tenn.) 780; *Crouch v. Happer*, 5 Lea (Tenn.) 172; *Brooks v. Jones*, 5 Lea (Tenn.) 245; *Erwin v. Foster*, 6 Lea (Tenn.) 189; *Young v. Officer*, 7 Yerg. (Tenn.) 137.

2. *Rakes v. Brown*, 34 Neb. 304. And see the statutes and codes of the various states.

has passed to his personal representative, the revivor should be in the name of such personal representative.¹

Revivor in Name of Representative's Successor. — Where a person is a party to the action in a representative capacity, in case of his death or where his powers as a personal representative cease, the action should be revived in the name of his successor.²

(b) **Heirs or Devisees.** — Where the plaintiff's right has passed to his heirs or to his devisees, who could support the action if

1. *Arkansas*. — *Grace v. Neel*, 41 Ark. 165.

Kentucky. — *Huggins v. Toler*, 1 Bush (Ky.) 192.

Maine. — *Valentine v. Norton*, 30 Me. 194.

Michigan. — *Larned v. Wilcox*, 4 Mich. 333.

Missouri. — *Rogers v. Tucker*, 94 Mo. 346; *Baker v. Crandall*, 78 Mo. 584; *Clark v. Hannibal, etc., R. Co.*, 36 Mo. 202; *Musick v. Kansas City, etc., R. Co.*, 114 Mo. 309; *Sutter v. Lackmann*, 39 Mo. 91; *Keyburn v. Mitchell*, 106 Mo. 365; *Roberts v. Nelson*, 86 Mo. 21; *Carlisle v. Rawlings*, 18 Mo. 167; *Brewington v. Stephens*, 31 Mo. 38; *Kingsbury v. Lane*, 21 Mo. 115.

Nebraska. — *Rakes v. Brown*, 34 Neb. 304; *Fox v. Abbott*, 12 Neb. 328; *Hendrix v. Rieman*, 6 Neb. 521.

New York. — *Robinson v. Brisbane*, 7 Hun (N. Y.) 180; *Peru v. Reeves*, 40 N. Y. Super. Ct. 316.

Ohio. — *Black v. Hill*, 29 Ohio St. 86.

Wisconsin. — *Stephens v. Magor*, 25 Wis. 533; *Tarbox v. French*, 27 Wis. 651.

Suit for Leasehold Estate. — In *Sutter v. Lackmann*, 39 Mo. 91, it was held that where the property in controversy is a leasehold estate for years, the suit may be revived in the name of the personal representatives on the ground that a leasehold is a chattel interest and passes to the administrator and not to the heirs of the lessee.

Action by Trustee of Express Trust. — An action brought by the trustee of an express trust may be revived in the name of the administrator where no successor under such trust has been appointed. *Keyburn v. Mitchell*, 106 Mo. 365, citing *Mauldin v. Armistead*, 14 Ala. 702.

Action of Replevin. — An action of replevin does not abate by the death of a plaintiff or defendant, but may be revived in the name of their personal

representatives. *Kingsbury v. Lane*, 21 Mo. 115.

Special Administrator for Purposes of Revivor. — In *Arkansas* it is provided by statute that "in all cases where suits may be instituted, and either plaintiff or defendant may die pending the same, it shall be lawful for the court before which such suit or suits may be pending, on the motion of any party interested, to appoint a special administrator, in whose name the cause shall be revived, and said suit or suits shall progress, in all respects, in his name, with like effect as if the plaintiff or defendant (as the case may be) had remained in full life. The powers of such special administrator shall extend and be confined alone to the mere prosecution or defense of the particular suit or suits he may be appointed by the court to prosecute or defend. No special administrator shall be appointed, as in this act prescribed, where there is a general administrator. No such special administrator or executor shall be liable for costs of the suit for the management whereof he may be appointed. Act January 10, 1851." Sand. & H. Dig. Stat. Ark., §§ 5920-5922.

2. *Greer v. Howard*, 41 Ohio St. 591.

Administrator de Bonis Non, or Other Successor. — "When any sole executor or administrator is plaintiff or defendant, and dies, the suit may be revived by or against the executor, administrator *de bonis non*, or other successor in the interest of the decedent." Annot. Code Tenn. (1896), § 4574; *Stott v. Alexander*, 2 Sneed (Tenn.) 650; *Jones v. Jones*, 8 Humph. (Tenn.) 705. See also *Bell v. Humphrey*, 8 W. Va. 1, wherein it was held that upon the death of the surviving executor it was competent and proper to revive the suit in the name of the administrator *de bonis non* of the testator, he being invested by law with the right to prosecute it.

brought anew, the revivor may be in their names.¹

(2) *Representatives of Defendant.* — It has been held in some jurisdictions that the privilege of having an action, brought by a sole plaintiff against a sole defendant, revived after the death of either is not confined to the plaintiff, and that the application therefor may be made by the personal representatives of the deceased defendant.²

b. AGAINST WHOM ACTIONS MAY BE REVIVED — Against Personal Representatives. — Under the provisions of the codes and

1. *Grace v. Neel*, 41 Ark. 165; *Martin v. Tyree*, 41 Ark. 314; *Louisville v. Hexagon Tile-Walk Co.*, (Ky. 1898) 45 S. W. Rep. 667; *Fine v. Gray*, 19 Mo. 33; *Rakes v. Brown*, 34 Neb. 304; *Valley R. Co. v. Bohm*, 29 Ohio St. 633; *Campbell v. Hubbard*, 11 Lea (Tenn.) 6; *Cunningham v. Sayre*, 21 W. Va. 440.

Action of Unlawful Entry and Detainer. — In *Cunningham v. Sayre*, 21 W. Va. 440, it was held that where, pending an action of unlawful entry and detainer, the plaintiff dies, the action may be revived in the name of his heirs at law or devisees.

Action of Ejectment. — In *Fine v. Gray*, 19 Mo. 33, it was held that if a plaintiff in an action of ejectment dies, the suit may be revived in the name of his heirs or devisees.

Proceedings in Error. — In *Valley R. Co. v. Bohm*, 29 Ohio St. 633, it was held that where the defendant in a proceeding under the statute to condemn land for public use dies during the pendency of the proceeding, or during the pendency of a petition in error to reverse it, the revivor of the proceeding must be had in the name of the heirs or devisees, and not in that of the administrator of the deceased, on the ground that the right has passed to the heirs or devisees, who could support the action if brought anew.

Revivor by Heirs When No Personal Representative. — In *Tennessee* it is provided that "if no person will administer on the estate of a deceased plaintiff or defendant, the suit may be revived by or against the heirs of the decedent." Annot. Code Tenn. (1896), § 4571. And see *Campbell v. Hubbard*, 11 Lea (Tenn.) 6; *Boyd v. Titzer*, 6 Coldw. (Tenn.) 568; *Brown v. Rocco*, 9 Heisk. (Tenn.) 187.

2. *Pierson v. Morgan*, 44 Hun (N. Y.) 517. In this case the court said: "The case of *Livermore v. Bainbridge*, 49 N. Y. 125, is an express authority that

under section 121 of the Code of Procedure the personal representatives of a deceased defendant could not have an action revived unless the deceased defendant had acquired some right by some interlocutory judgment therein or had become an actor in the proceedings by the presentation of a counterclaim, and this conclusion was based upon the wording of this section, which permitted the revivor, within one year, to be upon motion, or afterwards upon supplemental complaint. It was deemed by the court that the reference to a revivor by supplemental complaint assumed that the plaintiff or his representative is the moving party referred to. In the Code of Civil Procedure, however, these words are omitted from section 757 as such section now stands, and they were probably omitted because of the construction which had been placed upon them in connection with this matter of revivor, as there would seem to be no good reason why the representatives of a deceased defendant should not have the privilege of having an action revived so that it might proceed to judgment instead of that right being vested wholly in a plaintiff. We think that, in view of the present language of the code, the case cited is an authority in favor of the order appealed from, and such a construction seems to be evidently in accordance with the language of the section. The provision as to allowance does not seem to have been an improper exercise of discretion. The plaintiff may continue the litigation if he so desires, and if not he should be required to pay the usual terms as a condition of being permitted to retire."

Rights Acquired by Defendant. — In *Peru v. Reeves*, 40 N. Y. Super. Ct. 316, it was held that an action cannot be revived in favor of the defendant's personal representatives unless he had before his death acquired rights in the litigation.

statutes with regard to the revivor of actions upon the death of a party, an action is revived upon the death of a party defendant in the name of the person succeeding to the interest of the deceased.¹ If such interest concerns the personal estate, it should be revived against the personal representatives of the deceased defendant.²

Against Heirs or devisees. — If the action concerns realty it should be revived against the heirs or devisees of the deceased defendant.³

Against Heirs and Personal Representatives. — If the action relates to both real and personal estate, it should be revived against both heirs and personal representatives.⁴

5. Manner of Reviving Actions — *a.* **STATUTORY METHODS EXCLUSIVE.** — Revivor of actions being purely statutory in its origin, the modes provided by the codes and statutes of the various states are exclusive, and the courts cannot grant such

1. *Brewington v. Stephens*, 31 Mo. 38.

2. *Valentine v. Norton*, 30 Me. 194; *Larned v. Wilcox*, 4 Mich. 333; *Brewington v. Stephens*, 31 Mo. 38; *Kingsbury v. Lane*, 21 Mo. 115; *Gillette v. Morrison*, 7 Neb. 263; *Heinmuller v. Gray*, 35 N. Y. Super. Ct. 196; *Farrier v. Cairns*, 5 Ohio 45; *Littlefield v. Fry*, 39 Tex. 299.

"The provision of the statute in relation to suits abated by the death of a single defendant is that 'the action shall not be thereby abated, if it might have been originally prosecuted against the executors, administrators, etc., of the defendant; but such of them as might have been originally prosecuted for the same cause of action shall be substituted as defendants on the application of the plaintiff.'" *Kingsbury v. Lane*, 21 Mo. 115.

In an Action for a Wrongful Taking and Conversion of personal property brought against two defendants who are jointly and severally liable for the wrong, in case of the death of one of the defendants before final judgment, the action survives against the administratrix of the deceased and can be revived against her. *Heinmuller v. Gray*, 35 N. Y. Super. Ct. 196.

3. *Brewington v. Stephens*, 31 Mo. 38; *Gillette v. Morrison*, 7 Neb. 263; *Louisville v. Hexagon Tile-Walk Co.*, (Ky. 1898) 45 S. W. Rep. 667.

Code Civ. Pro. Neb. § 464, provides that "upon the death of a defendant in an action, wherein the right, or any part thereof, survives against his personal representative, the revivor shall

be against him; and it may also be against the heirs or devisees of the defendant, or both, when the right of action, or any part thereof, survives against them." *Gillette v. Morrison*, 7 Neb. 263.

Actions to Enforce Liens Against Lands should be revived against the heirs of a deceased owner of the lands, and not against his personal representatives. *Belcher v. Schaumburg*, 18 Mo. 189.

4. *Brewington v. Stephens*, 31 Mo. 38, wherein it was held that an action of forcible entry and detainer does not abate by the death of the defendant, but should be continued against the heirs and the administrator of the defendant.

Revivor by or Against Successor in Interest. — In *Moffitt v. Cruise*, 7 Coldw. (Tenn.) 137, it was held that if the decedent has parted with his interest pending the suit it may be revived by or against the successor in interest instead of the representative or heir. Thus, if the decedent was a bankrupt, the suit may be revived in the name of his assignee in bankruptcy to whom his interest in the subject-matter of the litigation had passed. The court said: "By Code, section 2850, 'if the decedent has parted with his interest pending the suit, it may be revived by or against the successor in interest, instead of the representative or heir.' This suit should, therefore, be revived against the assignee in bankruptcy, and not against the administrator of the deceased defendant in error."

benefit by any other method.¹

b. MOTION — (1) *When Proper* — (a) *To Introduce New Plaintiff*. — It is usually, if not universally, provided by the statutes and codes of the various states, though the language varies in the different jurisdictions, that on the death or disability of a plaintiff the court may, on motion within the proper time, allow the action to be continued by his representative or successor in interest.² In some of the states the provisions as to the revivor

1. *Lyon v. Park*, 55 N. Y. Super. Ct. 539.

2. See the codes and statutes of the different states, and see the following cases:

Alabama. — *Ex p. Jones*, 54 Ala. 108; *Phoenix Ins. Co. v. Moog*, 81 Ala. 335; *Rupert v. Elston*, 35 Ala. 79; *Dumas v. Robbins*, 48 Ala. 545; *Pope v. Irby*, 57 Ala. 105; *Brown v. Tutwiler*, 61 Ala. 372; *Floyd v. Ritter*, 65 Ala. 501; *Evans v. Welch*, 63 Ala. 250; *Ex p. Sayre*, 69 Ala. 184.

Arkansas. — *Howell v. Mason*, 9 Ark. 406; *Noland v. Leech*, 10 Ark. 504; *McNutt v. State*, 48 Ark. 30; *Haley v. Taylor*, 39 Ark. 106.

California. — *Campbell v. West*, 93 Cal. 653; *Taylor v. Western Pac. R. Co.*, 45 Cal. 337.

Connecticut. — *Russell v. Hosmer*, 8 Conn. 229; *Stiles's Appeal*, 41 Conn. 329.

Georgia. — *Dean v. Feeley*, 66 Ga. 273; *Meeks v. Johnson*, 75 Ga. 629; *Pickett v. Crumley*, 90 Ga. 147.

Illinois. — *Diversey v. Smith*, 9 Ill. App. 437; *Thorpe v. Starr*, 17 Ill. 199; *Singleton v. Wofford*, 4 Ill. 576.

Iowa. — *Masterson v. Brown*, 51 Iowa 445; *Maish v. Crangle*, 80 Iowa 650.

Kansas. — *Kansas, etc., R. Co. v. Smith*, 40 Kan. 192.

Kentucky. — *Thomson v. Williams*, 86 Ky. 15; *Amyx v. Smith*, 1 Met. (Ky.) 529.

Maine. — *Fulton v. Nason*, 66 Me. 446; *Treat v. Dwinel*, 59 Me. 341.

Maryland. — *Barton Coal Co. v. Cox*, 39 Md. 1.

Massachusetts. — *Brighton Bank v. Russell*, 13 Allen (Mass.) 221.

Michigan. — *Larned v. Wilcox*, 4 Mich. 333.

Minnesota. — *Lee v. O'Shaughnessy*, 20 Minn. 173; *Stocking v. Hanson*, 22 Minn. 542; *Landis v. Olds*, 9 Minn. 90.

Mississippi. — *McKey v. Torrey*, 28 Miss. 78.

Missouri. — *Gallagher v. Delargy*, 57 Mo. 29; *Fine v. Gray*, 19 Mo. 33.

Nebraska. — *Fox v. Abbott*, 12 Neb. 328; *Hendrix v. Rieman*, 6 Neb. 523; *Howell v. Alma Milling Co.*, 36 Neb. 80; *Rakes v. Brown*, 34 Neb. 304; *Gillette v. Morrison*, 7 Neb. 263.

Nevada. — *Virgin v. Brubaker*, 4 Nev. 31.

New Hampshire. — *Ela v. Rand*, 4 N. H. 54.

New Jersey. — *Crane v. Alling*, 14 N. J. L. 593.

New York. — *Holsman v. St. John*, 90 N. Y. 461; *St. John v. Croel*, (Supm. Ct. Gen. T.) 10 How. Pr. (N. Y.) 253; *Matter of Bainbridge*, 67 Barb. (N. Y.) 293; *Duffy v. Duffy*, (N. Y. Super. Ct. Gen. T.) 21 N. Y. St. Rep. 473; *Matter of Palmer*, 115 N. Y. 493; *Coit v. Campbell*, 82 N. Y. 509; *Green v. Martine*, (Supm. Ct. Spec. T.) 1 Civ. Pro. (N. Y.) 129; *Bornsdoeff v. Lord*, 41 Barb. (N. Y.) 211; *Matter of Clute*, 50 Hun (N. Y.) 604, 2 N. Y. Supp. 874; *Lyon v. Park*, 55 N. Y. Super. Ct. 539; *Garvey v. Owens*, (Supm. Ct. Gen. T.) 9 N. Y. St. Rep. 227.

Ohio. — *Carter v. Jennings*, 24 Ohio St. 182; *Black v. Hill*, 29 Ohio St. 86.

Oregon. — *Dick v. Kendall*, 6 Oregon 166.

Pennsylvania. — *Reist v. Heilbrenner*, 11 S. & R. (Pa.) 131; *Deiser v. Sterling*, 10 S. & R. (Pa.) 119.

South Carolina. — *Dunham v. Carson*, 42 S. Car. 383; *Best v. Sanders*, 22 S. Car. 589.

Tennessee. — *Campbell v. Hubbard*, 11 Lea (Tenn.) 6; *Rucker v. Moore*, 1 Heisk. (Tenn.) 726; *Churchwell v. East Tennessee Bank*, 1 Heisk. (Tenn.) 780; *Crouch v. Happer*, 5 Lea (Tenn.) 172; *Young v. Officer*, 7 Yerg. (Tenn.) 137; *Holland v. Harris*, 2 Sneed (Tenn.) 68.

Virginia. — *Ruffners v. Lewis*, 7 Leigh (Va.) 720.

West Virginia. — *Garrison v. Myers*, 12 W. Va. 330.

Wisconsin. — *Stephens v. Magor*, 25 Wis. 533; *Tarbox v. French*, 27 Wis. 651; *La Pointe v. O'Malley*, 47 Wis.

of suits upon the death of the plaintiff are to the effect that when the plaintiff in an action shall die before final judgment, the action shall not abate if it might originally have been prosecuted by his executor or administrator, and in such case the executor or administrator may enter and prosecute the suit if he sees cause.¹ In other states it is provided that when there is but one plaintiff, petitioner, or complainant in an action, proceeding, or complaint, and he shall die before final judgment or decree, such action, proceeding, or complaint shall not abate on that account if the cause of action survives to the heir, devisee, executor, or administrator of such decedent, but any of such to whom the cause of action shall survive may, by suggesting such death upon the record, be substituted as plaintiff, petitioner, or complainant, and prosecute as in other cases.² In all these states, however,

332; *Plumer v. McDonald Lumber Co.*, 74 Wis. 137.

United States. — *Stebbins v. Duncan*, 108 U. S. 32.

1. *Russell v. Hosmer*, 8 Conn. 229; *Brighton Bank v. Russell*, 13 Allen (Mass.) 221; *McKey v. Torrey*, 28 Miss. 78; *Ela v. Rand*, 4 N. H. 54; *Babcock v. Culver*, 46 Vt. 715; *Hyde v. Leavitt*, 2 Tyler (Vt.) 170.

In *Russell v. Hosmer*, 8 Conn. 229, it was held that in case of the death of the plaintiff during the pendency of the suit, the executor or administrator may enter at the next term, as a matter of right; but he will not be permitted to enter afterwards without showing good reason for his neglect. The court said: "The statute provides that 'when any action shall be pending in any Superior or County Court, and the plaintiff, before final judgment, shall die, the same shall not abate if it might originally have been prosecuted by his executor or administrator; and in such case the executor or administrator may enter their names in the suit, if they see cause, and prosecute the same.' * * * At the first term, the administrator may enter, as a matter of right. If he do not choose to exercise the right, his neglect may be considered and treated as a waiver."

2. *Stebbins v. Duncan*, 108 U. S. 32; *Thorpe v. Starr*, 17 Ill. 199; *Singleton v. Wofford*, 4 Ill. 576; *Larned v. Wilcox*, 4 Mich. 333; *Vickery v. Beir*, 16 Mich. 50; *Crane v. Alling*, 14 N. J. L. 593. And see *Barton Coal Co. v. Cox*, 39 Md. 1.

Suggestion Prima Facie Proof of Death.

— In *Stebbins v. Duncan*, 108 U. S. 32, the court said: "We think that this

suggestion, made without objection, and the order of the court thereon, settles *prima facie*, for the purposes of this case, the fact of the death of the original plaintiff. The statute provides upon whose suggestion of the death of a sole party plaintiff the court shall make his heir or devisee, etc., plaintiff in his stead. It certainly cannot be the fair construction of the statute that a party may stand by and see the suggestion of the death of the opposing party entered of record and his heir or devisee substituted in his stead, and upon final trial require further proof of the death, at least without some notice of his purpose to raise that particular issue. The death of the plaintiff, after the order of the court, may be considered as settled between the parties for that case, unless some motion is made or issue raised on the part of the defendant, by which the fact of the death is controverted."

In *Maine*, "when a party to a suit dies and his death is suggested on the record and the cause of action survives, his executor or administrator may become a party, or, at the request of the other party, be summoned to appear and become a party. Service of the summons shall be made on him fourteen days before the term to which it is returnable. If he neglects to appear, judgment may be entered by nonsuit or default according to chapter 87." *Rev. Stat. Me.*, c. 82, § 36; *Treat v. Dwinel*, 59 Me. 341.

In *Fulton v. Nason*, 66 Me. 446, the court said: "The death of a party being suggested, his executor or administrator may become a party, or be summoned in to become a party, at the

the proper mode of reviving an action by the representative or successor in interest of the original plaintiff would seem to be by motion, either *ex parte* or with notice to the adverse party.¹

(b) **To Introduce New Defendant — In General.** — In almost all of the states a motion is the proper method of reviving an action, not only by the representative or successor in interest in case of the death or disability of a party, but also against the representative or successor in interest of such party.² In some states it is provided that the death of the party shall be suggested on the record and his executor or administrator may thereupon appear and take upon himself the defense of the suit, and if the executor or administrator does not voluntarily appear within the proper time after the death of the party, the surviving party may have an

instance of the opposing party, when the cause of action survives. The statute applies to plaintiff and defendant. The administrator of the plaintiff has the same right to appear after the death of a defendant as if he were living. The death of a defendant affords no reason why the executor or administrator of the plaintiff should not become a party, and becoming a party, he may by statute summon in the executor or administrator of a deceased defendant."

1. See *infra*, p. 1134.

Motion a Substitute for Bill of Revivor. — The revivor of an action on motion, although differing as to its applicability and necessity and the time within which it may be made, nevertheless stands in the place of the former bill of revivor and original bill in the nature of a bill of revivor. *Landis v. Olds*, 9 Minn. 90; *Bornsdorff v. Lord*, 41 Barb. (N. Y.) 211; *Coit v. Campbell*, 82 N. Y. 509, wherein it was said: "All the various proceedings which have been from time to time authorized by statute for the purpose of reviving suits in equity interrupted by the death of parties are but substitutes for the old bill of revivor. They change merely the mode of procedure, but the right is always the same and should be governed by the same principles."

2. *Alabama.* — *Ex p. Jones*, 54 Ala. 108; *Phoenix Ins. Co. v. Moog*, 81 Ala. 335; *Brown v. Tutwiler*, 61 Ala. 372; *Ex p. Sayre*, 69 Ala. 184; *Evans v. Welch*, 63 Ala. 250.

Arkansas. — *McNutt v. State*, 48 Ark. 30.

California. — *Campbell v. West*, 93 Cal. 653; *Taylor v. Western Pac. R. Co.*, 45 Cal. 323.

Iowa. — *Masterson v. Brown*, 51 Iowa 445; *Union Mill Co. v. Prenzler*, 100 Iowa 540.

Kansas. — *Kansas, etc., R. Co. v. Smith*, 40 Kan. 192.

Kentucky. — *Thomson v. Williams*, 86 Ky. 15; *Buford v. Guthrie*, 14 Bush (Ky.) 677; *Greer v. Powell*, 1 Bush (Ky.) 489; *Amyx v. Smith*, 1 Met. (Ky.) 530.

Minnesota. — *Lee v. O'Shaughnessy*, 20 Minn. 173; *Stocking v. Hanson*, 22 Minn. 542; *Landis v. Olds*, 9 Minn. 90.

Missouri. — *Gallagher v. Delargy*, 57 Mo. 29; *Fine v. Gray*, 19 Mo. 33.

Nebraska. — *Fox v. Abbott*, 12 Neb. 328; *Hendrix v. Rieman*, 6 Neb. 523; *Howell v. Alma Milling Co.*, 36 Neb. 80; *Rakes v. Brown*, 34 Neb. 304; *Gillette v. Morrison*, 7 Neb. 263.

New York. — *Holsman v. St. John*, 90 N. Y. 461; *St. John v. Croel*, (Supm. Ct. Gen. T.) 10 How. Pr. (N. Y.) 253; *Matter of Bainbridge*, 67 Barb. (N. Y.) 293; *Coit v. Campbell*, 82 N. Y. 509; *Green v. Martine*, (Supm. Ct. Spec. T.) 1 Civ. Pro. (N. Y.) 129; *Gordon v. Sterling*, (Supm. Ct. Spec. T.) 13 How. Pr. (N. Y.) 405; *Lyon v. Park*, 55 N. Y. Super. Ct. 539; *O'Sullivan v. New York El. R. Co.*, (N. Y. Super. Ct. Spec. T.) 25 Civ. Pro. (N. Y.) 163; *Bornsdorff v. Lord*, 41 Barb. (N. Y.) 211; *Mackey v. Duryea*, (Supm. Ct. Spec. T.) 22 Abb. N. Cas. (N. Y.) 284.

Ohio. — *Carter v. Jennings*, 24 Ohio St. 182; *Foresman v. Haag*, 37 Ohio St. 143; *Black v. Hill*, 29 Ohio St. 86; *Pavey v. Pavey*, 30 Ohio St. 600.

Oregon. — *Dick v. Kendall*, 6 Oregon 166.

South Carolina. — *Dunham v. Carson*, 42 S. Car. 383; *Parnell v. Maner*, 16 S. Car. 349.

order of course to compel him to do so within a prescribed time after the service of notice of such order.¹

Revivor on Motion with Consent. — In some states it is provided that an action may be revived by the proper person entitled to the decedent's place by motion alone, and by the adverse party against such person by consent of that person on mere motion.²

(2) *Time of Motion.* — The codes and statutes relating to the revivor of actions by motion usually prescribe a certain time within which such revivor must be had.³ It is also generally

1. Comp. Laws Mich., § 10,115; Gen. Stat. N. J., p. 2; Ten Eyck v. Runk, 31 N. J. L. 428; Crane v. Alling, 14 N. J. L. 593; Philadelphia v. Jenkins, 162 Pa. St. 451.

2. Annot. Code Tenn. (1896), § 4576; Campbell v. Hubbard, 11 Lea (Tenn.) 6; Rucker v. Moore, 1 Heisk. (Tenn.) 726.

3. In Alabama the statute formerly allowed eighteen months only within which to revive in the name of or against the successor or representative of the deceased party, failing which the suit abated. *Ex p. Jones*, 54 Ala. 108; *Phoenix Ins. Co. v. Moog*, 81 Ala. 335; *Rupert v. Elston*, 35 Ala. 79; *Dumas v. Robbins*, 48 Ala. 545; *Pope v. Irby*, 57 Ala. 105; *Brown v. Tutwiler*, 61 Ala. 372; *Evans v. Welch*, 63 Ala. 250. This limitation as to time was held not to apply to suits in equity, *Ex p. Kirtland*, 49 Ala. 403; *Fearn v. Ward*, 80 Ala. 555, nor to the settlement of administration in a probate court, *Glenn v. Billingslea*, 64 Ala. 345. By a more recent provision of the statute the action must, on motion, be revived within twelve months. Civ. Code Ala., § 38.

In ejectment, when the death of the defendant in possession "is suggested and proved, and leave granted the plaintiff to revive this suit against the personal representatives of the defendant," the minute entry neither giving the name of the personal representative nor adding "when known," this cannot be regarded even as a motion to revive; and if no other steps to revive are taken in the cause until after the lapse of eighteen months from the death of the defendant, the right to revive having been thereby lost, the court may, on motion, strike the cause from the docket. *Ex p. Sayre*, 69 Ala. 184.

In Dakota the motion must be made within one year after the death or

disability. Comp. Laws Dak. (1887), § 488r.

In Indiana the motion may be at any time within one year. *Horner's Stat. Ind.* (1896), § 271.

In Kentucky it is provided by Bullitt's Civ. Code Ky. (1895) § 507, that "an order to revive an action against the personal representative of a defendant or against him and the real representatives of the defendant cannot be made, unless by consent, within six months after the qualification of the personal representative." Section 508 provides that "an order to revive an action against the representative or successor of a defendant shall not be made, without his consent, unless within one year after the time when it could have been first made." By section 509 it is provided that "an order to revive an action in the name of the representative or successor of a plaintiff may be made forthwith, but shall not be made without the consent of the defendant after the expiration of one year from the time the order might have been first made; except that if the defendant shall also have died, or his powers have ceased, in the meantime, the order of revivor on both sides may be made in the period limited in the last section." See *Thomson v. Williams*, 86 Ky. 15; *Buford v. Guthrie*, 14 Bush (Ky.) 677; *Hull v. Deatly*, 7 Bush (Ky.) 687.

In Minnesota it was formerly provided (Gen. Stat. 1866, c. 66, § 36) that in case of the death of a party the court on motion at any time within one year thereafter may allow the action to be continued by or against his representative or successor in interest. *Lee v. O'Shaughnessy*, 20 Minn. 173; *Stocking v. Hanson*, 22 Minn. 542. But the words "at any time within one year thereafter" have since been eliminated. Stat. Minn. (1894), § 5171.

In Missouri it is provided by Rev.

provided that if the action is not revived in such time, it shall abate as to such party, and the interest of his representatives or successor therein, and the cause shall proceed in favor of or against the survivors, and in case there be no surviving plaintiff or defendant the suit shall be dismissed.¹

Order Need Not Be Made Within Prescribed Time.—While the motion to revive an action after the death or other disability of a party must be made within the time prescribed by the statute authorizing such revivor, yet it is not necessary that the order itself be made until after the expiration of such time.²

(3) *Suggestion of Death or Disability.*—Although not expressly required in all the states, it would seem that, in order to revive an action by motion or otherwise upon the death or disability of a party thereto, such death or disability should be suggested upon the record at the time of making such motion.³

Stat. 1879, § 3663 (Burns's Prac. Code Mo., 1896, § 570), that "in case of the death, marriage, or other disability of a party, the court, on or before the third term after the suggestion of such death, marriage, or disability, may, on motion, order the action to be continued by or against the representative or successor of such party in interest." *Gallagher v. Delargy*, 57 Mo. 29; *Farell v. Brennan*, 25 Mo. 88; *Rutherford v. Williams*, 62 Mo. 252.

In New York the action must be continued within the time specified in the order "not less than six months, nor more than one year, after the granting thereof." Code Civ. Pro., § 761. And see *Holsman v. St. John*, 90 N. Y. 461; *Evans v. Cleveland*, 72 N. Y. 486; *Matter of Bainbridge*, 67 Barb. (N. Y.) 293.

In North Carolina it is provided that the court may, on motion at any time within one year, allow the action to be continued by or against a representative or successor in interest. Code N. Car., § 188.

In Oregon an action may be revived on motion at any time within one year after the death, marriage, or other disability of the party. Hill's Annot. Laws Oregon, § 38; *Dick v. Kendall*, 6 Oregon 166.

In South Carolina a court may, on motion at any time within one year, allow the action to be continued. Code Civ. Pro. S. Car., § 142; *Dunham v. Carson*, 42 S. Car. 383.

In Washington motion must be made within one year. Ball. Annot. Codes & Stat. Wash. (1897), § 4837.

In Wisconsin the motion may be

made at any time within one year. Stat. Wis., § 2803; *Stephens v. Magor*, 25 Wis. 533.

1. *Gallagher v. Delargy*, 57 Mo. 29.
Laches in Moving.—In New York the granting of the motion to continue the action is not compulsory in all cases; long delay will justify a refusal to continue the action. *Duffy v. Duffy*, (N. Y. Super. Ct. Gen. T.) 21 N. Y. St. Rep. 473; *Matter of Palmer*, 115 N. Y. 493. See also *Coit v. Campbell*, 82 N. Y. 509; *Underwood v. Sutcliffe*, 21 Hun (N. Y.) 357; *Grant v. Griswold*, 21 Hun (N. Y.) 509; *Evans v. Cleveland*, 72 N. Y. 486.

2. *Dick v. Kendall*, 6 Oregon 166. In this case the court held that "the representatives or successors in interest of a deceased party have one year after the death of the party to apply for leave to continue the suit; and the application * * * is in time if made within one year, although the court may not in fact make the order allowing the motion until after the expiration of the year."

3. *Alabama.*—*Waller v. Nelson*, 48 Ala. 531; *Pope v. Irby*, 57 Ala. 105; *Floyd v. Ritter*, 65 Ala. 501; *Wells v. American Mortg. Co.*, 109 Ala. 430.

Arkansas.—*McNutt v. State*, 48 Ark. 30.

California.—*Campbell v. West*, 93 Cal. 653; *Taylor v. Western Pac. R. Co.*, 45 Cal. 337.

Florida.—*Parker v. Hendry*, 8 Fla. 53.

Georgia.—*Dean v. Feeley*, 66 Ga. 273.

Illinois.—*Thorpe v. Starr*, 17 Ill.

109; *Singleton v. Wofford*, 4 Ill. 576.

Indiana.—*Holland v. Holland*, 131 Ind. 196.

(4) *Notice of Motion* — (a) *Necessity For* — *aa*. WHERE NEW PLAINTIFF IS INTRODUCED. — With regard to the necessity of notice to the adverse party when an action is revived by the representative of a deceased plaintiff, the statutory provisions differ in the various states. According to some it would seem that no notice is necessary when the cause is revived or continued in favor of the legal representative of the plaintiff.¹ In such case, since there is no change in the person of the defendant, it is the duty of such defendant to look after his interests, and being in court he is

Iowa. — *Maish v. Crangle*, 80 Iowa 650.

Maine. — *Treat v. Dwinel*, 59 Me. 341.

Massachusetts. — *Brighton Bank v. Russell*, 13 Allen (Mass.) 221.

Michigan. — *Larned v. Wilcox*, 4 Mich. 333; *Vickery v. Beir*, 16 Mich. 50.

Missouri. — *Sargeant v. Rowsey*, 89 Mo. 617; *Baker v. Crandall*, 78 Mo. 584; *Gallagher v. Delargy*, 57 Mo. 29.

Nebraska. — *Fox v. Abbott*, 12 Neb. 328.

New Jersey. — *Crane v. Alling*, 14 N. J. L. 593; *Ten Eyck v. Runk*, 31 N. J. L. 428.

Ohio. — *Black v. Hill*, 29 Ohio St. 87; *Carter v. Jennings*, 24 Ohio St. 182; *Pavey v. Pavey*, 30 Ohio St. 600.

Pennsylvania. — *Philadelphia v. Jenkins*, 162 Pa. St. 451.

Texas. — *Hanley v. Lemmon*, 28 Tex. 155; *St. Clair v. Hotchkiss*, 28 Tex. 474; *Vermont*. — *Hyde v. Leavitt*, 2 Tyler (Vt.) 170.

United States. — *Wilson v. Codman*, 3 Cranch (U. S.) 193.

And see in general article DEATH, vol. 5, p. 841.

An order to revive an action cannot be made until after the death of a party has been suggested. *Sargeant v. Rowsey*, 89 Mo. 617.

In *Vickery v. Beir*, 16 Mich. 50, it was held that proof of the party's death and of the appointment of an administrator should be presented to the court and placed on file in all cases where a suit is revived by administrator. The proceeding to substitute the administrator is entirely a matter of statutory regulation, and its effect upon the rights of parties cannot properly be extended beyond what the statute has provided on any mere fanciful analogies to the common-law practice.

By section 460 of the *Nebraska Code* in force in 1882, it was provided that "the order may be made on the mo-

tion of the adverse party, or of the representatives or successor of the party who died, or whose powers ceased, suggesting his death or the cessation of his powers, which, with the names and capacities of his representatives or successor, shall be stated in the order." *Fox v. Abbott*, 12 Neb. 328.

Amendment Serving as Suggestion of Death. — In *Wells v. American Mortg. Co.*, 109 Ala. 430, it was held that the amendment of a bill for the purpose of revival may serve as a suggestion of the death of the defendant and of the persons who are his heirs and personal representatives, so as to authorize the issuance of notice to the personal representatives and heirs to appear, though the heirs are minors.

1. *Campbell v. West*, 93 Cal. 653; *Taylor v. Western Pac. R. Co.*, 45 Cal. 337; *Thorpe v. Starr*, 17 Ill. 199; *Masterson v. Brown*, 51 Iowa 445; *Vickery v. Beir*, 16 Mich. 50; *Stebbins v. Duncan*, 108 U. S. 32. As to the necessity of notice of motions generally, see the article MOTIONS, vol. 14, p. 122.

"It has been the uniform practice in this state, from its organization, so far as we are advised, to permit the substitution to be made on a suggestion of the death of the former party and satisfactory proof on an *ex parte* motion of the appointment and qualification of the administrator." *Taylor v. Western Pac. R. Co.*, 45 Cal. 337.

In *Michigan* it was early held that where the plaintiff dies during the pendency of the suit, it may be revived in the name of his representatives by suggesting the death on the record and entering an order authorizing them to prosecute the suit in their representative capacity. The suggestion cannot be the subject of an issue; and whether the defendant is entitled to any notice is a question that can only be raised on application to the court below to set aside the judgment for irregularity. *Larned v. Wilcox*, 4 Mich. 333.

bound to take notice of the substitution.¹ As a general rule, however, the provisions of the various statutes as to the revivor of actions seem to require that notice of the motion be given to the adverse party under such circumstances.²

1. *Masterson v. Brown*, 51 Iowa 442. In this case the court said: "In case of the death of a party to an action, section 2527 of the code provides that 'the court, on motion, may allow the action to be continued by or against the legal representatives or successors in interest of the deceased. Such action shall be deemed a continuing one, and to have accrued to such representative or successor at the same time it did to the deceased if he had survived. If such is continued against the legal representative of the defendant, a notice shall be served on him as provided for service of original notices.' It is a necessary implication from the requirement that notice shall be served upon the legal representative of the defendant, when the cause is continued against him, that no notice is necessary when the cause is continued in favor of the legal representative of the plaintiff. In such case, there being no change in the person of the defendant, it is his duty to look after his interests, and to be vigilant in the preparation for trial."

In *Arkansas* it was held in a case decided before the present code that on the death of a plaintiff in a cause, his executor may voluntarily appear at the first term thereafter and make himself plaintiff and proceed with the cause, and the defendant, being in court, is bound to take notice of such substitution. *Noland v. Leech*, 10 Ark. 504. In this case the court said: "The next question presented relates to the propriety of the action of the court in permitting Leech to substitute himself in the place of William Robinson, deceased, and to proceed to trial and judgment without having first notified Noland of the intended substitution. The 7th section, c. 1, Dig., declares that 'when there is but one plaintiff in an action, and he shall die before final judgment, such action shall not thereby abate, if the cause of action survive to the heirs, devisees, executor or administrator of such plaintiff, but such of them as might prosecute the same cause of action may continue such suit by an order of the court substituting them as plaintiff therein.' The death

of Robinson, the original plaintiff, could not have the effect to abate the suit, and, as a necessary consequence, the defendant could not claim to be released from his obligation to be in court or to take the consequences of his default. It appears from the recital in the record that Leech availed himself of the earliest opportunity that presented itself to come in and substitute himself as a party in the place of the original plaintiff. He came in at the first term after the death of the original plaintiff, and the defendant, being in court, was bound at his peril to take notice of the proceeding, and, as he is not shown to have opposed it, the presumption is that he had no good ground upon which to rest a resistance to it."

2. *Arkansas*. — *McNutt v. State*, 48 Ark. 30.

Kentucky. — *Amyx v. Smith*, 1 Met. (Ky.) 529; *Thomson v. Williams*, 86 Ky. 15.

Missouri. — *Ferris v. Hunt*, 18 Mo. 480; *Fine v. Gray*, 19 Mo. 33; *Harkness v. Austin*, 36 Mo. 47; *Gallagher v. Delargy*, 57 Mo. 29; *Doering v. Kenamore*, 36 Mo. App. 147.

Nebraska. — *Fox v. Abbott*, 12 Neb. 328; *Missouri Pac. R. Co. v. Fox*, 56 Neb. 746.

Ohio. — *Carter v. Jennings*, 24 Ohio St. 182; *Foresman v. Haag*, 37 Ohio St. 143.

Oregon. — *Dick v. Kendall*, 6 Oregon 166.

South Carolina. — *Dunham v. Carson*, 42 S. Car. 383.

In *Georgia* "when a plaintiff or complainant in any cause now or hereafter pending dies, the executor or administrator of such plaintiff or complainant may be made parties on motion, to be made in writing, of which defendants or their counsel shall have notice." *Dean v. Feeley*, 66 Ga. 273.

Effect of Failure to Give Notice. — When a plaintiff or complainant in a pending cause dies, his executor or administrator may be made a party, on motion in writing, of which the defendants or their counsel shall have notice. Where, pending the foreclosure of a mortgage, the defendant died, and

bb. WHERE NEW DEFENDANT IS INTRODUCED. — Although notice is not expressly required by the statutes of some states where an action is revived by motion against the representatives of a deceased defendant,¹ yet, as a general rule, notice should be served upon the legal representative of the defendant when the cause is revived against him.²

his administratrix was made a party by scire facias, and the plaintiff having died, his executrix was made a party, without notice to the defendant, and judgment of foreclosure was at once rendered, the defendant not being present in person or by counsel, she had not had her day in court, and having a good defense to the foreclosure, an affidavit of illegality would lie to the *fi. fa.* issued thereunder. *Meeks v. Johnson*, 75 Ga. 629.

Waiver of Notice. — In *Brooks v. Northey*, 48 Wis. 455, it was held that after an action has been revived, appearing and arguing a demurrer by the opposite party is a waiver of objection that the order of revival was made without notice, and without sufficient evidence of the petitioner's representative character. The court said: "The failure of the plaintiff to give notice to the defendants of the petition to revive the action in the name of the executor was an irregularity. Such notice should have been given, and, on the hearing of the petition, the defendants might have insisted that due proof should be made of the probate of Carson's will and the qualification of the present plaintiff as executor. But this was an irregularity merely, which, like any other irregularity not going to the jurisdiction of the court, may be waived by the opposite party. The original plaintiff having deceased, it was competent for the court to revive the action in the name of his duly qualified executor. Notice of the petition should have been given; but proceeding without notice affects only jurisdiction of the person, not of the subject-matter, and a subsequent general appearance waives the defect. The rule is elementary that a general appearance to the action by the defendant waives a defective service, or want of service, of the original process. The principle of this rule is applicable here."

1. *Campbell v. West*, 93 Cal. 653; *Larned v. Wilcox*, 4 Mich. 333; *Vickery v. Beir*, 16 Mich. 50. In this case the court said: "The proceeding on suggesting the death of a plaintiff is

entirely *ex parte*, and there is no provision of statute by which notice of it is to be given to the defendant. If he happen to be present, he has no right to intervene, and if he be not present, the first intimation he receives of it may be when he is served with notice of trial."

In California it has been held that under Code Civ. Pro., § 385, which provides that "in case of the death or any disability of a party, the court, on motion, may allow the action or proceeding to be continued by or against his representative or successor in interest," the substitution will be made on suggestion of the death of a party, and on an *ex parte* motion, or by amendment of the complaint showing the appointment and qualification of an executor or administrator. *Campbell v. West*, 93 Cal. 653.

2. *Arkansas*. — *McNutt v. State*, 48 Ark. 30.

Iowa. — *Masterson v. Brown*, 51 Iowa 445.

Kentucky. — *Thomson v. Williams*, 86 Ky. 15; *Amyx v. Smith*, 1 Met. (Ky.) 529.

Missouri. — *Ferris v. Hunt*, 18 Mo. 480; *Fine v. Gray*, 19 Mo. 33; *Harkness v. Austin*, 36 Mo. 47.

Nebraska. — *Fox v. Abbott*, 12 Neb. 328; *Rakes v. Brown*, 34 Neb. 304; *Hendrix v. Rieman*, 6 Neb. 516; *Missouri Pac. R. Co. v. Fox*, 56 Neb. 746.

Ohio. — *Carter v. Jennings*, 24 Ohio St. 182; *Black v. Hill*, 29 Ohio St. 87; *Pavey v. Pavey*, 30 Ohio St. 600; *Forsman v. Haag*, 37 Ohio St. 143.

South Carolina. — *Dunham v. Carson*, 42 S. Car. 383.

In Florida, in the case of the death of a sole defendant, or sole surviving defendant, the plaintiff may file a suggestion of the death of a defendant, and that a person named therein is executor or administrator of the deceased, and may serve such executor or administrator with a copy of the suggestion, and with a notice requiring him to appear. Rev. Stat. Fla., § 991.

In South Carolina the proper practice of reviving an action against the rep-

(b) **Manner of Giving Notice** — *aa. IN GENERAL.* — It may be stated that, as a general rule, notices of motions to revive actions do not differ essentially from notices of other motions.¹

bb. CONDITIONAL ORDER — **In General.** — In several of the states it is provided by statute that a revivor may be effected by a conditional order of the court that the action be revived in the name of the representative or successor of the party who has died or whose powers have ceased, and that it shall proceed in favor of or against such representative or successor,² unless sufficient cause is shown within a prescribed time why such action should not be revived.³

On Whose Motion Made. — Such order may be made on the motion of the adverse party or of the representatives or successor of the party who died or whose powers ceased.⁴

Nature of Conditional Order. — A conditional order of revivor is in its nature an order to show cause, and, as is usually the case with such orders, is used as a method of shortening the notice of motion, and is equivalent to, *aa.* and a substitute for, a notice of motion.⁵

representative of a deceased party is by *ex parte* application based upon proper showing by affidavit for a rule against the representatives of the deceased's interest requiring them to show cause why the action should not be continued against them in the character ascribed; and upon default in showing good cause, the action will be continued. *Dunham v. Carson*, 42 S. Car. 383.

1. See article **MOTIONS**, vol. 14, p. 121.

In *Masteron v. Brown*, 51 Iowa 445, it is held that where an action is continued against the legal representative of a defendant, a notice should be served on him as provided for in services of original notices.

Copy of Suggestion. — In at least one state, in the case of the death of a sole defendant, or sole surviving defendant, where the action survives, the plaintiff may file in the cause a suggestion that the defendant is dead, and that a person named therein is executor or administrator of the deceased, and may thereupon serve such executor or administrator of the deceased with a copy of the suggestion, and with a notice requiring such executor or administrator to appear, and that in default of his so doing, the plaintiff will sign judgment against him as such executor or administrator. *Rev. Stat. Fla.*, § 991.

2. See the codes and statutes of the various states.

3. *Kentucky.* — *Thomson v. Williams*, 86 Ky. 15; *Amyx v. Smith*, 1 Met. (Ky.) 529; *Greer v. Powell*, 1 Bush (Ky.) 489; *Buford v. Guthrie*, 14 Bush (Ky.) 677.

Missouri. — *Sargeant v. Rowsey*, 89 Mo. 617; *Fine v. Gray*, 19 Mo. 33; *Harkness v. Austin*, 36 Mo. 47; *Shockley v. Fischer*, 21 Mo. App. 551; *Doering v. Kenamore*, 36 Mo. App. 147; *Gallagher v. Delargy*, 57 Mo. 29.

Nebraska. — *Fox v. Abbott*, 12 Neb. 328; *Hendrix v. Rieman*, 6 Neb. 523; *Gillette v. Morrison*, 7 Neb. 263; *Missouri Pac. R. Co. v. Fox*, 56 Neb. 746; *Rakes v. Brown*, 34 Neb. 304.

Ohio. — *Carter v. Jennings*, 24 Ohio St. 182; *Foresman v. Haag*, 37 Ohio St. 143; *Black v. Hill*, 29 Ohio St. 86.

4. *Bullitt's Civ. Code Ky.* (1895), § 501; *Stat. Okla.*, § 4319; *Comp. Laws N. Mex.*, § 3093; *Fox v. Abbott*, 12 Neb. 328; *Carter v. Jennings*, 24 Ohio St. 182.

By *Code Civ. Pro. Neb.*, § 459, it is provided that "the revivor shall be by a conditional order of the court if made in term, or by a judge thereof if made in vacation, that the action be revived in the names of the representatives or successor of the party who died, or whose powers ceased, and proceed in favor of or against them." *Fox v. Abbott*, 12 Neb. 328; *Missouri Pac. R. Co. v. Fox*, 56 Neb. 746.

5. As to orders to show cause generally, see article **ORDERS**, vol. 15, p. 362.

Requisites of Conditional Order. — A conditional order should suggest the death of the party or a cessation of his powers, together with the name and capacities of his representative or successor.¹

(a) **Service of Notice.** — With regard to the service of notice of motion to revive an action it may be said that such service does not differ as a rule from the service of other motions.²

Conditional Order. — If the Order Be Made by Consent of the parties the action forthwith stands revived.³

If Not Made by Consent, the order is served in the same manner and returned within the same time as a summons, upon the party adverse to the one making the motion.⁴

1. Form of Conditional Order to Revive Against Administrator. — A conditional order, after the suggestion of the death and of the names of the party to be proceeded against, is to the effect that the action be revived in his name as administrator, and proceed against him as such unless he show sufficient cause against the revivor at the next term of the court. *McNutt v. State*, 48 Ark. 30.

Amendment of Order. — In *McNutt v. State*, 48 Ark. 30, the court, after setting out the provisions of the statute (Mansf. Dig., §§ 5239, 5241) as to orders of revivor, held, where the administratrix was served with a writ requiring her to answer a suit begun against her intestate in his lifetime, and revived against her as administratrix, that this summons sufficiently apprised the administratrix of the nature of the suit, and that the writ could be amended at the return term by inserting before the word "revived," the words "show cause why the action should not be."

2. See articles MOTIONS, vol. 14, p. 144; SERVICE OF PROCESS AND PAPERS.

In *Masterson v. Brown*, 51 Iowa 445, it was held that such notice shall be served on the legal representative of a defendant as is provided for service of original notices.

3. Bullitt's Civ. Code Ky. (1895), § 502; Burns's Prac. Code Mo. (1896), § 572; Code Civ. Pro. Neb., § 461; Bates's Annot. Stat. Ohio (1897), § 5152; Thomson v. Williams, 86 Ky. 15; Amyx v. Smith, 1 Met. (Ky.) 529; Fine v. Gray, 19 Mo. 33; Harkness v. Austin, 36 Mo. 47; Fox v. Abbott, 12 Neb. 328.

4. Thomson v. Williams, 86 Ky. 15; Amyx v. Smith, 1 Met. (Ky.) 529; Fox v. Abbott, 12 Neb. 328. And see Fine v. Gray, 19 Mo. 33; Harkness v. Austin, 36 Mo. 47; Ferris v. Hunt, 18 Mo. 480, 20 Mo. 464; Farrell v. Brennan,

25 Mo. 88; Doering v. Kenamore, 36 Mo. App. 147; Farrell v. Brennan, 25 Mo. 84.

Service on Attorney. — Service of a conditional order of revivor must be in the same manner as service of a summons, and it seems that service upon the attorney of record is insufficient unless a summons may be so served. *Missouri Pac. R. Co. v. Fox*, 56 Neb. 746.

Effect of Omission of Service. — Where the plaintiff in an action dies, the order of revivor, made on the motion of his representatives, must be served upon the defendant in the same manner as a summons. Without such service the judgment subsequently rendered is void. *Amyx v. Smith*, 1 Met. (Ky.) 529.

Waiver of Service by Appearance. — A failure to serve a conditional order of revivor goes only to the jurisdiction of the person, and is waived by a voluntary general appearance. *Missouri Pac. R. Co. v. Fox*, 56 Neb. 746.

Time of Service of Order. — Under the provisions of the code for the revivor of actions, it is not essential that the action be actually revived within twelve months from the time when the revivor should have been had. The order to revive must be made within the twelve months and a copy served as a summons. When served, the case stands revived unless valid objections are interposed. If, however, the order to revive is entered within the proper period, but no copy is issued and placed in the hands of some one authorized by law to serve it, within twelve months, there is such laches as should compel the plaintiff to pursue his remedy by action; but the plaintiff is not barred of his summary remedy merely by the neglect of the officer to serve the order within twelve months

Service by Publication. — In those states where revivor may be by conditional order, provisions are usually made for the service of such order by publication, where, by reason of the absence of the parties to be served, personal service cannot be had.¹

(5) *Hearing and Determination* — (a) *Necessity For* — *In General.* — As in the case of other motions, a motion to revive or continue an action by or against the representatives or successors in interest of a deceased party should be brought to a hearing at a specified time.² If at the hearing sufficient cause is not shown to the contrary, the court may make an order reviving the action.³

Conditional Order. — In jurisdictions where the mode of procedure to revive an action when not by consent is by motion and conditional order, there must be a hearing at which the question of revivor of the action is finally determined.⁴ If sufficient cause be not shown against the revivor the action shall stand revived,⁵ the conditional order being made final.⁶

(b) *Objections to Revivor of Actions.* — Generally speaking, since a motion to revive an action is a substitute for the old bill of

or by the temporary absence of the representative of the decedent from the jurisdiction. *Thomson v. Williams*, 86 Ky. 15.

1. See in general article PUBLICATION, vol. 17, p. 26.

When Service May Be Made by Publication. — "When the plaintiff makes an affidavit that the representatives of the defendant, or any of them in whose name the action is ordered to be revived, are nonresidents of the state, or have left the state to avoid the service of the order, or so conceal themselves that the order cannot be served upon them, or that the names and residences of the heirs or devisees of the person against whom the action is ordered to be revived, or some of them, are unknown to the affiant, a notice may be published for six consecutive weeks, as provided by section five thousand and forty-eight, notifying them to appear on a day therein named, not less than ten days after the publication is complete, and show cause why the action should not be revived against them; and if sufficient cause be not shown to the contrary, the action shall stand revived." *Bates's Annot. Stat. Ohio* (1897), § 5153.

2. As to a hearing of motions in general, see article MOTIONS, vol. 14, p. 163.

Where a motion has been made to revive an action and notice has been given and due return made of the

service of such notice, the person thus notified must appear at the time appointed and show cause why the action should not be revived. *Mansf. Dig. Stat. Ark.*, § 5239; *Bullitt's Civ. Code Ky.* (1895), § 503; *McNutt v. State*, 48 Ark. 30. See also *Gallagher v. Delargy*, 57 Mo. 29.

3. *McNutt v. State*, 48 Ark. 30.

4. *Hendrix v. Rieman*, 6 Neb. 516; *Fox v. Abbott*, 12 Neb. 328; *Rakes v. Brown*, 34 Neb. 312; *Missouri Pac. R. Co. v. Fox*, 56 Neb. 746; *McNutt v. State*, 48 Ark. 30; *Carter v. Jennings*, 24 Ohio St. 182.

As to the hearing of motions to show cause in general, see article ORDERS, vol. 15, p. 370.

5. *Fox v. Abbott*, 12 Neb. 328; *Rakes v. Brown*, 34 Neb. 312; *Missouri Pac. R. Co. v. Fox*, 56 Neb. 746; *McNutt v. State*, 48 Ark. 30; *Carter v. Jennings*, 24 Ohio St. 182.

"If the order is made by consent of the parties, the action shall forthwith stand revived; and if not made by consent, the order shall be served in the same manner, and returned within the same time, as a summons, upon the party adverse to the one making the motion, and if sufficient cause be not shown against the revivor, the action shall stand revived." *Code Civ. Pro. Neb.*, § 461; *Fox v. Abbott*, 12 Neb. 328.

6. *Missouri Pac. R. Co. v. Fox*, 56 Neb. 746.

revivor and original bill in the nature of a bill of revivor,¹ upon the hearing of a motion to revive, the person opposing such motion may contest not only the title to the subject-matter in the controversy, but also the question as to who should properly be substituted.²

When Revivor Is Sought by Conditional Order, the hearing in pursuance thereof is the proper occasion to try the right of the successor in whose name the revivor is attempted,³ the issue being raised by the answer of the adverse party to the motion and conditional order.⁴

(c) Rules Governing Determination — Court's Discretion. — Where a motion is the prescribed manner of reviving an action, the court

1. See *supra*, p. 1131.

2. *Landis v. Olds*, 9 Minn. 90. In this case the court said: "The statute declaring that no action shall abate on account of any disability (where the cause of action continues), there can be no occasion to revive it, either by a bill of revivor or by original bill in the nature of such bill. Manifestly it was the intent of the statute to sweep away this expensive and cumbersome machinery of the old system and in all cases allow the admission of plaintiff on motion. Under the old system the defendant of course was allowed to contest the facts set up in either of these bills by answer, and proofs were taken upon the issues joined. Under this statute also he may contest the facts set forth in the motion papers, and so far as the nature of the proof is concerned, to wit, by affidavits rather than the production of witnesses in court, and trying the issue before a jury, the objection is applicable to the one case as well as the other; that is, where the person only entitled to admission is in question, or where in addition thereto the title to the subject-matter of the litigation might be disputed. If the nature of the proof be sufficient or allowable in the one case, no valid reason can be assigned why it should not be in the other, even though more intricate questions might arise in the latter case than in the former. The admission of a plaintiff on motion could scarcely involve the decision of more important questions than are determined by the court in the same manner in other cases, as the issuance of writs of attachment, injunction, etc."

In *Campbell v. Hubbard*, 11 Lea (Tenn.) 6, the court, in referring to the statutes authorizing revivor of action,

said: "Under these statutes, where persons claiming to be the proper representatives of deceased parties present themselves and move to revive, the opposing litigant may resist the revivor upon any sufficient ground, such as that they are not the heirs or all the heirs, and the court must, in acting upon the motion to revive, pass upon and decide the question." *Citing Mayfield v. Stephenson*, 6 Baxt. (Tenn.) 397; *Berrigan v. Fleming*, 2 Lea (Tenn.) 271.

3. *Missouri Pac. R. Co. v. Fox*, 56 Neb. 746. In this case the court said: "Under our system of practice, where a party dies or his authority as a representative ceases, two methods of revivor coexist. A conditional order of revivor may issue and be served, and the order made final, unless cause be shown against it, or the court may substitute the new party, and supplemental pleadings may be filed and summons served. * * * If the former method be pursued, the proper method of traversing the claim of the person in whose name revivor is attempted is by showing cause against the absolute order."

4. *Hendrix v. Rieman*, 6 Neb. 516, wherein the court said: "The statute provides the mode and regulates the practice in cases of revivor of actions. The mode of procedure, when not by consent, is by motion and conditional order of the court, if made in term, or by a judge thereof if made in vacation; and the statutory provisions very plainly indicate that the question of revival of the action in the name of the administrator must be finally determined on the hearing of the case, upon the motion and conditional order and answer thereto of the adverse party. And that this is the correct in-

should not exercise an arbitrary discretion in passing on such motion, but should, as a general rule, allow the motion unless good cause be shown to the contrary.¹ Indeed it has been held that the right to revive an action under a statutory provision authorizing revivor by motion and conditional order is not dependent on the discretion of the court or judge making the order, if the cause of action survives, but is a matter of right under the conditions and within the time limited by the statute.²

In Case of Laches. — The statutory provisions as to revivor do not, however, compel the granting of the motion in all cases, but simply require that where a party has the right to a revivor or continuance, relief should be granted on motion. Such right is to be determined according to the settled rules of equity so far as established by precedent.³ If there has been delay in making the application, the equitable rule which requires reasonable diligence as well as good faith applies, and long delay has been held to constitute a valid reason for denying the application.⁴

interpretation of the statute seems quite clear from the fact that no step can be taken in the prosecution of the action until there is a revival of the action by the substitution of the proper representative in the place of the deceased party."

1. *Landis v. Olds*, 9 Minn. 90. In this case the court said: "The statute provides (Comp. Stat. 535, § 37) that 'an action does not abate by death, marriage, or other disability of a party, or by the transfer of any interest, if the cause of action survive or continue. In case of death, marriage, or other disability of a party, the court, on motion, may allow the action to be continued by his representative or successor in interest.' Although the statute in terms is permissive and not mandatory of the substitution, yet it is not to be understood that the court is at liberty to exercise an arbitrary discretion in regard thereto, but (in case of death, at least, of the plaintiff where the action cannot proceed without substitution) it should always be allowed unless good cause be shown to the contrary. In case of the death of the plaintiff, his executor would usually be entitled to substitution, though not necessarily so, as he might not be the 'successor in interest' of the particular property in litigation."

2. *Gillette v. Morrison*, 7 Neb. 263, wherein the court said: "Where, under the statute, when it is sought to revive an action upon the ground that the cause has abated by reason of the death

of the defendant, the only questions at issue upon the motion are, first, the death of the defendant; second, the substitution of the administrator and heirs of the estate. In that proceeding, if the cause of action survive, the court has no authority to inquire into the merits of the case. And where the application is in proper form, and made within the time prescribed by statute, the order must be granted as a matter of right."

In *Carter v. Jennings*, 24 Ohio St. 188, the court, in construing such a statute, said: "The right to revive an action under title 13, chapter one, of the code, is not dependent on the discretion of the court or of the judge making the order, but, under the conditions and within the time therein limited, is a matter of right."

3. *Coit v. Campbell*, 82 N. Y. 509.

4. *Coit v. Campbell*, 82 N. Y. 509; *Duffy v. Duffy*, (N. Y. Super. Ct. Gen. T.) 21 N. Y. St. Rep. 473; *Matter of Palmer*, 115 N. Y. 493; *Carter v. Jennings*, 24 Ohio St. 182.

"All the various proceedings which have been from time to time authorized by statute, for the purpose of reviving suits in equity interrupted by the death of parties, are but substitutes for the old bill of revivor. They change merely the mode of procedure, but the right is always the same and should be governed by the same principles. In *Washington Ins. Co. v. Slec*, 2 Paige (N. Y.) 368, the chancellor expresses the opinion that the same objections

(6) *Final Order — Necessity For.* — The mere making of a motion to revive an action does not revive the action itself, but an order of the court to that effect must be obtained,¹ unless such order be waived.²

Form of Order. — Where a conditional order of revivor has issued and been served and no cause has been shown against it, the order is made final.³

Conclusiveness. — The final order of revivor, unless reversed or vacated on error, is conclusive, and cannot be reviewed on the

which might be raised by plea or demurrer to a bill of revivor might be shown in opposition to a petition to revive under the statute, and it would seem to follow that a delay which would not be a bar to a bill of revivor ought not to be a sufficient answer to a petition under the statute or a motion under the code, and I regard all the authorities on the subject as recognizing, as a rule of equity, that the discretion of the court to refuse to revive a suit on the ground of delay is to be guided by the statute of limitations applicable to the subject-matter of the suit." *Coit v. Campbell*, 82 N. Y. 509.

Abuse of Discretion. — In *Anderson v. Cary*, 89 Ga. 258, it is held that where, pending his action, the plaintiff dies, and his administrator fails to have himself made a party within a reasonable time after his qualification, the action may be dismissed for want of prosecution, and it is no abuse of discretion by the presiding judge to refuse to reinstate it on motion subsequently made by the administrator.

1. *Bornsdorff v. Lord*, 41 Barb. (N. Y.) 211.

Action of Court Must Appear of Record. — In *Pope v. Irby*, 57 Ala. 105, it was held that the making of the motion to revive within the prescribed period, and the action of the court thereon, must appear of record; it cannot rest in parol. The court said: "If there is, as in the present case, no entry made by or under the authority of the court, that within eighteen months the death of the party was suggested, and an application to revive, on which the court acts, either by granting or refusing it, or by a continuance, there can be no revivor on parol evidence that the suggestion and application was made."

Distinction Between Order Reviving and Order to Revive. — "There is a difference between an order reviving the action and an order to revive; and

although, when entered in either mode, by consent, or when served, it amounts to a revivor, regardless of the mere form of the order, still it is plain, from sections 507 and 508 of the code, that it is the order to revive that must be entered within the twelve months from the time the revivor could have been had, and not that the action must actually be revived within that period. The order to revive must be made within the twelve months, and when made a copy served as a summons, and when served, the case stands revived unless valid objections are interposed." *Thomson v. Williams*, 86 Ky. 15.

2. *Baker v. Crandall*, 78 Mo. 584. In this case a party died during the pendency of the cause. His death was suggested, and without a formal order of revivor his administrator appeared and the cause proceeded in the name of the administrator. The adverse party participated in the proceedings, and never objected to the want of such an order until the cause reached the appellate court. It was held that the objection then came too late.

Presumption as to Motion and Order. — In *Tarbox v. French*, 27 Wis. 651, it was held that where, after the plaintiff's death, the suit was, with the knowledge and consent of the administrator and approval of the court, continued in the name of the administrator, and judgment rendered against him, such judgment should be held valid and binding upon the estate, although there was no formal motion for such continuance or order granting it. The court held further in this case that perhaps it should be presumed in favor of the judgment that there was a motion and order for such continuance of the cause.

3. *Missouri Pac. R. Co. v. Fox*, 56 Neb. 746; *Fox v. Abbott*, 12 Neb. 328; *Hendrix v. Rieman*, 6 Neb. 516.

subsequent trial of the cause.¹

(7) *Necessity for Amended or Supplemental Pleadings.* — When a cause has been revived by conditional order duly made absolute, it has been held not to be essential that amended or supplemental pleadings be filed alleging the capacity of the new party, as such averments would not be traversable, and the fact already appears of record.²

c. *SCIRE FACIAS* — (1) *To Introduce New Plaintiff* — On Application of Plaintiff. — In several jurisdictions the practice exists, or has heretofore existed, of reviving an action at the instance of a new plaintiff, by means of a writ of scire facias, this being a concurrent remedy with revivor by motion.³

1. *Hendrix v. Rieman*, '6 Neb. 516; *Missouri Pac. R. Co. v. Fox*, 56 Neb. 746, wherein the court said: "If the court make the order absolute, that order becomes *res judicata* as to the right of the person named to proceed with the action, and the issue cannot be again made and tried with the main case."

Waiver of Objection to Order. — Where, pending a suit, the plaintiff died, and an order was taken which recited that the death had been suggested of record, motion to make parties made, and notice given to the opposite party, and which ordered the suit to proceed in the name of the legal representative of the deceased, objection to such order on the ground that the motion was not in writing should have been made at the time; where the case proceeded to trial, and no objection was made until a second trial at a subsequent term, it was then too late to raise the point. *Dean v. Feeley*, 66 Ga. 273. In this case the court said: "We think that it was the duty of defendants to have objected to said order at the time it was offered, so that the same might be amended, if any good objection they had; and not having done so, and having proceeded to trial under it, they have waived any want of formality or regularity in the passing of said order. The order recites, 'there was a motion and notice to defendants,' and this we are bound to hold was presumptively true, as the record imports verity; and after such a lapse of time defendants should not be heard to question it. Moreover, we are inclined to think the order in writing is a substantial compliance with the statute. *Hall v. Carey*, 5 Ga. 241, *Sirrine v. Southwestern R. Co.*, 43 Ga. 280; Code 3587. However this may be, we think the ob-

jection came too late, and the subsequent action of the court has relieved it of all difficulty by having Dean made a party according to the strictest construction of the statute, if such action was necessary."

2. *Missouri Pac. R. Co. v. Fox*, 56 Neb. 746.

Amendment of Declaration. — In *Hoes v. Van Alstyne*, 20 Ill. 201, it was held that when action is revived, declaration need not be amended by insertion of representative's name as plaintiff. The court said: "This declaration was in assumpsit. During the pendency of the action the plaintiff died, and his representatives were made parties under our statute, but the declaration was not amended by inserting their names as plaintiffs. The cause was tried upon the general issue, which was found for the plaintiffs, and it is now assigned for error that their names were not inserted in the declaration. It has not been the practice, under our statute, where the representatives of a deceased party are made parties, to amend the declaration by the insertion of their names, nor do we think it required by the statute. Whether the other course would not have been the better practice at the beginning, it is unnecessary now to say; but we think the statute will fairly bear a construction conformable to the practice, and after that has been so long and uniformly acted upon and acquiesced in by the courts and the bar, we ought not to hunt up ingenious pretexts for overturning it."

3. See *Garrison v. Myers*, 12 W. Va. 330. The court said: "In this state the statute as to reviving suits is as follows: By section 4 of c. 127 of the code it is provided that 'In any stage of any case, a scire facias may be sued out for

On Application of Defendant. — So in some jurisdictions the revivor of an action at the instance of the defendant therein is by writ of scire facias to bring in the new plaintiff. When the plaintiff in a suit dies before final judgment, if the representative of the deceased fails to appear voluntarily and prosecute the suit he may be compelled to do so by means of this writ.¹

(2) *To Introduce New Defendant* — (a) **Necessity For.** — It is provided by statute in several of the states that where it is sought to revive an action against a new defendant, such revivor may be by writ of scire facias, where such new defendant does not voluntarily appear and defend.² Such provisions are applicable

or against the committee of any party who is insane or a convict; or for or against a party before insane, the powers of whose committee have ceased; or for or against the personal representative of the decedent who, or whose personal representatives, was a party; or for or against the heirs or devisees of a decedent who was a party; or for the assignee or beneficiary party, to show cause why the suit should not proceed in the name of him or them; or where the party dying, or whose powers cease, or such insane person or convict, is plaintiff or appellant, the person or persons for whom such scire facias might be sued out may without notice or scire facias move that the suit proceed in his or their name. In the former case, after the service of the scire facias, or in the latter case, on such motion, if no sufficient cause be shown against it, an order shall be entered that the suit proceed according to such scire facias or motion. Any such new party (except in an appellate court) may have a continuance of the case at the term at which such order is entered; and the court may allow him to plead anew, or amend the pleadings, as far as it deems reasonable, but in other respects the case shall proceed to final judgment or decree, for or against him, in like manner as if the case had been pending for or against him, before such scire facias or motion.' " See also *Deiser v. Sterling*, 10 S. & R. (Pa.) 119; *Lovell v. Arnold*, 2 Leigh (Va.) 17.

In North Carolina, before the code, it was held that the representative of the deceased plaintiff might, upon application, issue scire facias to make himself a party, the defendant being kept in court for that purpose. Such method of revivor was not, however, necessary, since the motion was an equally effi-

cient and more usual mode of revivor. *Borden v. Thorpe*, 13 Ired. L. (N. Car.) 298.

1. See the codes and statutes of the several states, and see *Treat v. Dwinel*, 59 Me. 341; *Brighton Bank v. Russell*, 13 Allen (Mass.) 221; *McKey v. Torrey*, 28 Miss. 78; *Ela v. Rand*, 4 N. H. 54; *Reist v. Heilbrenner*, 11 S. & R. (Pa.) 131; *Hyde v. Leavitt*, 2 Tyler (Vt.) 170; *Wentworth v. Wentworth*, 12 Vt. 244; *Vermont v. Raymond*, 16 Vt. 364; *Garrison v. Myers*, 12 W. Va. 330.

Scire Facias Must Issue in the Suit to Be Revived. — "It is clear that a scire facias to revive a suit or action, decree or judgment, can only be issued in the suit to be revived; and if the suit was in equity, the scire facias must be in equity and be governed by the rules of that court; and if the action was at law, the proceedings must conform to the rules of that court. Therefore we do not think the court erred in treating the scire facias in this cause as being a proceeding in equity." *Garrison v. Myers*, 12 W. Va. 330.

2. Gen. Stat. Conn., § 1005; Code Ga., § 5017; Pub. Gen. Laws Md., art. 26, § 20; Annot. Code Tenn., § 4576; Rev. Stat. Tex., art. 1248. And see, as to appropriateness of scire facias as remedy for bringing in new defendant:

Connecticut. — *Smith v. Allen*, 5 Day (Conn.) 337.

Florida. — *Parker v. Hendry*, 8 Fla. 53.

Georgia. — *Heath v. Bates*, 70 Ga. 633; *Lewis v. Allen*, 68 Ga. 398; *McArdle v. Bullock*, 45 Ga. 89; *Henderson v. Alexander*, 2 Ga. 81.

Maine. — *Fulton v. Nason*, 66 Me. 446; *Treat v. Dwinel*, 59 Me. 341.

Maryland. — *Norfolk v. Gantt*, 2 Har. & J. (Md.) 435.

Massachusetts. — *Brighton Bank v. Russell*, 13 Allen (Mass.) 221.

to appeals and writs of error.¹

(b) **Suggestion of Death on Record — Necessity For.** — When the defendant in an action dies before final judgment, and it is

New Hampshire. — *Ela v. Rand*, 4 N. H. 54.

Pennsylvania. — *Philadelphia v. Jenkins*, 162 Pa. St. 451.

Tennessee. — *Campbell v. Hubbard*, 11 Lea (Tenn.) 6; *Rucker v. Moore*, 1 Heisk. (Tenn.) 726; *O'Connor v. Memphis*, 6 Lea (Tenn.) 730; *Preston v. Golde*, 12 Lea (Tenn.) 267.

Texas. — *St. Clair v. Hotchkiss*, 28 Tex. 474; *Hanley v. Lemmon*, 28 Tex. 155.

Virginia. — *Catlett v. Russell*, 6 Leigh (Va.) 344; *Hunt v. Martin*, 8 Gratt. (Va.) 579.

"There are two ways in which an executor or administrator may become a party to a suit commenced by or against the deceased in his lifetime. He may come in voluntarily and on motion be admitted to prosecute or defend the action; or he may be compelled to become a party by a scire facias served upon him in pursuance of the provisions of the statute." *Ela v. Rand*, 4 N. H. 54.

Detinue for a chattel lies against an executor as such, if the chattel actually came to the executor's possession, otherwise not; and detinue brought against a testator and pending at his death may be revived by sci. fa. against the executor, under the *Virginia* Statutes, if the chattel demanded actually came to the executor's possession, otherwise not. *Catlett v. Russell*, 6 Leigh (Va.) 344.

Debt. — On the death of a defendant in an action of debt, etc., a summons may issue to an executor *de son tort* (there being no legal executor or administrator of the deceased), to appear to and defend the action. *Norfolk v. Gantt*, 2 Har. & J. (Md.) 435.

Nature of Scire Facias to Make Parties.

— While a scire facias to make parties in some of its features is in the nature of a suit, it is more properly a continuation of the old case than the inception of a new one, and it is not such a suit or action, within the meaning of the code, as will abate under a plea setting out the pendency of another scire facias between the parties and for the same purpose. *Heath v. Bates*, 70 Ga. 633.

Failure to Execute Scire Facias Against

One of Several Executors. — When a scire facias to revive a suit is issued against several executors, and executed on all save one, there is no discontinuance in proceedings without him, if the record does not show that he ever qualified. *Sherrod v. Hampton*, 25 Ala. 652.

1. *Diversey v. Smith*, 9 Ill. App. 437; *Campbell v. Hubbard*, 11 Lea (Tenn.) 6.

"At common law a writ of error in no case abated by the death of the defendant in error. If the death occurred after joinder in error the case proceeded to judgment the same as if the defendant were living, and his representatives were made parties to the judgment by scire facias; if the death happened before joinder in error, his representatives could be required to join in error by like proceeding." *Foresman v. Haag*, 37 Ohio St. 143, *citing* 2 Tidd's Practice 1163; *Spurk v. Vangundy*, 3 Ohio 307; *Delaplaine v. Bergen*, 7 Hill (N. Y.) 591; *Schuchardt v. Remiers*, (C. Pl. Gen. T.) 28 How. Pr. (N. Y.) 514; *Walpole v. Smith*, 4 Blackf. (Ind.) 151.

"The eleventh section of chapter one of the Revised Statutes, which by section twenty-four of the same chapter is made to apply to appeals and writs of error, provides that when there is but one defendant in an action, and he dies before final judgment, such action shall not on that account abate, if it might be originally prosecuted against the heir, devisee, executor, or administrator of such defendant; but the plaintiff may suggest such death on the record, and shall, by order of the court, have summons against such person or legal representative, requiring him to appear and defend the action, after which it may proceed as if it had been originally commenced against him." *Diversey v. Smith*, 9 Ill. App. 437.

Waiver of Scire Facias by Administrator of Defendant in Error. — Where a defendant in error, pending the suit in the Supreme Court of Errors, having died, the administrator appeared, and waiving a scire facias or any further notice consented that the cause proceed to final issue, it was held that such proceeding was regular, in analogy to the provision of the statute. *Smith v. Allen*, 5 Day (Conn.) 337.

sought to revive by scire facias to the legal representative of the deceased, a suggestion to the court of the death of such defendant is necessary to authorize the issuance of a writ.¹

Effect of Suggestion. — The mere filing of a suggestion of the death of a defendant will not operate as a substitution, but will support a scire facias directly to the parties therein named as representatives of the deceased.²

(c) **Return.** — A return is necessary in the case of a scire facias to revive an action as in the case of a scire facias for any other purpose.³

1. *Parker v. Hendry*, 8 Fla. 53; *Di-versey v. Smith*, 9 Ill. App. 437; *Treat v. Dwinel*, 59 Me. 341; *Philadelphia v. Jenkins*, 162 Pa. St. 451; *St. Clair v. Hotchkiss*, 28 Tex. 474; *Hunt v. Martin*, 8 Gratt. (Va.) 578.

Omission of Suggestion or Petition Ground for Quashing. — In *Hanley v. Lemmon*, 28 Tex. 155, it was held that when a defendant in a suit dies before verdict, a suggestion of his death to the court, or a petition of the plaintiff representing that fact, is necessary to authorize the issuance of a scire facias to the legal representative of the deceased defendant, and if, without such suggestion or petition, a scire facias has issued for such representative, it is quashable on his motion. In this case the court said: "It is assigned for error, the overruling the defendant's motion to quash the writ and service of scire facias. By art. 538, O. & W. Dig., it is provided that 'in all suits where the defendant may die before verdict, if the action survive, the suit shall not abate therefor, but upon a suggestion of such death being entered upon the record in open court, or upon a petition of the plaintiff representing that fact being filed in the clerk's office, it shall be the duty of the clerk to issue a scire facias to the legal representative of such defendant, and upon the return thereof executed such representative shall be made a party to such suit, and the same shall proceed against him.'"

2. *Philadelphia v. Jenkins*, 162 Pa. St. 451. In this case the court said: "If a defendant dies, that fact may be suggested by the plaintiff, and the name of his executor, administrator, or heir at law embodied in the suggestion. This will not operate as a substitution, but will support a scire facias directly to the parties so named. *Hall's Appeal*, 1 Penny. (Pa.) 223. The suggestion may be made also by

the proper representative or successor of the deceased defendant, and the plaintiff will be fixed with notice of the facts so brought to his attention and must govern his future action accordingly. But without some order of substitution or a writ of scire facias to bring in the suggested representative or successor, no change is made in the parties. The suggestion states facts of which the plaintiff and the court should take notice, and upon which their further action should be based, but it does not stand in the place of such action or render it unnecessary."

Time for Service of Scire Facias. — Where the death of a party has been suggested during a term of the court, and a scire facias ordered for his legal representative, and such representative has not voluntarily appeared and made himself a party, the cause will be continued unless the scire facias shall have been served forty days before the first day of the time in such term designated by the court for the trial of causes from the district from which such cause has been brought. *St. Clair v. Hotchkiss*, 28 Tex. 474.

3. See generally as to return of scire facias, article SCIRE FACIAS; *Mallison v. Howard*, 1 Murph. (N. Car.) 44.

Peremptory Order Before Return. — In *Mallison v. Howard*, 1 Murph. (N. Car.) 44, it was held that a peremptory order that an executor shall be made a party defendant before scire facias returned against him is erroneous. In this case, the death of the defendant being suggested, an order was made "that Sally Howard, administratrix of George Howard, deceased, be made defendant in this case, unless cause shown to the contrary at next term." A copy of this order having been served on Sally Howard, she appeared and showed cause, to wit, that the said order was irregular and not conformable to the provisions of the statute in

(d) *Issue Raised on Return of Writ.* — On a scire facias to make an administrator a party to a suit pending against one who is dead, the issue is whether or not the person served is a proper party, in the capacity in which he acts.¹

(e) *Effect of Failure to Appear.* — Where the new defendant has been properly served with the scire facias requiring him to appear and show cause why the action should not be revived against him, judgment may be entered against him by nonsuit or default if he fails to appear.²

d. SUPPLEMENTAL PLEADINGS — (1) *Where Time for Motion Has Expired* — In General. — Another statutory method of reviving an action after the death or disability of a party against his representative or successor in interest is by supplemental complaint.³

such cases made and provided; that the representatives of the defendant George Howard must be made a party by a scire facias, and therefore she prayed to be dismissed, whereupon it was submitted to the appellate court, "whether the mode adopted was regular and proper?" If the court should be of opinion that the mode was irregular and improper the rule to be discharged; otherwise, to be made absolute. The court held that "the object of a scire facias, which the Act of Assembly directs to be issued in cases like the present, is to enable the executor or administrator to show cause why he should not be made a party, and no peremptory order is made, that he shall be made a party, until an opportunity is afforded to show cause, upon the return of the scire facias. The order made in this case was irregular and improper; the rule must therefore be discharged."

1. *McArdle v. Bullock*, 45 Ga. 91. In this case a scire facias was issued to make an administrator a party. The court held that if the suit be one that does not survive at law against the intestate's estate, he ought to make the question before he is made a party.

As to issues in general on scire facias, see article SCIRE FACIAS.

2. Pub. Stat. Mass., c. 165, § 10; Rev. Stat. Me., c. 82, § 36; Stat. Vt., § 2459; Treat v. Dwinel, 59 Me. 341; Brighton Bank v. Russell, 13 Allen (Mass.) 221.

In *Mississippi* it is provided by statute (Annot. Code Miss. § 1918), that, on the death before final judgment of either party to a pending action, the executor shall have full power to prosecute or defend, and that if the executor, having been served with

scire facias, shall neglect to become a party, the court may proceed in the same manner as if the executor had voluntarily made himself a party. In *McKey v. Torry*, 28 Miss. 78, it was held that the statute does not prohibit the representative from coming into court voluntarily and making himself a party, and that it was not necessary therefore to resort to scire facias.

In *Texas* it is provided that "where in any suit the defendant shall die before verdict, if the cause of action be one which survives, the suit shall not abate by reason of such death, but, upon a suggestion of such death being entered of record in open court, or upon a petition of the plaintiff, representing that fact, being filed with the clerk, it shall be his duty to issue a scire facias for the executor or administrator, and in a proper case for the heir of such deceased defendant, requiring him to appear and defend the suit, and upon the return of such service the suit shall proceed against such executor, administrator, or heir, and such judgment may be rendered therein as may be authorized by law." Rev. Stat. Tex., art. 1248.

3. *Lee v. O'Shaughnessy*, 20 Minn. 173; *Stocking v. Hanson*, 22 Minn. 542. See also *Parnell v. Maner*, 16 S. Car. 349; *Arthur v. Allen*, 22 S. Car. 436.

In *Lee v. O'Shaughnessy*, 20 Minn. 173, the court said: "Section 36, which governs this case, enacts that 'An action does not abate by the death * * * of a party * * * if the cause of action survives or continues. In case of the death * * * of a party, the court on motion at any time within one year thereafter, or afterward on a supplemental complaint, may

Requisites. — A supplemental complaint filed after a year from the death of a party must not only state the grounds on which the application is based,¹ but must excuse delay.²

Effect of Supplemental Complaint. — The presentation or filing of a supplemental complaint does not, of itself, authorize, adjudge, or effect the continuance or revivor of the action, but this is to be done only after a hearing.³

(2) *Cumulative or Concurrent Remedy with Motion* — (a) **Generally.** — In some jurisdictions the statutes, after providing for the continuance or revivor of an action by motion and conditional order, contain an additional provision conferring authority upon the court in the exercise of a sound discretion to allow the action to be prosecuted by or against the representatives or successors in interest of the deceased party, for which purpose supplemental pleadings may be filed and process served as in the commencement of an action.⁴ These provisions are, however, not exclu-

allow the action to be continued by or against his representative or successor in interest.' Defendant * * * having died more than one year before any steps were taken to continue, a continuance, unless stipulated, could be properly allowed only upon supplemental complaint, in analogy to the proceeding by bill of revivor under the old chancery practice." *Citing Taylor v. Taylor*, 43 N. Y. 585; *Bornsdorff v. Lord*, 41 Barb. (N. Y.) 211; *Roach v. La Farge*, 43 Barb. (N. Y.) 616.

In New York the provision of the code as to revivor of actions was formerly to the effect that in case of the death or other disability of the party, the court might, on motion at any time in one year thereafter, or afterwards, on a supplemental complaint, allow the action to be continued by or against his representative or successor in interest. *St. John v. Croel*, (Supm. Ct. Gen. T.) 10 How. Pr. (N. Y.) 253; *Bornsdorff v. Lord*, 41 Barb. (N. Y.) 211; *Coon v. Knapp*, (Supm. Ct. Gen. T.) 13 How. Pr. (N. Y.) 175. At the present time, however, the proper method of revivor or continuance in that state would seem to be by motion alone, and not by a supplemental complaint. See *supra*, p. 1129; *Coit v. Campbell*, 82 N. Y. 509.

1. *Stocking v. Hanson*, 22 Minn. 542.

2. *Stocking v. Hanson*, 22 Minn. 542, wherein it was held that if an issue of fact raised by an answer to the supplemental complaint was tried, it was necessary for the applicant to establish the facts pleaded in excuse for his delay.

3. *Lee v. O'Shaughnessy*, 20 Minn. 173. In this case the court said: "Under our present practice, the continuance which corresponds to the revivor is to be allowed on supplemental complaint. This, like any other complaint, is the first pleading in an action, and in this instance in an action collateral and subsidiary to the original action, the object in view being to try and determine the question whether the original action shall be revived, or, as we now say, continued. The action is not to be continued before or at the time of filing the supplemental complaint (as in the case at bar), but upon a hearing after opportunity has been offered to the parties sought to be brought in to appear and resist the continuance. The presentation or filing of the supplemental complaint does not authorize, adjudge, or effect the continuance of the action. Until, after proper notice to the persons sought to be made parties, the question of continuance is judicially determined and the continuance allowed, the original action is not continued, and the persons sought to be brought in are not made parties thereto."

4. *Carter v. Jennings*, 24 Ohio St. 182; *Black v. Hill*, 29 Ohio St. 87; *Fox v. Abbott*, 12 Neb. 333; *Rakes v. Brown*, 34 Neb. 304; *Hunter v. Leahy*, 18 Neb. 81; *Missouri Pac. R. Co. v. Fox*, 56 Neb. 746.

In *Wisconsin* it is provided that whenever any person shall be entitled to revive or continue any action or proceeding interrupted by the occurrence of death, removal from a trust,

sive of the right to revive or continue by motion, but are merely cumulative or concurrent with such method of revivor.¹

(b) **What Constitutes Supplemental Complaint.**—Under the statutes authorizing revivor by a supplemental complaint, it has been held that although the first complaint filed in the action is made by the representatives of a deceased party, yet it is a supplemental complaint.²

(c) **Notice to Show Cause—Necessity For.**—In *Wisconsin*, where a revival is effected by filing a supplemental complaint, etc., it is also provided that notice shall issue to the other party or his proper representative, why the action should not be revived.³

or other disability, he may make and file with the clerk a supplemental complaint, affidavit, or petition, as the action or proceeding may be, etc. *Plumer v. McDonald Lumber Co.*, 74 Wis. 141, note; *Stephens v. Magor*, 25 Wis. 533; *Tarbox v. French*, 27 Wis. 651.

1. *Carter v. Jennings*, 24 Ohio St. 182; *Black v. Hill*, 29 Ohio St. 87; *Rakes v. Brown*, 34 Neb. 304; *Fox v. Abbott*, 12 Neb. 333.

In *Tarbox v. French*, 27 Wis. 651, the court said: "It was held in *Stephens v. Magor*, 25 Wis. 533, that the remedy given by chapter 363, Laws of 1860, to revive actions, was merely cumulative to that given by section 1, c. 135, R. S., which might still be resorted to, and by which the court, in case of the death, marriage, or other disability of a party, is authorized on motion to allow the action to be continued by or against his representative or successor in interest."

"The right to revive an action, under title 13, chapter 1, of the code, is not dependent on the discretion of the court or of the judge making the order, but, under the conditions and within the time therein limited, is a matter of right. The chapter of the code above referred to provides a summary remedy for reviving an action, but the remedy thus provided is not exclusive. The court has power, under section 39 of the code, in the exercise of a sound discretion, to allow the action to be prosecuted by or against the representatives or successor in interest of a deceased party. For this purpose, supplemental pleadings may be allowed and process served as in the commencement of an action." *Carter v. Jennings*, 24 Ohio St. 182.

Service of Summons.—Where it is sought to revive an action by supple-

mental pleadings, the summons should be served as in the commencement of an action. *Rakes v. Brown*, 34 Neb. 304; *Fox v. Abbott*, 12 Neb. 333; *Carter v. Jennings*, 24 Ohio St. 182.

2. *Plumer v. McDonald Lumber Co.*, 74 Wis. 143, wherein the court said: "We think any complaint made by the representative of the deceased plaintiff is a 'supplemental complaint' within the meaning of the statute. Such complaint, in order to be a good one, must necessarily state facts which have occurred since the commencement of the action, or it would not be a good complaint. It must state the death of the plaintiff, the appointment and qualifications of the representative of the deceased, as well as the facts constituting the original cause of action. The new facts occurring after the action was commenced, and which must be stated in the complaint made and filed by the plaintiff's representative, are necessarily supplemental to the facts necessary to be stated in the complaint made before the death of the plaintiff."

3. *Plumer v. McDonald Lumber Co.*, 74 Wis. 141, note; *Durbin v. Waldo*, 15 Wis. 352.

Requisites of Notice.—Such notice should give information as to the time and place of the filing of the supplemental complaint, and that, unless the party to whom it is addressed shows cause within a certain time after the service of such notice on him why such action should not be revived or continued, the same will stand revived or continued according to the supplemental complaint, petition, or affidavit. *Plumer v. McDonald Lumber Co.*, 74 Wis. 141, note.

In *South Carolina* the proper practice of reviving an action against the representative of a deceased party is by *ex parte* application based upon proper

(d) **Manner of Showing Cause.** — Where a supplemental complaint has been filed and notice has been given to the other party or his proper representative, an answer or affidavit showing cause against such revivor or continuance may be served on the party subscribing such notice within the time specified, in the same manner as a pleading is served.¹

(e) **Order.** — Where the answer or affidavit has been served within the proper time, the court shall thereupon make such order as the circumstances may require.² Where no cause is shown in such case within the time limited, the action stands revived as of course, without further order.³

showing by affidavit, for a rule against the representatives of the deceased's interest requiring them to show cause why the action should not be continued against them in the character ascribed; and upon default in showing good cause, the action will be continued. *Dunham v. Carson*, 42 S. Car. 383. In this case the court said: "Now as William Carson and James Petigru Carson are designated as sole heirs at law as well as devisees of Caroline Carson, it is very obvious that the reason for the distinction above adverted to does not apply in this case; and, therefore, even under the former practice, they might have been brought in by an ordinary bill of revivor, and when so brought in, could only contest the fact that they stood in such a relation to Caroline Carson as entitled them to represent the interest transmitted to them by her, either as heirs or devisees."

1. Stat. Wis., § 2810; *Plumer v. McDonald Lumber Co.*, 74 Wis. 141, note.

Time of Service of Answer or Affidavit. — The party to whom the notice is given must show cause by his answer or affidavit within twenty days after the service of such notice on him, exclusive of the day of service. *Plumer v. McDonald Lumber Co.*, 74 Wis. 141, note.

2. Stat. Wis., § 2810.

Notice Need Not Mention Time and Place. — In *Durbin v. Waldo*, 15 Wis. 352, it is held that the notice prescribed need not mention the time and place for showing cause, and if cause be not shown within twenty days the action stands revived. In this case the court

said: "It is objected that the proceeding was irregular; that the rule and notice were void for uncertainty in not specifying a time and place for cause to be shown. It ought to be a sufficient answer to this objection that the law is so written; that the statute is plain and unambiguous in its terms, and has been fully complied with. But it is insisted that the statute is nugatory, and effect cannot be given to it, for the same reason — that it was impossible for the defendants to show cause unless a time and place were fixed. We can see no such insuperable difficulty. If they had any reasons to urge against the revival, they had but to file their response to the order with the clerk and serve a copy upon the attorneys of the plaintiff, and it would have been heard by the court like other motions or interlocutory proceedings in an action. If notice of argument was necessary, they could have given it, or the plaintiff would have been obliged to do so, before he could have proceeded further in the case."

3. *Durbin v. Waldo*, 15 Wis. 352, wherein the court said: "There was no irregularity in taking judgment within ninety days after the action was revived. No cause having been shown or answer served within the period limited, the action was in the same condition, so far as it concerned a trial and judgment, as before the decease of the principal defendant. The act declares, if no cause be shown, that the suit shall, after twenty days from the service of notice, stand revived as of course, without further or other order or rule in the premises."

REWARD.

BY JAMES B. CLARK.

- I. FORM OF ACTION, 1151.**
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- VIII. APPEAL, 1162.**

CROSS-REFERENCES.

As to *matters of Substantive Law and Evidence*, see AM. AND ENG. ENCYC. OF LAW, title *REWARD*.

I. FORM OF ACTION — *Assumpsit* or *Debt*. — *Assumpsit* is the most usual and, for obvious reasons, the most convenient form of action to recover a sum offered as a reward, though *debt* will lie.¹

II. PARTIES — *Joinder of Several Claimants*. — Where the services for which the reward is claimed were rendered by several persons, all must join as plaintiffs in an action to recover the reward,²

1. *Symmes v. Frazier*, 6 Mass. 344; *Furman v. Parke*, 21 N. J. L. 310; *Fitch v. Snedaker*, 38 N. Y. 248.

Debt Will Lie to recover a reward offered for the apprehension and conviction of the alleged perpetrator of a crime. *Furman v. Parke*, 21 N. J. L. 310.

Assumpsit. — Where there is nothing special in the contract in relation to the time or manner of the payment of the reward, *indebitatus assumpsit* will lie. An objection that a recovery can be

had only on a special action upon the agreement is untenable. *Madison First Nat. Bank v. Hart*, 55 Ill. 67.

2. *Janvrin v. Exeter*, 48 N. H. 83; *Lancaster v. Walsh*, 4 M. & W. 16.

Where There Is But One Reward to Be Paid, if two persons come together to give the information they must bring a joint action for the reward. *Parke, J.*, in *Williams v. Carwardine*, 5 C. & P. 566, 24 E. C. L. 457, 4 B. & Ad. 621, 24 E. C. L. 126.

Necessity of Joining Police Officer. — In

and to entitle them to recover they must show that the reward was earned by their combined efforts.¹

III. AVERMENTS AND PROOF — 1. Right to Reward. — To maintain an action for a reward the plaintiff must show that he is solely entitled to it, by averring and proving that he was principally instrumental in producing the result for which the offer of reward was made.²

Jenkins v. Kelren, 12 Gray (Mass.) 330, it appeared that the plaintiff called upon a deputy chief of police and inquired if he had information of goods having been recently stolen, and on a response in the negative, told him that if any goods were reported as stolen, to inform him, the plaintiff, as he thought he could put the police in the way of recovering the property; thereafter and on the same day the defendant informed the officer that goods had been stolen from him, and he, the defendant, thereafter issued handbills offering a reward for their recovery, one of which was taken by the officer to the plaintiff, who gave such a description of the thief that he was subsequently arrested and convicted; and it was held that the omission to join the police officer as one of the plaintiffs was not a good ground of objection.

Recovery by One as Bar to Right of Others. — Where a reward is claimed by several, the fact that one of their number has sued for and recovered the amount of the reward will not affect the right of the others to recover. *Swanton v. Ost*, 74 Ill. App. 281.

Assignment of Right of Action. — An assignment of their claim by parties entitled to a reward, after the accrual of a right of action, will not operate to defeat the claim, and the assignee may institute suit in his own name, but an assignee takes the claim subject to all legal or equitable defenses. *Goldsbrough v. Cradie*, 28 Md. 477.

1. **To Enable Joint Plaintiffs to Establish a Claim** to a reward for services rendered, they must prove that the reward was earned through their agency, and that the apprehension and return of the property for which the reward was offered was secured. Such service may be effected by each performing a part. *Goldsbrough v. Cradie*, 28 Md. 477.

2. *Coltman, J.*, in *Thatcher v. England*, 3 C. B. 254, 54 E. C. L. 254.

Single Action. — A party who prom-

ises to pay a reward as an entire sum can be held liable only in a single action at the suit of the person or persons who gave the information for which the reward was offered. *Fallick v. Barber*, 1 M. & S. 108.

Principal Instrumentality. — The question to be considered in an action to compel payment of a reward for arrest and conviction is whether or not the plaintiff was principally instrumental in securing the arrest and conviction. *Rinehart v. Lancaster*, 18 W. N. C. (Pa.) 364.

Sufficiency of Allegation. — In *Thatcher v. England*, 3 C. B. 254, 54 E. C. L. 254, the advertisement was that the reward would be paid "on recovery of the property and conviction of the offender, or in proportion to the amount recovered." The declaration averred that the plaintiff caused the offender, naming him, to be apprehended, and that before the commencement of the suit he was tried, and upon and by means of the affidavits and information of the plaintiff was found guilty and duly sentenced, and that the said property of the defendant was thereby then recovered by the plaintiff; and it was said, by Maule, Justice, that the plaintiff had failed to state the person to whom the reward was to be paid, or to make out, even by inference, that he, the plaintiff, was the party intended.

Producing Partial Result. — Where the reward is for the apprehension and conviction of such person or persons as may have been implicated in the murder of four persons named, to authorize a recovery the plaintiff must allege and prove that the person or persons implicated in each of the four murders was or were apprehended and convicted, else, but one reward being offered, on each single conviction there might be a recovery of the whole reward. *Furman v. Parke*, 21 N. J. L. 310.

Necessity of Alleging Amount "Due and Unpaid." — A complaint averring the

2. Fact of Offer — Averments of Declaration. — An offer of specific compensation for the performance of a service or of services may be either public or private; that is, the proposal may be made to the public generally or it may be made to a particular person. However, in whichever form it is claimed the offer or request was made, the fact that it was made must appear by appropriate allegations, which must be supported by competent proof.¹

Averments of Plea or Answer. — Where the defendant seeks to escape liability by denying the fact that a reward was offered, or on the ground that the services for which the recovery is sought were performed in ignorance of that fact, he must allege facts which will render such a defense available and must support his allegations by competent proof.²

performance by the plaintiff of the services for which the reward was offered, and that defendant was then requested to pay the amount to the plaintiff, but that he refused and still refuses to pay, etc., is sufficient, without an allegation that the amount of the reward offered is due and unpaid. *Bronnenberg v. Coburn*, 110 Ind. 169.

1. *Amis v. Conner*, 43 Ark. 337. See also *Miller v. Hogeboom*, 56 Neb. 434.

Sufficiency of Allegation — Public Offer. — An allegation "that thereupon the said defendant offered and promised any person or persons a reward of one hundred dollars whoever would apprehend and take into custody the said R. H. so that he might be dealt with according to law," implies that the offer was publicly made to any and all persons who might choose to accept it and comply with its terms. *Hayden v. Souger*, 56 Ind. 42, 26 Am. Rep. 1.

Failure to Allege Request to Perform Services. — A complaint alleging that the plaintiff recovered and returned certain stolen property to the defendant, who in consideration thereof promised to pay fifty dollars to the plaintiff, which he has failed and refuses to do, is insufficient, because it does not allege a request to perform the services. The consideration alleged to support the promise was a voluntary service rendered for the defendant, without request, and not shown to be of any value. *Dawkins v. Sappington*, 26 Ind. 199.

Necessity of Proving Contract as Alleged. — Where plaintiffs sue upon a contract consummated by the offer of a reward and its acceptance, evidenced by the doing of the act for which the reward is offered, the plaintiff must recover upon the contract alleged or not at all. *Morris v. Kas-*

ling, 79 Tex. 141, wherein it was held that an action to recover a reward alleged to have been offered for the capture of the party guilty of a certain offense was not sustained by proving a contract for the capture and conviction of such party.

2. Sufficiency of Answer — Rendition of Service After Offer. — An answer that a hand-bill offering a reward was not published until after the rescue of the animal for which the reward was offered, and its delivery to the defendant, is sufficient in law, however improbable it may be in fact. *Dawkins v. Sappington*, 26 Ind. 199.

An Answer that the Services Were Performed Without Knowledge that the reward had been offered is bad, since knowledge of the offer of the reward before rendition of the service is not essential. *Dawkins v. Sappington*, 26 Ind. 199.

Denial of Offer by Corporation — Necessity of Plea. — In *Blain v. Pacific Express Co.*, 69 Tex. 74, the plaintiffs alleged that a reward had been offered by the defendant for the arrest of an embezzler and a certain percentage of all the moneys alleged to have been embezzled, and that such offer had been made by the defendant acting through certain designated persons as its officers, and it was held that the authority to offer the reward could not be questioned by the defendant except upon a plea of *non est factum* filed as required by statute.

Sufficiency of Evidence of Promise to Pay. — In an action against a corporation to recover on an offer of a reward made on its behalf by its officers, the declarations of a third party who had assumed to act for the defendant are not admissible for the purpose of

3. As to the Offerer.—The plaintiff's pleading need not show that the party offering the reward had any interest in the accomplishment of the result for which the offer was made.¹

The Defendant Cannot Be Charged Personally under an averment of individual liability, where from the proof it is evident that he made the offer officially.²

4. As to the Subject Matter of Offer.—Where the reward is offered either for the detection, apprehension, or conviction, as the case may be, of a person of a kind or class particularly described, or of the perpetrator of a designated offense, the identity of the person so intended, or of the offense, must be established by proper averment and proof.³

5. Compliance with Conditions of Offer.—Where the reward is not apportioned, that is, where the offer is of one sum for the performance of different services, to authorize the recovery of the

showing an agreement by the defendant to pay the reward, in the absence of evidence showing the authority of such person to make such declarations and in the absence of a proper plea setting up such authority. *Blain v. Pacific Express Co.*, 69 Tex. 74.

1. Averments as to Who Offered Reward.—A complaint alleging that "the defendant * * * offered a reward of [a specific sum] in the manner following, to wit;" and that said offer was signed by the defendant as sheriff and sent to the plaintiff, and that, relying upon the same, he arrested the person for whom the reward was offered, delivered him to the sheriff, and complied with all the terms of the offer, is not open to the construction that some person not named offered a reward, nor is it open to an objection made by way of general demurrer that the reward was not offered by the sheriff himself, but merely as information that some one not named had offered a reward, though possibly a demurrer specifically pointing out the supposed ambiguity would be good. *McLeod v. Meade*, 77 Cal. 87.

Averment of Interest or Relationship of Offerer.—A declaration for a reward need not aver that the party offering the reward was to derive any pecuniary benefit for the conviction for which the reward was offered, nor that he was a relative of the person upon whom the crime (in this case murder) was committed, nor that he was a member of the community in which the crime was committed, nor that he was a citizen of the state whose laws were violated. *Furman v. Parke*, 21 N. J. L. 310. See

also *Williams v. Carwardine*, 5 C. & P. 566, 24 E. C. L. 457, 4 B. & Ad. 62r, 24 E. C. L. 126, wherein it was held that a declaration was not objectionable because it failed to aver that the party offering the reward was a relative of the person murdered.

2. Averment of Individual Liability—Proof of Offer in Official Capacity.—Under an averment that the defendants offered a reward as individuals and not in an official capacity, and that consequently the offer of the reward was personal and binding upon them as individuals, there can be no recovery, where by the offer itself it appears that it was not the intention of the parties that they should bind themselves personally to pay the amount of the offer. *Huthsing v. Bousquet*, 2 McCrary (U. S.) 152.

3. Averment Connecting Person with Crime.—A declaration to recover a reward offered "for the apprehension and conviction of such person or persons as may have been implicated in the murder of" four persons named, which simply avers that a person was arrested on plaintiff's complaint charging him with murder of the several persons mentioned in the offer of reward, that such person was indicted and convicted of the murder of one of such persons, and for that murder sentenced and executed, is fatally defective, because failing to aver that the person convicted was in any wise implicated in the murder of the other person named, or that other persons were not implicated in the murder of those individuals, or that the conviction was in consequence of the complaint made

amount offered by way of reward for the performance of particular services, the party claiming it must allege and prove compliance with all the terms and conditions of the proposal, that is, he must allege and prove the rendition of the services required by the offer;¹ and it is necessary that he should allege that he performed the services after knowledge of and with a view to obtaining the reward offered.²

by plaintiff, or that he was the efficient instrument of the conviction. *Furman v. Parke*, 21 N. J. L. 310.

1. *Chicago, etc., R. Co. v. Sebring*, 16 Ill. App. 181; *Hogan v. Stophlet*, 179 Ill. 150; *Pool v. Boston*, 5 Cush. (Mass.) 219; *Furman v. Parke*, 21 N. J. L. 310; *Jones v. Phoenix Bank*, 8 N. Y. 228; *Fitch v. Snedaker*, 38 N. Y. 248; *Howland v. Lounds*, 51 N. Y. 604; *Commercial Bank v. Pleasants*, 6 Whart. (Pa.) 375; *Blain v. Pacific Express Co.*, 69 Tex. 74.

Time of Earning Reward.—A complaint alleging that within five days after the offer of a reward for the production of a certain letter, and in reliance upon it, the plaintiff performed the service requested, *prima facie* shows a complete contract and performance on the part of the plaintiff, since, the offer not being limited in time, it will be presumed that it was open on the fifth day after it was made, nothing to the contrary appearing. Revocation of the offer, if it had been revoked, is a matter of defense. *Wilson v. Stump*, 103 Cal. 255.

Uncontroverted Allegation of Performance.—A complaint alleging that "plaintiff has fully performed all of the conditions of said contract upon his part to be performed," that is, all the conditions of the offer of reward, unless denied by the answer need not be proven at the trial. *Reif v. Paige*, 55 Wis. 496, 42 Am. Rep. 731.

Claim for Arrest—Proof of Arrest by Another.—A complaint brought on a subscription paper for the arrest and delivery to the sheriff of a person accused of crime is not supported by proof that the plaintiff accompanied the sheriff in question to another county, where the latter received the accused from the custody of the sheriff of that county. *Adair v. Cooper*, 25 Tex. 548.

Identity and Guilt of Person Arrested.—The claimant of a reward for the apprehension of a felon must prove not only that the reward was offered as

alleged in his complaint, but must also prove that the person arrested was the guilty party, if both these facts are denied by the answer. *Amis v. Conner*, 43 Ark. 337.

Separate Services.—A declaration counting first on the promise of a certain sum if the plaintiff would tell who "got" the money stolen, and secondly on the promise of another amount if the plaintiff should get the money back, is supported by proof that plaintiff informed the defendant that a person named "got" the money, and that in consequence of such information defendant had the person named arrested, and procured from him and another person, as to whom the plaintiff had given no information, property to the value of the sum lost. *Gilkey v. Bailey*, 2 Harr. (Del.) 359.

Where a reward is offered for the apprehension of a wrong-doer and also for the recovery of moneys wrongfully procured by him, the performance of both conditions must be averred and proven to entitle the plaintiff to a recovery. *Jones v. Phoenix Bank*, 8 N. Y. 228.

Recovery on Quantum Meruit.—In *Franklin v. Heiser*, 6 Blatchf. (U. S.) 426, the declaration contained counts for work and labor, but the recovery was sought under a special agreement, and it was held that there could be no recovery on a *quantum meruit* for the services rendered, there having been no complete performance of the services required.

2. *Fink v. Meyers*, 4 Kulp (Pa.) 145. See also *Stamper v. Temple*, 6 Humph. (Tenn.) 113, and the cases cited in the preceding note.

Allegation of Knowledge of Offer.—To authorize a recovery the plaintiff must aver and prove that he knew of the reward offered, and that in consideration of that offer he pursued and apprehended the person designated in the reward. *Lee v. Flemingsburg*, 7 Dana (Ky.) 29. See also *Auditor v. Ballard*, 9 Bush (Ky.) 572, 15 Am. Rep. 728.

Substantial Performance of Service. — It will be sufficient, however, to show a substantial performance of the service proposed and for which the reward was offered, though it need not be shown that there was a literal performance.¹

Offer Not Complied with by Giving Information. — The plaintiff will not be entitled to a reward offered for an apprehension and conviction, merely upon proof that he furnished information leading to such results.²

Conviction of Offender. — Where one of the conditions of the payment of a reward is the establishment of the guilt or the conviction of an offender, it is necessary to show by proper allegations and proof to support them, that the terms and conditions were performed in fact.³

But see *contra*, *Everman v. Hyman*, 3 Ind. App. 459.

Sufficiency. — A complaint setting out that the defendant, being desirous of obtaining a certain letter written by a person named, offered a stated sum as a reward, and that the plaintiff procured such letter and left it in the custody of the defendant, and demanded the amount of the said reward, which the defendant refused to pay, by implication shows knowledge by the plaintiff that the reward was offered, and that the services were performed in reliance upon defendant's promise, and is sufficient to stand the test of a general demurrer. *Wilson v. Stump*, 103 Cal. 255.

An allegation "that in consideration of said offer, promise, and agreement on the part of the defendant" the plaintiff produced (to the defendant) a certain letter for which a reward had been offered, and "then demanded" the reward, sufficiently shows that the offer of the defendant was the cause which moved the plaintiff to perform the service, and implies that he knew before such performance that the offer had been made. *Wilson v. Stump*, 103 Cal. 255.

1. *Haskell v. Davidson*, 91 Me. 488; *Burke v. Wells*, 50 Cal. 218; *Besse v. Dyer*, 9 Allen (Mass.) 151, 85 Am. Dec. 747; *Lovejoy v. Atchison*, etc., R. Co., 53 Mo. App. 386; *Fitch v. Snedaker*, 38 N. Y. 248; *Howland v. Lounds*, 51 N. Y. 605; *Franklin v. Heiser*, 6 Blatchf. (U. S.) 426.

Tracing Stolen Property. — Where a reward was offered to whomsoever would give "information by which the same [stolen property] might be traced," it was held that a declaration averring that plaintiff did give informa-

tion "by which the said notes and moneys were traced, and did give information of and discover and trace" one B. D. to the defendant, to be the party to the offense, etc., averred a tracing of the stolen property to the offender. *Lancaster v. Walsh*, 4 M. & W. 16.

2. *Lovejoy v. Atchison*, etc., R. Co., 53 Mo. App. 386.

Information Instead of Capture. — The plaintiff cannot recover a reward offered for the capture of a thief, where the affidavit merely shows that he gave information to an officer which enabled the latter to make the arrest. *Everman v. Hyman*, 3 Ind. App. 459.

3. *Stone v. Wickliffe*, (Ky. 1899) 50 S. W. Rep. 44.

Reward under Nebraska Statute. — A petition in an action for a reward offered under section 296 of Neb. Crim. Code, which authorizes counties to offer rewards for the detection or apprehension of persons charged with a felony, is defective, unless it avers that the person for whose apprehension or for whose detection and apprehension the reward was offered was in fact convicted. *Anderson v. Pierce County*, 40 Neb. 481.

Arrest of Judgment. — An allegation that the plaintiff procured the conviction of a person for whose conviction a reward had been offered is sustained by proof that there was a verdict of guilty although the judgment was arrested and the prisoner discharged. *Buckley v. Schwartz*, 83 Wis. 304.

Reward for Detection — Causing Arrest. — In an action brought to recover on an advertisement stating that "twenty-five dollars reward will be paid for her [a mare's] whereabouts, and fifty dollars will be paid for the detection

Jurisdiction of Court to Convict. — It is not necessary, however, that the jurisdiction of the court wherein the conviction was had should be shown.¹ But it will be enough to prove that there was a conviction in fact.²

6. Authority to Make Arrest. — Unless the case is one wherein there must have been a special authority to make the arrest for which the reward was offered, such authority need neither be alleged nor proved.³

7. Negating Duty to Perform Required Services. — A declaration or complaint which shows that services for which a reward was offered were rendered by a person upon whom the duty was imposed by law is insufficient, without some qualification showing that the plaintiff is within an exception to the general rule prohibiting public officers and servants from accepting emoluments other than those pertaining to the office.⁴

of the thief," it was held sufficient to entitle the plaintiff to recover the fifty dollars for him to prove that he told the defendant where the mare was, that he saw a person, naming him, whom he believed to be the thief, with the animal in his possession, and that it was not necessary to prove the conviction of such person. In that respect it was sufficient to show the arrest of such person and that he was in custody on the charge, it being incumbent on the defendant to show, if that was the fact, that the accused had been released or acquitted; or to remove the presumption created by the evidence that the plaintiff had discovered or detected the thief. *Brennan v. Haff*, 1 Hilt. (N. Y.) 151.

1. Jurisdiction to Convict. — A declaration to recover a reward for the arrest and conviction of an offender need not show in what manner the court wherein the conviction was had acquired jurisdiction of the indictment, nor that the conviction was had in a court of competent jurisdiction. *Furman v. Parke*, 21 N. J. L. 310.

2. Fraudulent Dismissal of Indictment. — In *Louisville, etc., R. Co. v. Goodnight*, 10 Bush (Ky.) 552, 19 Am. Rep. 80, the petitioner charged that the dismissal of the indictment against persons whom he had arrested pursuant to a reward for their apprehension and conviction was procured by the defendants with the fraudulent intent and purpose of evading payment, and it was declared by the court that inasmuch as it was unnecessary that the plaintiffs should charge and prove bad faith, their failure to establish this im-

material averment would not militate against their right to recover.

3. Where the Arrest May Be Made by a Private Person without a warrant, a complaint to recover a reward offered for the apprehension of the person taken into custody need not allege that there was special authority for the arrest. *Morrell v. Quarles*, 35 Ala. 544.

4. Execution of Warrant by Officer. — In *Gilmore v. Lewis*, 12 Ohio 281, which was an action by a constable for a reward, the declaration in a single count averred that the defendant advertised that he would pay a reward for the apprehension of the perpetrator of a theft, and that, confiding in said terms, etc., plaintiff procured a warrant for the apprehension of the alleged thief, and arrested him by virtue thereof, and it was held that the declaration was fatally defective because showing no more than the performance by the plaintiff of a duty imposed upon him as an officer of the law.

Averment of Permission to Accept Reward. — A petition by a police officer for a reward must set forth that he had permission from his superior officers to accept it. *Appel's Petition*, 43 Leg. Int. (Pa.) 108.

Presumption as to Duty of Officer. — A complaint which does not show that it was the legal duty of the plaintiff to make the arrest for which the reward is claimed is not demurrable because of a statement therein that at the time of the arrest the plaintiff was one of the policemen of the city in which the arrest was made, since such a statement does not imply that in making the arrest the plaintiff acted in obedi-

8. Notice of Performance of Services. — Unless it is a condition of the offer, it need be neither alleged nor proved that notice was given by or on behalf of the person claiming the reward to the person offering the same, that the conditions of the offer had been performed.¹

IV. PROVINCE OF COURT AND JURY. — As in other cases, questions of law arising on the trial are for the consideration of the presiding judge, who cannot take from the jury the determination of questions of fact, upon which depend matters of law involved in the cause.² Such questions of fact are for the jury, to be considered and determined by them under proper instructions.³

V. INSTRUCTIONS. — The jury should be given instructions touching the fact of the offer, its acceptance on the part of the plaintiff by performance of the required services, and the substantial performance by him of such services; though improper instructions will not necessarily require a reversal of the judgment rendered if no prejudice has resulted.⁴

ence to any duty imposed upon him by law. The presumption of the imposition of such a duty is not justified. *Morrell v. Quarles*, 35 Ala. 544.

1. Notice of Arrest. — A complaint showing a full compliance with the terms of the offer of reward is not open to the objection that at the time of the commencement of the action the defendant had no notice that the plaintiff had arrested the person for whom the reward was offered, and delivered him to the sheriff, or that he had done so on account of the offer of the reward; notice of the arrest not having been made one of the conditions on which the alleged reward was to be paid. *Hayden v. Souger*, 56 Ind. 42, 26 Am. Rep. 1.

2. Directing Verdict. — It is error to take a cause from the jury and to direct a verdict for the defendant on the ground that there was no testimony tending to prove the cause of action, where as a fact there was testimony which would have warranted a finding for the plaintiff if the jury believed the case which the testimony was calculated to make out. *Huckins v. East Saginaw Second Nat. Bank*, 47 Mich. 92.

Where there is a conflict in the evidence as to whether or not the reward sued for was offered, the issue is for the determination of the jury, and it is reversible error to direct a verdict. *Miller v. Hogeboom*, 56 Neb. 434. And see generally article **DIRECTING VERDICT**, vol. 6, p. 667.

Nonsuit. — Where there is conflicting evidence as to whether the plaintiff's

offer to find the body of defendant's boy who had been drowned was made for the purpose of obtaining a reward offered, or was gratuitous and to obtain a reputation, the court is not justified in holding as a matter of law that the plaintiff did not rely upon the reward as his compensation and in nonsuiting the plaintiff. *Bagnall v. Barnard*, 59 Hun (N. Y.) 151. And see generally article **DISMISSAL, DISCONTINUANCE, AND NONSUIT**, vol. 6, p. 823.

3. Performance of Required Services. — The question whether or not the plaintiff procured the arrest of the defendant and discovered or contributed to the discovery of other evidence which led to his conviction is properly for the jury. *Brown v. Bradlee*, 156 Mass. 28. See also *Pierson v. Morch*, 82 N. Y. 503.

Good Faith of Plaintiff. — Whether or not the finder of articles for the recovery of which a reward was offered acted in good faith is for the consideration of the jury under proper instructions. *Pierson v. Morch*, 82 N. Y. 503.

4. Assumption of Existence of Contract of Reward. — Where the jury were instructed that the plaintiff based his right to recover upon a contract or agreement made between the plaintiff and the defendant, whereby the latter agreed and promised to pay the former a certain sum of money as a reward, upon condition that he would render certain services, there was held to be no such assumption of the existence of a contract as would mislead the jury, where they had the complaint before

VI. INTERPLEADER. — Where the reward has been earned, but there are several conflicting claims thereto, so that the offerer cannot with safety to himself pay either of the claimants, he may when sued pay the money into court, interplead the persons claiming the same, leaving them to litigate their respective

them, and they were further instructed that the burden was upon the plaintiff to prove the material facts stated in the complaint, and that they should determine from the evidence whether or not such material facts had been proved. *Bronnenberg v. Coburn*, 110 Ind. 169.

Knowledge of Offer by Defendant. — In *Hugill v. Kinney*, 9 Oregon 250, the defendants denied the offer of the reward or that they had authorized it, and it was held error to instruct that if the defendants had knowledge of the offer, and they did not object to, countermend, or deny it, they were liable.

Fact of Offer — Performance of Services. — In an action to recover specifically the amount of a reward offered for an arrest and evidence to convict, the plaintiff's evidence showed that the defendant's liability was not to pay the amount of the reward but only the value of plaintiff's services, and there was no evidence introduced to show what the value of such services were, nor did the record show distinctly what services were performed; there was held to have been no error in instructing the jury that if the reward was offered, and the plaintiffs thereupon furnished evidence showing the conviction of the person arrested, they were entitled to recover the amount of the reward, and in refusing to charge that if the reward offered was withdrawn before the performance of the services contemplated, no recovery could be had under the declaration. *Biggers v. Owen*, 79 Ga. 658.

Performance of Required Services. — Where a declaration counted first on the promise of a certain sum if the plaintiff would tell who "got" the money stolen, and second on the promise of another amount if the plaintiff should get the money back, it was held proper to instruct the jury that under the second count they must be satisfied that all the money was in fact recovered in consequence of the information given by the plaintiff. *Gilkey v. Bailey*, 2 Harr. (Del.) 359. See also *Stephens v. Brooks*, 2 Bush (Ky.) 137; *Higgins v. Lessig*, 49 Ill. App. 459.

Impartation of Information. — In *Dunham v. Stockbridge*, 133 Mass. 233, the defendant requested the following instructions: "Knowledge and information obtained by a state detective and imparted to the plaintiff, whereby a confession was made to both the plaintiff and the state detective by an incendiary for whose detection and conviction a reward was offered, would not entitle the plaintiff to a verdict, even though conviction is had by the incendiary's pleading guilty to the offense on the complaints and indictments had on such confession." The judge refused the request and instructed the jury that "if the knowledge and information therein referred to was in substance such as to detect and convict the offender, then its impartation by C. [the detective] to the plaintiff would not entitle the plaintiff to claim the reward; but if, on the other hand, it was merely information that L. [the incendiary] upon certain conditions would disclose what she knew as to the setting of the fires, and the first statement by her leading to her detection and conviction was obtained by the subsequent influence and advice of the plaintiff, then he might recover," and it was held that the distinction made by the justice in the instruction actually given, was erroneous.

Value of Information. — Whether or not the information given by the plaintiff was too remote from the apprehension and conviction of certain thieves for whom a reward was offered, is properly left to the jury. *Turner v. Walker*, 6 B. & S. 871, 118 E. C. L. 871.

Request to Find. — On a trial wherein a jury is waived, a request by the defendant that the court shall hold the law of the case to be under the evidence that the plaintiff is not entitled to recover, and that the finding shall be for defendant, presents the question whether there is a total lack of evidence to show any liability of the defendant to the plaintiff on the offer of the reward with the like effect as would be a request for an instruction to find for the defendant on the ground that there was no evidence to support

rights among themselves, and thus discharge himself from all liability; or, without waiting for the institution of an action by the claimants, he may file a bill of interpleader, or bring an action in the nature of such a bill against them, and in like manner secure a discharge of the obligation incurred by reason of the offer.¹

a verdict for the plaintiff. *Stophlet v. Hogan*, 74 Ill. App. 631, *affirmed* 179 Ill. 150.

Interrogatory Not Warranted by Evidence. — Where the reward offered was for the "return" of an animal alleged to have been stolen, the court may properly refuse to submit to the jury, at the request of the defendant, an interrogatory, "Did the plaintiff put the defendant in possession of the horse described in his complaint before the beginning of this action?" *Everman v. Hyman*, 3 Ind. App. 459, 28 N. E. Rep. 1022.

Harmless Error. — An instruction that if the arrest for which the reward was offered was made outside the county wherein the warrant was issued it was void, and that if the jury believed the arrest was made within the jurisdiction of the constable to whom the warrant was issued and by virtue of the warrant the plaintiffs could not recover, but that if they believed the arrest was made out of the county by persons induced to perform the labor they could recover, though not entirely correct is not such an erroneous instruction as will require reversal, where it appears that in view of the evidence no possible harm resulted, and furthermore because it was immaterial for the purpose of the case where the arrest was made. *Hayden v. Souger*, 56 Ind. 42, 26 Am Rep. 1.

As Proof to Sustain Allegation of Offer. — In *Morris v. Kasling*, 79 Tex. 141 the plaintiffs alleged a promise to pay a certain sum for the capture of a person, who in fact was captured. This allegation was denied, and defendant alleged that the offer was for the capture and conviction of three other persons, which allegation plaintiffs denied. It was held that there was not presented a case in which the omission of one party to state a fact necessary to his cause of action or defense was cured by the statement of that fact by the adverse party, and that consequently a request to charge that the plaintiffs could not recover unless they proved the offer of reward as alleged was improperly refused.

Offer of Reward as Evidence of Proper Compensation. — Where an action was resisted upon the ground that but a part of the lost property was recovered, although the reward, by the terms of the advertisement, was offered for the recovery of the whole, there was held to be no error in instructing the jury that upon a count for a *quantum meruit* the jury might consider the advertisement as evidence of the plaintiff's acknowledgment that the sum offered as a reward was a reasonable compensation for finding and restoring the whole, and that they might adopt it as a rule for ascertaining the reasonable compensation for the part which was actually restored. *Symmes v. Frazier*, 6 Mass. 344.

1. *Burke v. Wells*, 50 Cal. 218; *Mahoney v. Whyte*, 49 Ill. App. 97; *Ensminger v. Horn*, 70 Ill. App. 605; *Fargo v. Arthur*, (Supm. Ct. Spec. T.) 43 How. Pr. (N. Y.) 193; *Howland v. Lounds*, 51 N. Y. 605; *Russell v. Stewart*, 44 Vt. 170. See the article INTERPLEADER, vol. II, p. 446.

Action of Interpleader. — Where an arbitrary sum is offered as a reward, and several persons make claim to it, there may be a division of the reward based on the relative value of their acts, which may be done in an action of interpleader. *Fargo v. Arthur*, (Supm. Ct. Spec. T.) 43 How. Pr. (N. Y.) 193.

Enjoining Action at Law. — Where a reward is claimed by several persons, the defendant, when sued, may file a bill of interpleader, pay the amount offered into court, and enjoin an action at law brought by one of the claimants to recover the same. *City Bank v. Bangs*, 2 Paige (N. Y.) 570.

The Judgment. — Where there are several claimants to a reward, the plaintiff may bring an action in the nature of a bill of interpleader against all the persons claiming the reward, and on payment by him into court of the money claimed there may be a judgment entered discharging him and a direction that the action proceed between the defendants. *Warner v. Grace*, 14 Minn. 487.

VII. STATE, MUNICIPAL, AND STATUTORY REWARDS. — The general rules respecting the recovery of rewards are applicable as well to rewards offered by public authorities as to those offered by private persons. Proceedings for their recovery are instituted by application to the proper authorities or tribunal for their payment. In some jurisdictions the approval and certification of the claim is a necessary preliminary to entitle the claimant to its payment, though it seems that such approval and certification are not conclusive upon the public authorities. In all cases the right to the reward must be clearly shown, and what has been said heretofore as to the plaintiff's pleading in actions against private parties is alike applicable to applications for the payment of rewards of this nature.¹

Intervention by Claimant. — In *Ward v. Keystone Land, etc., Co.*, (Tex. Civ. App. 1896) 38 S. W. Rep. 532, a claimant of a part of a reward intervened, and the defendant, admitting that he owed somebody the reward, paid the amount offered into court and prayed that it might be determined who was entitled to the money.

Motion to Interplead — Collusion. — In *Burritt v. Press Pub. Co.*, 19 N. Y. App. Div. 609, which was an action to recover a reward offered for certain information, the defendant moved for an order of interpleader to bring in a third party in his employ, who it was alleged had presented a claim to the reward. It appeared that this claim had not been made until some time after the action was begun and that no defense of an adverse claim had been interposed, and it was held that the motion was properly denied on the ground that such claim sought to be interpleaded was collusive in the legal sense of that term.

Responsibility for Costs. — Where on a motion for an interpleader in an action to obtain a reward, it appears that the party whom it is proposed to interplead is not responsible for costs, that fact, although a circumstance to be considered, will not control the court in denying or granting the motion. *Burritt v. Press Pub. Co.*, 19 N. Y. App. Div. 609.

Costs of Reference. — Where several parties claim a reward and a reference is ordered to ascertain who is entitled to the fund, each party may be required to pay the costs of the litigation and such part of the master's bill as was occasioned by the time occupied in the examination of and for drawing the depositions on their respective sides. *City Bank v. Bangs*, 2 Edw. (N. Y.) 95.

In Connecticut the offerer of the reward may, under statute, apply to have commissioners appointed to determine who among opposing claimants are entitled to the fund. *Matter of Russell*, 51 Conn. 579, 50 Am. Rep. 55.

1. Petition for Reward — Averment as to Arrest. — A petition for a mandamus to compel the issuance of a warrant by a state treasurer to pay the amount of a reward offered for the arrest of the person or persons guilty of a murder, his or their delivery to the jailer of a specified county, and their conviction of said crime, which shows that the petitioner ascertained who was the murderer, swore out a warrant, delivered it to the sheriff, ascertained the whereabouts of the accused, succeeded in effecting his arrest and delivery to the jailer, etc., and that the account for the amount of the reward was approved and allowed by the proper court and ordered to be certified for payment, is sufficient, though it does not appear that the petitioner made the arrest personally and alone. *Stone v. Wickliffe*, (Ky. 1899) 50 S. W. Rep. 44.

Unimportant Averments. — In *Lees v. Colgan*, 120 Cal. 262, which was a petition for a writ of mandate requiring the state controller to draw a warrant upon the state treasury in favor of the petitioner for the amount of a reward offered by the government for the arrest and conviction of the person or persons who committed a murder, the court stated that an allegation declaring that the petitioner furnished the evidence upon which the murderer was convicted was unimportant in view of the fact that the power of the government was limited to offering rewards for the apprehension of certain criminals.

VIII. APPEAL. — The appellate court will not interfere with the judgment below, when there was evidence to support it, where a finding upon which a determination was made is conclusive, or when the error complained of was harmless, nor will the court indulge in presumptions when the record is incomplete.¹

Variance Between Petition and Exhibit.

— A petition for a mandamus to compel the payment of a reward, the account for which has been approved and allowed by the circuit court, which states that the petitioner delivered the person for whose arrest the reward was offered to the jailer, is not vitiated by the fact that the receipt of the jailer filed as an exhibit states that the custody of the accused was delivered to the jailer by the sheriff and that the petitioner "was with him at the time." *Stone v. Wickliffe*, (Ky. 1899) 50 S. W. Rep. 44.

Sufficiency of Proceeding to Secure Approval of Claims. — A motion made for the allowance of a sum offered as a reward by the governor is in effect a motion for an order of the court approving and certifying the officer's receipt, within the meaning of a statute providing for the payment of rewards offered by the governor for the apprehension and delivery into the custody of the proper officer of a fugitive from justice, and also providing for the payment of such a reward upon the production of the officer's receipt, approved and certified by the circuit court of the county of his residence. *Coffey v. Com.*, (Ky. 1896) 37 S. W. Rep. 575.

Application for Reward — Variance. — In the Matter of Kelly, 39 Conn. 161, an application for a reward set forth that the selectmen of a town offered a reward of \$200 to any person or persons who should make discovery and give information against the person or persons guilty of the crime of burning the barn of a person named, on a specified day, so that he or they might be tendered to justice and convicted. The proof offered was an advertisement in the name of the town, signed by the selectmen, offering a reward of \$500 to whoever should be the means of detecting and convicting the person who set fire to the barn. There was evidence that the applicant made discovery and gave information against a certain person, who was guilty of the crime, and that such person was tendered to justice and convicted, etc., and there was held

to be no such variance of the allegations in the application and the evidence offered as would preclude a recovery.

Opposing Petitions. — In *Whitcher v. State*, (N. H. 1895) 34 Atl. Rep. 745, several petitions were filed under a statute to procure a reward for the arrest or for procuring the arrest of a person charged with a crime. There was a judgment awarding the amount to two persons and dismissing the petitions as to the others. All the parties, including the state, excepted to all of the court's findings and orders not favorable to such party, and no ground being stated or appearing upon which any of the exceptions could be sustained, they were all overruled.

Finality of Determination of Right to Reward. — An order overruling a motion for the approval and certification of an officer's receipt of a fugitive for whom a reward has been offered, which approval and certification is necessary to enable such officer to procure payment of the reward offered for such fugitive, is subject to revision. *Coffey v. Com.*, (Ky. 1896) 37 S. W. Rep. 575.

1. Campbell v. Mercer, (Ga. 1899) 33 S. E. Rep. 871.

Technical Objection Cured by Action of Court. — A technical objection against a paragraph of a complaint which alleges a general offer of a reward, an acceptance of that offer by the plaintiff, and the performance of the services in accomplishing the result for which the reward was offered, is not available on appeal, where it appears that the trial court practically withdrew that paragraph of the complaint from the jury. *Bronnenberg v. Coburn*, 110 Ind. 169.

Judgment Supported by Evidence. — The appellate court will not interfere with a judgment where there is evidence to support it. *Hayden v. Souger*, 56 Ind. 42, 26 Am. Rep. 1.

A Finding of an Inferior Appellate Court that the person who was arrested, was apprehended for a specified offense, and that for his apprehension and conviction of the offense in question the reward was offered, is binding upon the supreme court, which cannot

Remittitur.—The appellate court may require the plaintiff to remit so much of the verdict recovered by him as is excessive, as a condition of sustaining a judgment for the proper amount.¹

consider whether or not the appellate court found the facts correctly. *Hogan v. Stophlet*, 179 Ill. 150.

Presumption—Incomplete Record.—Where the record on appeal recited that the plaintiffs offered in evidence a "subscription list or reward," but such document is not embodied in the record, nor its contents or conditions in any manner brought to the attention of the appellate court, that court will not presume that a state of facts existed which did not warrant the judgment rendered. *Means v. Hendershott*, 24 Iowa 78.

Improper Reception of Evidence—Harmless Error.—Evidence as to what

a person said as to the reward which would be paid, if improperly received, is harmless error, where the fact was otherwise proved, there was no prejudice to the complaining party, and the trial was had without a jury. *Swanton v. Ost*, 74 Ill. App. 281.

1. **Requiring Remittitur.**—Where the jury find a verdict in excess of that justified by the evidence, the appellate court may require the plaintiff to remit so much of the verdict as is excessive as a condition of the affirmation of the judgment to the amount to which he is entitled. *Everman v. Hyman*, 3 Ind. App. 459. See also article REMITTITUR, *ante*, p. 123.

RIGHT OF PROPERTY, TRIAL OF.

BY ARCHIBALD C. BOYD

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CROSS-REFERENCES.

See in general articles *INTERPLEADER*, vol. 11, p. 444;
INTERVENTION, vol. 11, p. 494.

As to *Claimants in Attachment*, see articles *ATTACHMENT*, vol.
 3, p. 70; *INTERVENTION*, vol. 11, p. 498.

Claimants in Garnishment, see article *GARNISHMENT*, vol.
 9, p. 838.

I. SCOPE OF ARTICLE. — This article is limited to a consideration of the statutory proceeding known as the "trial of the right of property." Matters pertaining to interpleading or intervention generally are excluded, and will be found, as indicated in the cross-references preceding this paragraph, in separate articles.

II. NATURE AND PURPOSE OF PROCEEDING — Independent of Main Action. — A statutory trial of the right of property levied on by legal process is a proceeding independent of the main cause of action and is determined separately from it.¹

1. *Rhodes v. Smith*, 66 Ala. 174; *Gielt v. McGannon Mercantile Co.*, 74 Mo. App. 209; *Brennan v. O'Driscoll*, 33 Mo. 372; *Ladd v. Couzins*, 35 Mo. 516; *State v. Superior Ct.*, 5 Wash. 639; *Livingstone v. Wright*, 68 Tex. 707; *Kirschenschlager v. Armitage Herschel Co.*, 58 Mo. App. 165; *Boettger v. Roehling*, 74 Mo. App. 257; *Taylor v. Taylor*, 3 Bush (Ky.) 118.

Action or Suit. — In some states it has been held that a trial of the right of

property levied on by legal process is a proceeding having all the form and substance of a suit or action at law. *Rhodes v. Smith*, 66 Ala. 174; *Planters, etc., Bank v. Borland*, 5 Ala. 531; *Jacott v. Hobson*, 11 Ala. 434; *McAdams v. Beard*, 34 Ala. 478; *Jackson v. Bain*, 74 Ala. 320; *Treadway v. Treadway*, 56 Ala. 390; *Atkinson v. Foxworth*, 53 Miss. 741; *Lassiter v. State*, 106 Ala. 292; *Heyward v. Phillips Butoff Mfg. Co.*, 97 Ala. 533;

Protection of Levying Officer. — The proceeding is in many jurisdictions designed for the protection of the levying officer.¹

III. ELECTION OF REMEDY — 1. Right of Election. — A claimant to property seized under process is not, it would seem, confined to the statutory remedy of trial of the right of property for the determination of his title to the property. Resort may be had, at the election of the claimant, to such actions as replevin, trover, detinue, or trespass, or the corresponding action under the code.²

Gayle v. Bancroft, 22 Ala. 316. But see *Rowe v. Bowen*, 28 Ill. 116, wherein it was held that a trial of the right of property before a sheriff was not a judicial proceeding.

Graft on Original Action. — In *Missouri* it has been held that an interplea under the statute is substantially an action of replevin engrafted upon the attachment suit. *Burgert v. Borchert*, 59 Mo. 80; *Mansur v. Hill*, 22 Mo. App. 372; *Kirschenschlager v. Armistage Herschel Co.*, 58 Mo. App. 165; *Wyeth Hardware Co. v. Carthage Hardware Co.*, 75 Mo. App. 518; *Hellman v. Pollock*, 47 Mo. App. 205.

Substitute for Replevin. — In *Hershy v. Clarksville Institute*, 15 Ark. 130, it was said: "Where property belonging to a third person is seized by virtue of a writ of attachment, his claim, by way of interplea, proceeds upon the ground of a wrongful injury to his right of possession. As such wrongs are liable to be done, and the statute forbids that any cross replevin, or replevin for property in the possession of an officer by virtue of any legal authority, shall be brought, the trial of the right of property is allowed as a summary, though where the attachment is from a circuit court not informal, substitute for the remedy by replevin thus taken away."

Separate Record. — In *Brennan v. O'Driscoll*, 33 Mo. 372, it was held that the record of the proceedings in cases of interpleader upon attachment should be kept distinct from the records of the proceedings in the attachment. See also *Giett v. McGannon Mercantile Co.*, 74 Mo. App. 209.

1. *Armstrong v. Harvey*, 11 Ohio St. 527; *Dilley v. McGregor*, 24 Kan. 361; *Patty v. Mansfield*, 8 Ohio 369; *B'Hymer v. Sargent*, 11 Ohio St. 682; *Bain v. Funk*, 61 Pa. St. 185; *Rowe v. Bowen*, 28 Ill. 116; *Firestone v. Mishler*, 18 Ind. 439; *Com. v. Booker*, 6 Dana (Ky.) 441; *Book v. Day*, 189 Pa. St. 44; *Jones v. Carr*, 16 Ohio St. 420; *Maurer v. Sheaffer*, 116 Pa. St. 339;

Vulcan Iron Works v. Edwards, 27 Oregon 563.

In *Florida* it has been held that the purpose of the claim statute is to give to a third person who claims title to property levied on, a remedy for settling the question of the superiority of his alleged title and to give him the possession if his title is found superior. *Baars v. Creary*, 23 Fla. 311.

In *Illinois* it has been held that the statutory interpleader to try the title to property seized is a substantial and valuable right tending to prevent multiplicity of suits, and the claimant of property who asserts such right should not be deprived of it on a mere technical ground. *Juilliard v. May*, 130 Ill. 87.

In *Ohio* it has been held that a trial of the right of property is a summary proceeding to regain the possession of property levied on and is not a means to acquire or confirm a title thereto. *Armstrong v. Harvey*, 11 Ohio St. 527.

2. *Alabama.* — *Lehman v. Warren*, 53 Ala. 535; *Abraham v. Carter*, 53 Ala. 8; *Treadway v. Treadway*, 56 Ala. 390; *Block v. Maas*, 65 Ala. 211; *Columbus Iron Works Co. v. Renfro*, 71 Ala. 577; *Anderson v. Hooks*, 9 Ala. 704; *Lassiter v. State*, 106 Ala. 292.

Arkansas. — *Hogan v. Deuell*, 24 Ark. 216; *Mitchell v. Woods*, 11 Ark. 180; *Bloom v. McGehee*, 38 Ark. 329; *Hershy v. Clarksville Institute*, 15 Ark. 128.

Georgia. — *Jenkins v. Nolan*, 79 Ga. 295; *Rutherford v. Fullerton*, 89 Ga. 353.

Illinois. — *Pike v. Colvin*, 67 Ill. 227. *Indiana.* — *Firestone v. Mishler*, 18 Ind. 439.

Iowa. — *Sperry v. Ethridge*, 70 Iowa 27.

Kentucky. — *Hoskins v. Robinson*, (Ky. 1897) 42 S. W. Rep. 113.

Louisiana. — *Shuff v. Morgan*, 9 Mart. (La.) 592.

Maryland. — *Kean v. Doerner*, 62 Md. 475.

Missouri. — *Hawk v. Applegate*, 37

2. Effect of Election. — It has, however, been held that where the claimant of property levied on as the property of another resorts to the statutory remedy to try the right to the property, he thereby waives his privilege of suit at common law.¹

Mo. App. 32; *State v. Durant*, 53 Mo. App. 493; *Wangler v. Franklin*, 70 Mo. 659.

New York. — *Standard Sewing Mach. Co. v. Heyman*, (N. Y. City Ct. Gen. T.) 25 Misc. (N. Y.) 429.

Ohio. — *Patty v. Mansfield*, 8 Ohio 369; *Moses v. Brashears*, 2 Handy (Ohio) 36; *Armstrong v. Harvey*, 11 Ohio St. 532; *Ralston v. Oursler*, 12 Ohio St. 105; *Jones v. Carr*, 16 Ohio St. 420; *Abbey v. Sears*, 4 Ohio St. 598.

Oregon. — *Vulcan Iron Works v. Edwards*, 27 Oregon 563.

Pennsylvania. — *Megee v. Beirne*, 39 Pa. St. 50.

South Carolina. — *Olin v. Figeroux*, 1 McMull. L. (S. Car.) 203.

Texas. — *Harris v. Tenney*, 85 Tex. 254; *Jaffray v. Meyer*, 1 Tex. App. Civ. Cas., § 1350; *Lang v. Dougherty*, 74 Tex. 226; *McKay v. Treadwell*, 8 Tex. 176; *Fuller v. Sparks*, 39 Tex. 136; *Hardy v. Broaddus*, 35 Tex. 668; *Moore v. Gammel*, 13 Tex. 122. See also *Vickery v. Ward*, 2 Tex. 212; *Paxton v. Boyce*, 1 Tex. 317.

Washington. — *Chapin v. Bokee*, 4 Wash. 1; *Scott v. McGraw*, 3 Wash. 675.

Necessity that Officer Should Pursue Remedy. — In *Kentucky* the statute authorizing the sheriff to summon a jury to try the right of property levied on by him and claimed by a third person is intended only for the protection of the sheriff. He is not, therefore, obliged to pursue such remedy. *Com. v. Booker*, 6 Dana (Ky.) 441.

Statutory Remedy Exclusive as Against Levying Officer. — In *Indiana* it has been held that the statutory remedy of trial of the right of property (*Burns' Rev. Stat. 1894, § 1597*), is exclusive of a replevin action as against the officer levying the process under which the property was seized. *Wright v. Shelt*, 19 Ind. App. 1. See also *Bernheimer v. Martin*, 66 Miss. 486.

Remedy by Bill in Equity. — In *Anderson v. Hooks*, 9 Ala. 704, it was held that although a mortgagee of personal property, with power to take possession of and sell on the mortgagor's default, may interpose a claim under the statute to try the right of property when it is

levied on by execution, yet he may waive his legal right and resort at once to a court of equity, where all interests may be adjusted, and justice more completely administered. See also *Bishop v. Rosenbaum*, 58 Miss. 84, wherein it was said: "While it is true that the statute points out a mode of procedure in attachment suits and provides a method for third persons to assert their claims to property attached which is ordinarily exclusive of all others, this will not deprive the Court of Chancery, even in this class of cases, of its right to interpose with a view of preventing a multiplicity of suits, where the circumstances render such interposition proper."

Remedy by Injunction Against Execution. — The claimant of property levied on under execution cannot invoke relief by injunction to prevent its sale unless some good reason be alleged in the petition why he did not resort to his legal remedy by affidavit and claim bond to try the right of property. *Ferguson v. Herring*, 49 Tex. 126.

1. *Vulcan Iron Works v. Edwards*, 27 Oregon 563; *Lang v. Dougherty*, 74 Tex. 228; *Lera v. Freiberg*, (Tex. Civ. App. 1893) 22 S. W. Rep. 236; *Howeth v. Mills*, 19 Tex. 295; *Vickery v. Ward*, 2 Tex. 212; *Moore v. Gammel*, 13 Tex. 120; *Rose v. Riddle*, 3 Tex. App. Civ. Cas., § 298. But see *Triebler v. Blocher*, 10 Md. 14; *Hall v. Richardson*, 16 Md. 396, wherein it was held that where the plaintiff's goods were seized under an attachment against another, he could sue the sheriff in trespass and recover for the illegal taking and detention, notwithstanding he came into court in the attachment case, filed his plea claiming the property, and recovered judgment for its restitution. See also *Wangler v. Franklin*, 70 Mo. 659.

Waiver of Right to Maintain Replevin. — In *Ohio* it has been held that where property is seized on execution and a third person claims the property, and proceedings are had under Code, §§ 426, 427, to try the right of property, and a verdict is rendered by the jury in favor of the claimant, and thereupon the plaintiff in execution executes and delivers an undertaking to the sheriff, and the

IV. JURISDICTION OF PROCEEDING — 1. Court Issuing Seizure Process. — The court in which a proceeding to try the right of property levied on should be brought is usually designated by statute. Such court is, as a rule, the court issuing the process under which the property was seized.¹

2. Court of County Where Property Was Seized. — In some states the statutes provide that where an attachment or execution is levied in a county other than that in which it was issued, and a

sheriff delivers the same to the claimant, who accepts it — the claimant cannot resort to replevin to take the property out of the hands of the sheriff. *Moses v. Brashears*, 2 Handy (Ohio) 36; *Abbey v. Searls*, 4 Ohio St. 598; *Paty v. Mansfield*, 8 Ohio 369.

Waiver of Constitutional Objection. — In *Ohio* it has been held that although the summary trial of the right of property seized on execution, not being appealable to a court where a constitutional jury can try it, would, if conclusive, be liable to grave constitutional objections, yet if the claimant voluntarily resorts to this special remedy, instead of to the remedies left open to him by the common law, he resorts to it with all its statutory incidents, and cannot complain of its infringement of his constitutional rights. *Armstrong v. Harvey*, 11 Ohio St. 527; *Ralston v. Oursler*, 12 Ohio St. 105.

1. See the statutes of the several states, and the following cases: *Thompson v. Evans*, 12 Ala. 588; *Clark v. Clinton*, 61 Miss. 337; *Frost v. Bebout*, 14 La. 104; *Matlock v. Strange*, 8 Ind. 57; *Test v. Beeson*, 37 Ind. 380; *Beuton v. Willis*, 1 Fla. 262; *Alexandria First Nat. Bank v. Turnbull*, 16 Wall. (U. S.) 190.

In *Georgia* by the better practice a claim to property levied on under execution should be returned with the execution to the court whence the execution issued for trial there. *Stamps v. Hardigree*, 100 Ga. 160.

In *Indiana* and *Oklahoma* it has been held that the provisions of the statute (Ind. Rev. Stat. 1896, § 1529, Okla. Code Civ. Pro., § 4905), as to the trial of the right of property seized under a process from a justice's court relates only to proceedings before a justice, and that a proceeding to try the right of property can be instituted in no other court. *Davis v. Warfield*, 38 Ind. 461; *Griffin v. Malony*, 13 Ind. 402; *Matlock v. Strange*, 8 Ind. 57; *Hixon v. Hubbell*, 4 Okla. 224.

In *Mississippi* it has been held that a circuit court may entertain jurisdiction of a claim by a third person to property seized under process of that court though the amount involved is less than \$150. *Martin v. Harvey*, 54 Miss. 685.

In *Texas* jurisdiction of a proceeding to try the right of property levied on is dependent on the value of the property as assessed by the levying officer. Rev. Stat. 1895, art. 5295; *Heidenheimer v. Marx*, 1 Tex. App. Civ. Cas., § 171; *Cleveland v. Tufts*, 69 Tex. 582; *Godard v. Frieberg*, 1 Tex. App. Civ. Cas., § 173; *Chrisman v. Graham*, 51 Tex. 454; *Harris v. Hood*, 1 Tex. App. Civ. Cas., § 573; *Carney v. Marsalis*, 77 Tex. 62; *Yarborough v. Downes*, 1 Tex. App. Civ. Cas., § 675; *Marx v. Carlisle*, 1 Tex. App. Civ. Cas., § 92.

Where the affidavit and claim bond states the value of the goods to be within the jurisdiction of a justice and no indorsement of value is made by the officer on the claim bond, the statements in the affidavit and bond are sufficient to show the power of the justice to try the case. *Leman v. Borden*, 83 Tex. 620.

Supreme Court. — In *State v. Booker*, 61 Miss. 16, it was held that owners of personal property taken on execution issuing from the Supreme Court under a judgment between other persons could not interpose claimants' issues in such court, as want of original jurisdiction in matters of fact prevents the supreme court from trying a claimant's issue.

Court Acquiring Jurisdiction. — In *Triest v. Enslen*, 106 Ala. 180, it was held that a claim of ownership of personal property attached on process and returnable to the circuit court and issue taken thereon presented a subject-matter within the competency of all circuit courts to hear and determine upon acquiring jurisdiction of the persons of the plaintiffs in attachment and the claimants.

claim is interposed, the trial of the right of property must be had in a court of the county in which the attachment or execution was levied.¹

3. Justices of the Peace. — A justice of the peace may entertain jurisdiction of a proceeding to try the right of property without reference to the value of the property, where the statute conferring such jurisdiction does not fix a jurisdictional amount; a general constitutional or statutory provision limiting the jurisdiction of a justice to causes in which the amount in controversy shall not exceed a certain sum, having no application to a proceeding to try the right of property.²

V. PROPERTY SUBJECT TO PROCEEDING — Personalty. — In some states it is held that the statutory remedy for the trial of the right of property applies only to personalty.³

1. *Ex p. Dunlap*, 71 Ala. 73; *State v. Superior Ct.*, 5 Wash. 639. See also *Sponenbarger v. Lemert*, 23 Kan. 55.

2. *Bernheimer v. Martin*, 66 Miss. 486, wherein it was said: "The proposition that the justice of the peace, under whose process the cotton was seized and held, when the action of replevin was instituted, could not try a claim to the cotton interposed by a third person, because the value of the cotton exceeded his jurisdiction, is not maintainable. An execution issued by a justice of the peace may be levied on property of any value however great, and the claim of a third person to it is triable by him, because the statute so provides, and it is free from any objection on constitutional grounds, since a trial of the right of property in such case is not a 'cause' in the sense of the constitution in limiting the jurisdiction of justices of the peace, but is an incident of the exercise of the undoubted jurisdiction of such justice as conferred by the constitution." See also *Griffin v. Malony*, 13 Ind. 402; *Hanna v. Steinberger*, 6 Blackf. (Ind.) 520; *Matlock v. Strange*, 8 Ind. 57; *Test v. Beeson*, 37 Ind. 380; *Wright v. Shelt*, 19 Ind. App. 1; *Mills v. Thomson*, 61 Mo. 415; *Stryker v. Skillman*, 14 N. J. L. 189.

Jurisdiction by Consent. — Consent of parties cannot confer jurisdiction on a justice of the peace to try the title to property levied on unless a claim is interposed under oath as required by statute. *Walker v. Ivey*, 74 Aa. 475.

Nor can consent confer jurisdiction on a county criminal court to try the right of property. *Lassiter v. State*, 106 Ala. 292.

Disqualification of Justice. — In *Indiana*

it has been held that where the justice who issued the execution is disqualified from acting and has no successor, there is no jurisdiction in any other justice. *Test v. Beeson*, 37 Ind. 380.

Waiver by Appearance. — Where the subject-matter of a controversy involved in a claim case is within the jurisdiction of the court to which it is returned, and the claimant appears and joins issue thereon without pleading to the jurisdiction in so far as it affects his person and without exception to the levy, such conduct amounts to a waiver of any question upon the jurisdiction of the court as to the person of the claimant. *Stamps v. Hardigree*, 100 Ga. 160. See also *Almand v. Scott*, 83 Ga. 403.

3. *Leffel v. Miller*, (Miss. 1890) 7 So. Rep. 324, wherein it is said: "The right of another than the defendant to interpose [a claim] applies only to cases in which personal property is seized; there is no such thing known to the law as a claimant's issue where real estate is the subject of controversy." See also *King v. Walton*, 3 Port. (Ala.) 289; *Gordon v. McCurdy*, 26 Mo. 304; *White v. Jacobs*, 66 Tex. 462; *Jones v. Bull*, 90 Tex. 187.

Fixtures. — In *Jones v. Bull*, 90 Tex. 187, it was held that if property levied on was at the time so attached to the land as to be in law a part of it, the statutory remedy for the trial of the right of property did not apply.

Leasehold Estate. — In *Maurer v. Sheaffer*, 116 Pa. St. 339, it was held that a leasehold estate conferring the right to mine, dig, and carry away coal was a chattel real, and a levy thereon upon a fieri facias by the sheriff as the

Realty. — In other states it is held that the statute giving the remedy of trial of the right of property is applicable alike to realty and to personality.¹

VI. WHO MAY INSTITUTE PROCEEDING — 1. Persons Claiming Interest or Ownership. — The persons who may institute a proceeding to try the right of property seized under process are also designated by statute. As a rule the persons designated are those who claim an interest in or the ownership of the seized property.²

property of the defendant involved him in no responsibility to others, and hence he was not entitled to demand an issue under the interpleader act.

Special Execution in Attachment. — In *Arkansas* it has been held that the statute giving to the claimant of personal property which has been levied on as the property of another, the right to give bond and suspend the sale, applies as well to property about to be sold under a special execution in attachment as to that levied on under general execution. *State v. Spikes*, 33 Ark. 801.

Proceeds of Sale under Order of Court. — In *Williamson v. Wylie*, 69 Mo. App. 368, it was held that where property levied on under execution is sold by special order of court and the proceeds are returned into court, the right to the proceeds may be tried in the statutory proceeding of the trial of the right of property. See also *Stevens v. Springer*, 23 Mo. App. 375; *Martin v. Fox*, 40 Mo. App. 665.

1. *Bennett v. Wolverton*, 24 Kan. 284, wherein the court, by Brewer, J., said: "The statute reads that 'any person claiming property, money, effects, or credits attached, may interplead,' etc. Now the word 'property,' in its ordinary acceptation, includes all property, both real and personal. By statute it is made equally inclusive. When used by the legislature it should therefore receive this meaning unless the context indicates its use in a different and more limited sense." See also *Bostwick v. Blake*, 145 Ill. 85; *Juilliard v. May*, 130 Ill. 87; *Williams v. Vanmetre*, 19 Ill. 293; *City Ins. Co. v. Commercial Bank*, 68 Ill. 351; *Bodwell v. Heaton*, 40 Kan. 36.

2. *Alabama.* — *McKeithen v. Pratt*, 53 Ala. 116; *Gerald v. McKenzie*, 27 Ala. 166.

Georgia. — *Haas v. Old Nat. Bank*, 91 Ga. 307; *Wade v. Hamilton*, 30 Ga. 450; *Bailey v. Brockett*, 20 Ga. 148.

Illinois. — *Grimsley v. Klein*, 2 Ill. 343; *Hollenback v. Todd*, 119 Ill. 543.

Mississippi. — *Wolfe v. Crawford*, 54 Miss. 514.

Missouri. — *Mansur v. Hill*, 22 Mo. App. 372; *Toney v. Goodley*, 57 Mo. App. 235; *State v. McKellop*, 40 Mo. 184.

Texas. — *Heinze v. Marx*, 4 Tex. Civ. App. 599; *Dallas Nat. Bank v. Davis*, 78 Tex. 362.

Legal or Equitable Claim. — In *North Carolina* it has been held that the claim of an interpleader to property attached must be a legal one; a mere equitable claim will not be sufficient. *Simpson v. Harry*, 1 Dev. & B. L. (N. Car.) 202.

Claim of Title or Possession. — In *Texas* it has been held that the claim of a third person to property seized under process must be one of title or possession. *Willis v. Thompson*, 85 Tex. 301; *Wootton v. Wheeler*, 22 Tex. 338; *Wright v. Henderson*, 12 Tex. 43; *Gillian v. Henderson*, 12 Tex. 47; *Garrity v. Thompson*, 64 Tex. 597; *Belt v. Raguet*, 27 Tex. 482; *Osborn v. Koenigheim*, 57 Tex. 91; *Schmick v. Bateman*, 77 Tex. 326; *White v. Jacobs*, 66 Tex. 464; *Allyn v. Willis*, 65 Tex. 65; *Half v. Allyn*, 60 Tex. 278; *Fox v. Willis*, 60 Tex. 373; *Saunders v. Ireland*, (Tex. Civ. App. 1894) 27 S. W. Rep. 880; *Scarborough v. Alcorn*, 74 Tex. 358; *Erwin v. Blanks*, 60 Tex. 583; *Garrity v. Thompson*, 64 Tex. 597.

But both title and possession need not unite in the claimant. *White v. Jacobs*, 66 Tex. 462; *Marsh v. Thomason*, 6 Tex. Civ. App. 379.

Infants. — In *Strode v. Clark*, 12 Ala. 621, it was held that a trial of the right of property might be prosecuted in the name of an infant by a *prochein ami*.

Defendant in Attachment. — In *Ellis v. Clarke*, 19 Ark. 420, it was held that the defendant in attachment could not interpose the statutory interplea.

Cestui Que Trust. — In *King v. Hill*, 20 Ala. 133, it was held that a *cestui que trust* of personal property could

Interest at Interposition of Claim. — But the facts which support the interest or title of the claimant must exist at the time of the interposition of the claim to enable him to maintain the proceeding.¹

2. Lienholders. — The authorities are in conflict as to whether a person having no other claim to property than a lien upon it can have his right tested in a proceeding to try the right of property.²

not interpose a claim to try the right of property. But see *State v. McKellop*, 40 Mo. 184.

Substitution of Trustee. — In *Winkelmaier v. Weaver*, 28 Mo. 358, it was held that where, on the trial of an issue raised by an interplea in an attachment, objection was made that the interpleader only claimed as *cestui que trust*, he should be permitted to substitute his trustee as plaintiff in the interplea.

1. *Kirschenschlager v. Armitage Herschel Co.*, 58 Mo. App. 165, wherein it was held that ownership and right of possession at the time of the attachment of property was not sufficient to maintain an interplea for such property, in the absence of proof that the interpleader had the general title to or special interest in such property and was entitled to the possession of it at the time of filing the interplea. See also *Seisel v. Folmar*, 103 Ala. 491. But see *Dodds v. Pratt*, 64 Miss. 123, wherein it was held to be proper for the court on the trial of a claimant's issue to sustain the claim of a trustee in a deed of trust, the conditions of which at the interposition of such claim were unbroken, if at the time of the trial the conditions were broken.

2. In *Alabama*, under Code 1886, § 3004, a lienholder may institute the proceeding. *Hardy v. Ingram*, 84 Ala. 544; *Ballard v. Mayfield*, 107 Ala. 396; *Patapsco Guano Co. v. Ballard*, 107 Ala. 710; *Wells v. Cody*, 112 Ala. 278.

In *Texas* it has been held that a lienholder cannot maintain the proceeding unless as such lienholder he is in possession of the property. *White v. Jacobs*, 66 Tex. 462; *Osborn v. Koenigheim*, 57 Tex. 91; *Wright v. Henderson*, 12 Tex. 43; *Wootton v. Wheeler*, 22 Tex. 338; *Adoue v. Seeligson*, 54 Tex. 593; *Belt v. Raguet*, 27 Tex. 471; *Gillian v. Henderson*, 12 Tex. 47; *Allen v. Russell*, 19 Tex. 87; *Brown v. Young*, 1 Tex. App. Civ. Cas., § 1240; *Aiken v. Kennedy*, 1 Tex. App. Civ. Cas., § 1321; *Parker v. Benner*, 1 Tex. App. Civ. Cas., § 64; *George v. Dyer*,

1 Tex. App. Civ. Cas., § 780; *Blanton v. Langston*, 60 Tex. 149.

Landlord's Lien. — In *Mississippi*, under Code 1892, § 4425, providing for a trial of the right of property between a plaintiff in execution and any person claiming "to have a lien" on property seized under the writ, a claim may be interposed by the holder of a landlord's lien. *Thomas v. Shell*, (Miss. 1899) 24 So. Rep. 876.

In *Missouri*, where a tenant makes default in the payment of his rent and abandons the leased premises, leaving an unharvested crop, the landlord has such a right of property therein as would enable him to claim it by interplea as against a creditor of the tenant who seized the crops under attachment before the expiration of the landlord's lien. *Sanders v. Ohlhausen*, 51 Mo. 163.

In *Alabama*, under the express provisions of the statute (Code 1886, § 3004), a landlord having a lien on a crop for rents and advances may maintain the statutory claim suit. *Hardy v. Ingram*, 84 Ala. 544; *Ballard v. Mayfield*, 107 Ala. 396; *Patapsco Guano Co. v. Ballard*, 107 Ala. 710; and an assignee of a landlord's claim for rent may also maintain a claim suit. *Wells v. Cody*, 112 Ala. 278.

In *Illinois* it was early held that a landlord who has distrained upon the goods of his tenant has a sufficient interest in them to enable him to be the claimant of the same as a trial of the right of property, if they are subsequently taken in execution. *Grimsley v. Klein*, 2 Ill. 343.

Bailees. — In *Shahan v. Herzberg*, 73 Ala. 59, it was held that where goods are levied on while in a bailee's possession as the property of the defendant in an attachment who is not connected with the legal title, the bailee may interpose a claim for their recovery. To same effect, *Knight v. Davis Carriage Co.*, 71 Fed. Rep. 662. But see *Faust v. Stevens*, 8 Kulp (Pa.) 218.

Factors and Brokers. — In *Lehman v.*

3. Mortgagees. — By the weight of authority a mortgagee cannot maintain a proceeding to try the right of property before breach of the condition of the mortgage.¹

4. Levying Officers. — A proceeding to try the right of property cannot, it has been held, be instituted against the will of the claimant by the officer who levied on the property.²

Warren, 53 Ala. 535, it was held that a factor or broker, having actual possession of property belonging to his principal, may interpose a claim in his own name against one not in condition to set up the principal's title.

Sureties in Replevin Bond. — In *Cordaman v. Malone*, 63 Ala. 556, it was held that where a junior attachment is levied on property after it has been replevied, the sureties in the replevin bond may interpose a claim and try the right of property. See also *Boehm v. Calisch*, (Tex. 1887) 3 S. W. Rep. 293.

1. *Applewhite v. Harrell Mill Co.*, 49 Ark. 279; *Hamilton v. Mitchell*, 6 Blackf. (Ind.) 131; *Philbrick v. Goodwin*, 7 Blackf. (Ind.) 18; *Dodds v. Pratt*, 64 Miss. 123; *Helm v. Gray*, 59 Miss. 54; *Butler v. Lee*, 54 Miss. 476; *F. O. Sawyer Paper Co. v. Mangan*, 60 Mo. App. 76; *Huiser v. Beck*, 55 Mo. App. 668; *Wyeth Hardware Co. v. Carthage Hardware Co.*, 75 Mo. App. 518. *Contra*, *Boswell v. Carlisle*, 70 Ala. 244; *Ballard v. Mayfield*, 107 Ala. 396; *Micham v. Schuessler*, 98 Ala. 635.

In *Texas* a mortgagee out of possession cannot assert his claim to property levied on in the manner prescribed by the statute for the trial of the right of property. *Erwin v. Blanks*, 60 Tex. 583; *Wright v. Henderson*, 12 Tex. 43; *Gillian v. Henderson*, 12 Tex. 47; *Garrity v. Thompson*, 64 Tex. 597; *Linz v. Atchison*, 14 Tex. Civ. App. 647; *Adoue v. Seeligson*, 54 Tex. 593; *Wilber v. Kray*, 73 Tex. 533; *Dupuy v. Ullman*, 78 Tex. 341. Nor can a trustee under a deed of trust maintain a proceeding to try the right of property where he was not in possession of the property at the time of its seizure. *Saunders v. Ireland*, (Tex. Civ. App. 1894) 27 S. W. Rep. 880; *Garrity v. Thompson*, 64 Tex. 598; *Wilber v. Kray*, 73 Tex. 533. But where the trust deed empowers the trustee to take immediate possession, he may maintain the proceeding though he has not taken actual possession. *Willis v. Thompson*, 85 Tex. 301.

2. *Jones v. Carr*, 16 Ohio St. 420,

wherein it was said: "To us it seems clear that the legislature did not intend that this summary remedy should be resorted to by parties other than the claimant, and against his will. Indeed, we think the fair import of the language of the statute is clearly otherwise. The terms of the act give no option to the officer who has made the levy as to whether such a proceeding shall be instituted or not. On the contrary, all his agency in the proceeding is in discharge of official duties imposed upon him. 'It shall be his duty forthwith to give notice in writing to some justice of the peace,' is the language of the act. Nor is he even a nominal party to the proceeding, nor can any judgment be rendered for or against him. As to him, it is *res inter alios acta*, though it may result in affording him protection. On the other hand, the statute clearly regards the claimant as the actor throughout the proceeding. As such, it is made his duty to give notice in writing to the plaintiff in execution of the time and place of trial; and no trial of his right to the property can be had unless he first proves to the satisfaction of the justice that such notice was given. If the proceeding may be instituted by the sheriff, on his own motion, why should he not have been required to give notice of the time and place of trial, both to the plaintiff in execution and the claimant? * * * We hold that the legislative intent was to provide for the case of a claim made with reference to the statute, or accompanied with a demand of the remedy given by the statute, and that, in this case, the justice of the peace had no jurisdiction to try the right of the plaintiff in error to the property in question, against his consent, and at the instance of the sheriff alone, nor to render judgment against him in the premises." In *Vulcan Iron Works v. Edwards*, 27 Oregon 563, the court said that at common law, a sheriff might call a jury on his own motion, "when from any source or in any manner he acquired information causing him to doubt the title of

5. Married Women. — A married woman, when authorized by statute to sue as a *feme sole*, may maintain in her own name a proceeding to try the right of property.¹

6. Joint Owners. — Where property levied on belongs to joint owners, strangers to the levy, one may interpose a claim to the property in his own name and rely on the joint title.²

Proof of Joint Ownership. — But a joint claim by two or more claimants can be supported only by proof of joint ownership.³

VII. TIME OF INSTITUTING PROCEEDING. — The time in which a proceeding for the trial of the right of property must be instituted is generally prescribed by the statute creating the proceeding.⁴

the property seized; but under the statute such proceedings can only be instituted by the claimant giving notice in writing of his claim, and until such notice the sheriff has no power or authority to summon or call a jury, whatever his views may be as to the title to the property. The right to institute the proceeding belongs entirely to the claimant."

But see *Philips v. Harriss*, 3 J. J. Marsh. (Ky.) 122, wherein it was held that a sheriff may, of his own motion, summon a jury to try the right of property levied on and claimed by a third person.

1. *Meyer v. Sulzbacher*, 75 Ala. 423; *Kennon v. Dibble*, 75 Ala. 351; *Crawford v. Kimbrough*, 76 Ga. 299. See generally article HUSBAND AND WIFE, vol. 10, p. 191.

Husband as Trustee. — In *Pepper v. Lee*, 53 Ala. 33, it was held that where property is of the equitable separate estate of the wife, of which there is not a trustee, the husband is by operation of law the trustee and is the proper person to interpose a claim for the trial of the right of property.

2. *McGrew v. Hart*, 1 Port. (Ala.) 175, wherein it was said that as a general rule the claimant of property levied on by execution could not interpose the title of a third person to defeat the execution. But when the claimant has an undivided interest in the property, as where it belongs to him and to some third person not a party to the suit, this would form an exception to the general rule and would warrant the interposition of his title to show that the defendant in execution had none. See also *Cotten v. Thompson*, 21 Ala. 574; *Hollenback v. Todd*, 119 Ill. 543; *Hamburg v. Wood*, 66 Tex. 168.

Claim by One Co-surety. — In *Hawkins*

v. May, 12 Ala. 673, it was held that one of two co-sureties may interpose a claim under the statute for the benefit of both.

Claim by Partnership. — In *Pace v. Lee*, 49 Ala. 571, it was held that where a claim to property taken under attachment was interposed by one partner in the name of the partnership, the subsequent proceedings were properly conducted against the partnership as claimant, though the forthcoming bond was given by the partner individually and recited that he "had filed a claim," etc.

3. *Cottingham v. Armour Packing Co.*, 109 Ala. 421, wherein it was said: "Under the issue as tendered by their joint claim and as made up under the direction of the court, the burden being shifted upon them by the evidence of the plaintiff showing *prima facie* that the property was subject to the attachment, they were called upon to show that the property belonged to them jointly or in common. Neither could recover unless both showed title." See also *King v. Sapp*, 66 Tex. 519.

4. In *Alabama* the proceeding may be instituted at any time before a sale of the property under the process by which it was seized. Code 1896, § 4141. But a trial of the right cannot be had at the same term that the affidavit and claim bond are lodged with the sheriff. *Johnson v. Johnson*, 108 Ala. 124; *Johnson v. Dismukes*, 104 Ala. 520. And where an affidavit of title to property levied on under execution is made and a claim bond executed, and upon the trial the property is found liable to execution and upon failure to deliver by the claimant within ten days the claim bond is indorsed "Forfeited" and returned, the constable is unauthorized to accept affidavit of claim

VIII. AFFIDAVIT OR NOTICE OF CLAIM—1. **Necessity For.**—A failure to make an affidavit or give notice of claim, when required to do so by statute, is fatal to the proceeding.¹

and claim bond from another party, while the property is withheld so as to defeat the plaintiff's right to execution. *Cooper v. Davis*, 88 Ala. 569. See also *Heyward v. Phillips Buttoff Mfg. Co.*, 97 Ala. 533.

In *Colorado* third persons claiming property seized under attachment must assert their right before the trial of the main action. Code, § 106; *Whalen v. McMahon*, 16 Colo. 373. An application, however, is in apt time where made after judgment by default in the main action has been set aside and before trial on the merits. *Latham v. Gregory*, 9 Colo. App. 292.

In *Georgia* it has been held that property may be claimed by a third person not a party to the attachment at any time before a sale of the property. *Simmons v. Bennett*, 20 Ga. 48; *Rogers v. Bates*, 19 Ga. 545; *Krutina v. Culpepper*, 75 Ga. 602.

In *Illinois* although the statute allowing an interpleader as to the right of property in an attachment suit does not in terms, say that it shall be tried or even interposed before judgment in the original attachment suit, the better practice is first to settle the matter of the interpleader and then render judgment upon the attachment, or, if such judgment has already been taken, to open it for the purpose of permitting the interpleader. *Juilliard v. May*, 130 Ill. 87.

In *Iowa* the Code, § 3016, authorizes a claim to property attached to be set up at any time before the proceeds are paid to the plaintiff in attachment. *Howe v. Jones*, 57 Iowa 130; *Edwards v. Cosgro*, 71 Iowa 296. It has, however, been held that this section does not apply where the property attached has been sold upon an execution issued upon the judgment rendered in the cause. *Newton First Nat. Bank v. Jasper County Bank*, 71 Iowa 486.

In *Mississippi* a trial of the right of property levied on by attachment may be had before the rendition of judgment against the defendant in attachment. *Melius v. Houston*, 41 Miss. 59.

In *Missouri* an interpleader to property taken on attachment must be interposed while the attachment suit is pending. *McElfatrick v. Macauley*, 15

Mo. App. 102; *Ladd v. Couzins*, 35 Mo. 513; *State v. Langdon*, 57 Mo. 353.

Laches.—In *Clemmons v. Hampton*, 70 N. Car. 534, it was held that in an action for the possession of personal property a third party claiming such property loses his right to be made a party to the suit after a lapse of three years from the filing of his affidavit and his motion to allow him to interplead.

1. *Higdon v. Vaughn*, 58 Miss. 572; *Carter v. Carter*, 36 Tex. 693.

Filing Bond to Dissolve Garnishment.—In *Georgia* it has been held that the filing by a claimant in garnishment proceedings of a bond to dissolve the garnishment is the filing of a claim, there being no requirement of the statute that such claim shall be filed under oath. *Gordon v. Wilson*, 99 Ga. 354.

Absence of Affidavit from Papers in Cause.—In *Ellis v. Abercrombie*, 10 Smed. & M. (Miss.) 474, it was held to be error to dismiss a trial of the right of property, when a claimant's bond has been regularly executed, on the ground that the claimant's affidavit does not appear in the papers in the cause. The statute requires the sheriff to take the affidavit before he takes the bond. It also requires him to return the bond with the execution into court, but does not require him to return the affidavit. His omission to return the affidavit cannot prejudice the claimant. See also *State v. Superior Ct.*, 6 Wash. 417; *Mayer v. Woolery*, 10 Wash. 354.

Separate Affidavits.—In *Moody v. Hoe*, 22 Fla. 309, it was held that where various executions on judgments of different persons between whom there is no connection are levied on personal property, which is claimed by a third person, and such person asserts his claim under the statute, he should make an affidavit and bond separately to each plaintiff in fieri facias. He cannot join in the same affidavit and bond all the plaintiffs in execution.

Nature of Affidavit.—In *Texas* the affidavit of the claimant for the trial of the right of property is not a pleading conclusive on the claimant as to the source or character of title set up therein. *Hargadine-McKittrick Dry-Goods Co. v. Jacksboro First Nat. Bank*, 14 Tex. Civ. App. 416; *Sutton v. Gregory*,

2. Sufficiency. — An affidavit or notice of claim in substantial compliance with the requirements of the statute is sufficient.¹

3. Amendment. — Where the claimant's affidavit is quashed, he cannot file an amended affidavit, setting up a different title to the property, without filing a new bond.²

IX. BOND. — The bond given by a claimant in proceedings to try the right of property should be in substantial compliance with the requirements of the statute.³

(Tex. Civ. App. 1898) 45 S. W. Rep. 932.

1. M'Gregor v. Hall, 3 Stew. & P. (Ala.) 397, wherein it was said: "Do the words used in the present instance substantially comply with the requirements of the law? The claimant deposed that he had a 'just claim' to the negroes in controversy. This, although not so definite as it might have been, yet when the uncertainty of the statute is considered, is believed to be a sufficient compliance with it." See also *Gravely v. Southern Ice Mach. Co.*, 46 La. Ann. 549; *Selman v. Shackelford*, 17 Ga. 615; *Hankins v. Ingols*, 4 Blackf. (Ind.) 35; *Rives v. Wilborne*, 6 Ala. 45; *Merchant v. Scott*, (Tex. Civ. App. 1894) 28 S. W. Rep. 717; *Kohlman v. Meridian First Nat. Bank*, 71 Miss. 843.

Nature of Claim. — The affidavit of claim should show the nature of the claim whether absolute or conditional. *Norris v. Detar*, 5 Blackf. (Ind.) 31; *Humble v. Williams*, 4 Blackf. (Ind.) 473.

Any Assertion of Title. — In *Oregon* it has been held that the provision of the statute that the claimant shall "give notice of his claim in writing" was broad enough to include any assertion of title or demand for the property made in writing. *Vulcan Iron Works v. Edwards*, 27 Oregon 563.

Absence of Jurat. — In *Ryan v. Goldfrank*, 58 Tex. 356, it was held that where the claimant of property seized by attachment files the requisite bond and makes oath that his claim is made in good faith, the absence of the jurat which, through inadvertence, was not attached to the affidavit, will not vitiate the proceedings if seasonably cured by amendment. See in general article *AFFIDAVITS*, vol. 1, p. 309.

Names of Owners. — In *Richardson v. Smith*, 21 Fla. 336, it was held that where a claim to property levied upon under a writ of attachment was interposed by an unincorporated company

or firm, the affidavit of ownership should state the names of the individuals composing such company or firm.

In *Flint v. McCarty*, 1 Tex. App. Civ. Cas., § 1018, it was held that a claim affidavit signed in the name of a partnership was insufficient.

Facts Constituting Claimant's Right. — In *Wright v. Henderson*, 10 Tex. 204, it was held that an affidavit of claim need not state the facts constituting the claimant's right to the property; that it was sufficient for the affidavit to state that the claimant claims the property as "trustee" and that the claim was made in good faith.

2. Zadek v. Dixon, (Tex. 1886) 3 S. W. Rep. 247.

Payment of Costs. — In *Indiana* it has been held that the affidavit of a claimant of goods taken in execution as the property of another may be amended on payment of costs. *Norris v. Detar*, 5 Blackf. (Ind.) 31.

Amendment Unnecessary. — In *Hadden v. Larned*, 87 Ga. 634, it was held that where all the pertinent facts on behalf of the claimant of property levied on under execution were admitted in evidence, the refusal of the court to allow an amendment of the claim affidavit setting out these facts in detail was of no consequence. See also *Trice v. Walker*, 71 Miss. 968.

3. See, for a full treatment of the claimant's bond, article *FORTHCOMING AND DELIVERY BONDS*, vol. 9, p. 642.

The Payee. — In *Georgia* the bond should be made payable to the plaintiff in the seizure process. *Selman v. Shackelford*, 17 Ga. 615.

Where Several Executions Are Levied on the Same Property there should be a bond by the claimant in each case and a separate trial and judgment. *McAnulty v. Bingaman*, 6 How. (Miss.) 382.

In *Texas* under Rev. Stat. 1895, § 5287, which provides that when more than one writ has been levied upon the same property only one bond need be given

X. PLEADING — 1. Formal Pleadings. — In some states the statutes relating to the trial of the right of property provide for the making up between the parties, under the direction of the court, of an issue to consist of a brief statement of the respective claims of the parties to the property.¹ In such states it would

by the claimant which shall be payable to all the plaintiffs in the several writs, only one bond need be given by a claimant, though one writ issues from the district court and another from the county court. *Phillips v. Davis*, (Tex. Civ. App. 1899) 49 S. W. Rep. 144. See also *P. J. Peters Saddlery, etc., Co. v. Schoelkopf*, 71 Tex. 418; *Jacobs v. Shannon*, 1 Tex. Civ. App. 395.

Failure to Give Delivery Bond. — In *Williamson v. Wylie*, 60 Mo. App. 368, it was held that the failure of the claimant to give a delivery bond after the taking of an indemnifying bond from the execution creditor by the sheriff was tantamount to a waiver of the claimant's privilege to have the right of property tried in the summary manner provided by Mo. Rev. Stat. 4928. See also *House v. West*, 108 Ala. 355.

Insufficient Bond. — The fact that the claimant does not file a bond in the precise amount required neither works a total defeat of the claimant's right to recover nor prevents an inquiry of damages. *Turner v. Lytle*, 59 Md. 199.

Amendment of Bond. — In *Martin v. Mayer*, 112 Ala. 620, it was held that a claimant in attachment may, before the trial is entered upon, be permitted to amend a replevy bond given by him so as to make it a claim bond, where the affidavit and claim and sheriff's return all show that a claim bond was intended but that the condition of the bond was improperly framed. See also *Bradford v. Dawson*, 2 Ala. 203.

Failure to Return Bond to Proper Court. — In *Peterson v. Wright*, 9 Wash. 202, it was held that the laches of the sheriff in failing to return the claimant's bond to the proper court will not deprive the court of jurisdiction when the bond is returned, but the bond will be considered as having been on file in the proper court as of the date when it should have been returned by the sheriff.

Waiver of Objections. — In *Fulghum v. Connor*, 99 Ga. 237, a claim case was tried on its merits without objection to the sufficiency of the claim bond, and afterwards came on for trial more than twelve years after issue had been orig-

inally joined. It was held that it was then too late to move to dismiss the claim on the ground that such bond was defectively executed. In *Willis v. Thompson*, 85 Tex. 301, a trustee filed affidavit and claim bond to try the right of property in certain goods seized under attachment. The claim bond was signed by two securities, one of whom was a beneficiary in the trust. On motion for new trial objection was first made to the sufficiency of the bond on the ground of the incompetency of such security. It was held that the objection came too late.

1. *Alabama.* — *Phelan v. Fancher*, 5 Ala. 449; *Planters, etc., Bank v. Willis*, 5 Ala. 770; *Desha v. Scales*, 6 Ala. 356; *Branch Bank v. Parker*, 5 Ala. 731; *Langdon v. Brumby*, 7 Ala. 53; *Lehman v. Warren*, 53 Ala. 535; *Shahan v. Herzberg*, 73 Ala. 59; *Starnes v. Allen*, 58 Ala. 316; *Ramey v. W. O. Peoples Grocery Co.*, 108 Ala. 476.

Arizona. — *Lawler v. Bashford-Burmister Co.*, (Ariz. 1896) 46 Pac. Rep. 72.

Mississippi. — *Phillips v. Cooper*, 50 Miss. 722; *Smokey v. Wack*, 57 Miss. 832.

Texas. — *McKinnon v. Reliance Lumber Co.*, 63 Tex. 30; *State v. Bender*, 68 Tex. 676; *Wright v. Henderson*, 10 Tex. 204; *Latham v. Selkirk*, 11 Tex. 314; *Choate v. McIlhenny Co.*, 71 Tex. 119; *Scarborough v. Alcorn*, 74 Tex. 358; *Hall, etc., Wood Working Mach. Co. v. Brown*, 82 Tex. 469; *Emerson v. McGregor First Nat. Bank*, (Tex. Civ. App. 1894) 25 S. W. Rep. 433.

Tendering of Issue. — In *Smokey v. Wack*, 57 Miss. 832, it was held that where attached goods were claimed by a third person, an averment by the plaintiff that at the time of the seizure of the goods under the attachment they were the property of the defendant and subject to his attachment, was a sufficient tendering of issue as against the claimant and denials therein of the claimant's title were mere surplusage and immaterial.

In *Emerson v. McGregor First Nat. Bank*, (Tex. Civ. App. 1894) 25 S. W. Rep. 433, the plaintiff in attachment filed a pleading alleging that the prop-

seem that no formal pleadings are required.¹

2. Written Pleadings. — The pleadings in a trial of the right of property should be in writing as in ordinary actions.²

3. Sufficiency of Pleadings. — The pleadings in a proceeding to try the right of property need only contain such allegations as are required by the statute creating the proceeding.³

erty seized by the writ of attachment was the property of the defendant and that the same was subject to the levy of the writ of attachment. The claimant's affidavit and answer stated that at the time of the levy the property was theirs and in their possession and control and that they were entitled to hold the same. It was held that the pleadings sufficiently presented issues as to whether the property was that of the defendant and subject to levy and as to whether the claimants could be deprived of its possession.

In *McKinnon v. Reliance Lumber Co.*, 63 Tex. 30, it was held that where in a suit for the trial of the right of property seized under attachment the attaching creditor set up the fact that the property levied on was the property of his attached debtor who was insolvent and who had no other property subject to levy, and that he had fraudulently transferred the same to the claimants, there was a sufficient tender of issue.

Waiver of Issue in Writing. — Where a trial of the right of property has been had, it cannot be assigned for error on appeal that no issue in writing was made up previous to the trial. *Dent v. Smith*, 15 Ala. 286; *Hall v. Dargan*, 4 Ala. 696; *Phillips v. Cooper*, 50 Miss. 722.

1. Lehman v. Warren, 53 Ala. 535; *Betton v. Willis*, 1 Fla. 262; *Moody v. Hoe*, 22 Fla. 309.

In *Washington* in a proceeding to try the right of property levied on, no pleadings other than the affidavit of the claimant are required. *Chapin v. Bokee*, 4 Wash. 1; *Sayward v. Nunan*, 6 Wash. 87; *Seattle First Nat. Bank v. Hagan*, 16 Wash. 45.

2. Neal v. Newland, 4 Ark. 459, wherein the court said: "This proceeding by way of interpleader partakes of an equitable character. Its object is to save unnecessary litigation, because the title can be tried and determined with the same facility as if a new action was instituted. But such interpleader must be in writing and embody sufficient matter to make up an issue upon, if

necessary, and support a verdict and judgment." See also *Rosewater v. Schwab Clothing Co.*, 58 Ark. 446; *Martin v. Fox*, 40 Mo. App. 664; *Tupper v. Cassell*, 45 Miss. 352. But see *Watson v. Gabby*, 18 B. Mon. (Ky.) 658, wherein it was held that upon the trial of the right of one claiming property levied on by an officer under execution, no pleading in writing was necessary.

Written Answer. — Since an interplea filed by a claimant of attached property stands on its own footing, the answer of the attachment creditor thereto should be in writing. *Rosewater v. Schwab Clothing Co.*, 58 Ark. 446.

Verification of Pleading. — In *Indiana* the complaint in an action to try the right of property must be verified. *Raymond v. Parisho*, 70 Ind. 256. See also *S. Albert Grocer Co. v. Goetz*, 57 Mo. App. 8.

3. Maus v. Bome, 123 Ind. 522, wherein it was said: "The statute authorizing an action of this character to be brought expressly states what shall be set forth in the complaint, and it requires that the complaint shall state the plaintiff's claim to the property, and the nature of such claim, whether absolute or conditional. The complaint in this case alleges that the plaintiff is the owner of the property. It states an absolute claim, and is sufficient under the statute." See also *Taylor v. Taylor*, 3 Bush (Ky.) 118.

Nature of Claim — Right to Possession. — In *Indiana* the complaint in an action to try the right of property should set forth the nature of the plaintiff's claim whether absolute or conditional. *Raymond v. Parisho*, 70 Ind. 256. But it need not allege that the plaintiff is entitled to the possession of the property, an allegation that he is the owner of such property being sufficient. *Maus v. Bome*, 123 Ind. 522.

In *Minnesota* a third person claiming money or property in the hands of a garnishee, should serve the first pleading in the nature of a complaint in intervention, setting up his claim to which the plaintiff in the main action

4. **Special Plea — Invalidity of Levy.** — In *Texas*, on a trial of the right of property, the invalidity of the levy by virtue of which the property was seized can be raised only by a special plea calling it in question and pointing out the invalidity.¹

5. **Amendment of Pleadings.** — The pleadings in the trial of the right of property may be amended as in ordinary actions.²

6. **Pleading and Proof — Conformity of Pleading to Proof.** — The proof in a proceeding to try the right of property must, of course, conform to the pleading.³

may answer. *Smith v. Barclay*, 54 Minn. 47. See also *McMahon v. Merrick*, 33 Minn. 262.

In *Missouri* an interplea in proceedings by attachment need not contain all the averments essential to a sufficient statement in an action of replevin; it need not set forth more than the statute requires. *S. Albert Grocer Co. v. Goetz*, 57 Mo. App. 8.

Setting Out Evidence of Title. — A plea by a claimant to property levied on need not set out the evidence of claimant's title. *Hamilton v. Duty*, 36 Ark. 474.

Answer to Interplea. — In *Meyberg v. Jacobs*, 40 Mo. App. 128, it was held that an answer to an interplea need not allege the defendant's indebtedness to the plaintiff where the interplea itself admits it.

In *Martin v. Fox*, 40 Mo. App. 664, it was held that an answer by the execution plaintiff merely denying that the claimant "is in good faith the lawful owner of the whole property" levied upon and claimed, was insufficient to raise the issue that a sale of the execution debtor to the claimant, under which the claimant derived title to the property, was fraudulent as to the creditors of the debtor.

1. *Ft. Worth Pub. Co. v. Hitson*, 80 Tex. 234, wherein it was said: "The validity of the plaintiff's writ was not to be contested except by a special plea pointing out the grounds relied upon for showing its invalidity. If the plaintiff had to prove his writ in every case in which the defendant pleaded a general denial, logically the burden of proof would be upon him in every such case. Evidently the purpose of the statute was to secure a trial of the contest as to the right of property and not of the validity of the writ, and we think it was intended that the validity of the writ should not be questioned except by a special plea setting up the grounds upon which its invalidity is claimed."

See also *Davis v. Dallas Nat. Bank*, 7 Tex. Civ. App. 41; *Meader Co. v. Aringdale*, 58 Tex. 447.

Estoppel in Pais. — In *Scarborough v. Alcorn*, 74 Tex. 358, it was held that in a trial of the right of property, if the defendant claim ownership by virtue of an estoppel, he must plead it and set forth the facts constituting the estoppel, and that in the absence of such plea it was error to submit the question of estoppel to the jury.

2. *Cleveland v. Tufts*, 69 Tex. 580, wherein the claimant on the new trial after reversal on appeal was permitted to amend his plea so as to claim damages for the illegal seizure of his property. The court said: "The right to amend in our practice is not confined to any particular character of actions. The settlement in one suit of all controversies growing out of the subject matter in dispute is always encouraged. The claimant had a right to damages growing out of the illegal seizure of his property. This cause of action was germane to the subject matter of the controversy, and there was no necessity for subjecting the parties to the costs and trouble of another action to remedy a wrong inflicted by the institution of the suit then before the court." See also *Phillips v. Cooper*, 50 Miss. 722; *Battles v. Sliney*, 126 Pa. St. 460; *Equitable Mortg. Co. v. Brown*, 105 Ga. 474; *Corsicana First Nat. Bank v. Fleming*, 103 Ga. 722.

Time of Amendment. — In *Bicklin v. Kendall*, 72 Iowa 490, it was held that after final judgment has been rendered in attachment proceedings, settling all the rights of the parties thereto including the claim of an intervener, and after the attached property has been sold, it is too late to file an amendment to the intervening petition setting up new issues.

3. **Absolute or Conditional Ownership.** — *Raymond v. Parish*, 70 Ind. 256, wherein it was held that where a com-

Evidence Admissible under General Denial. — Under a general denial to an interplea in an attachment, the plaintiff may show the interpleader's claim to be fraudulent.¹

XI. PROCEEDINGS BEFORE TRIAL — 1. Continuance. — In a trial of the right of property a continuance, it seems, may be had for good cause shown.²

plaint alleges absolute ownership in the plaintiff, he cannot recover on proof of mere conditional ownership, such as that conferred on him by a chattel mortgage.

Value of Property. — In *Colorado* under Gen. Stat., § 2011, which provides for summary proceedings to try the right of property, and, if found to be in the claimant, for the assessment of damages, the court having found the title to be in the claimant may receive evidence as to the value of the property, though no formal issue of value is raised by the pleadings. *Schluter v. Jacobs*, 10 Colo. 449.

Proof of Possession — Holding Property as Security. — In *Washington* in a summary proceeding instituted by a claimant of property levied upon by the sheriff as the property of another, under an affidavit alleging ownership and right to immediate possession in the claimant, the claimant is entitled to prove that he was in possession of the property and was holding it as security for an indebtedness due him from the execution defendant, and is not confined to proof of absolute ownership. *Seattle First Nat. Bank v. Hagan*, 16 Wash. 45.

Consideration of Purchase. — Where the claimant avers that he bought the property levied on, prior to the levy, and paid a certain consideration therefor, he may prove that the consideration was a debt due from the attachment debtor. *Hamburg v. Wood*, 66 Tex. 168.

Variance Between Affidavit and Proof of Claim. — On the trial of an issue formed on a sheriff's interpleader the fact that the claimant in his affidavit alleged himself to be the absolute owner of the property levied on, and the proof showed that he held it in trust "to manage, release, and dispose of the same as he saw proper, only accounting to" a third person for whose benefit he held the title, will not prevent his recovery, as it is not necessary to set out in the affidavit the trust upon which the claimant holds the property. *Campbell v. Clevestine*, 149 Pa. St. 46.

1. *Mankato First Nat. Bank v.*

Kansas City Lime Co., 43 Mo. App. 561; *Plano Mfg. Co. v. Cunningham*, 73 Mo. App. 376. See also *Bostwick v. Blake*, 145 Ill. 85; *Smith v. Barclay*, 54 Minn. 47.

Evidence in Confession and Avoidance. — Where the affidavit of claim to property taken in execution asserted the title of the claimant in general terms, and what purported to be the claimant's answer, on file when the issue was made up, alleged his title in the same general terms, and the issue made by the parties under the direction of the court was whether the property levied on was the property of the claimant, it was held that the plaintiff should be allowed to introduce evidence in confession and avoidance of whatsoever title the claimant might introduce in evidence. *Linn v. Wright*, 18 Tex. 317.

Matters Occurring Subsequent to Attachment. — Where an attachment against the landlord is served on growing crops in possession of the tenant, evidence offered at the trial of the tenant's interplea that the sheriff had subsequently turned over part of the attached crop to the landlord is not admissible under a general denial to the interplea, since it was a matter occurring after the institution of the attachment and should be specially pleaded. *Plano Mfg. Co. v. Cunningham*, 73 Mo. App. 376.

Replication to Interplea. — Where the question of ownership of property attached arises upon the interplea of one claiming it, it devolves upon the interpleader to establish his title, and any fact in disproof thereof may be shown under the traverse contained in the general replication to the interplea. *Hutchinson Nat. Bank v. Crow*, 56 Ill. App. 558.

2. *Juilliard v. May*, 130 Ill. 87. And see in general article CONTINUANCES, vol. 4. p. 822.

Suspension of Proceedings. — In a trial of the right of property seized under attachment the claimant pleaded in abatement that the attachment had been quashed. The plaintiffs in attachment thereupon moved to suspend the

2. Change of Venue. — It has been held that the venue of a proceeding by interplea to try the right of property levied on may be changed.¹

3. Removal to Federal Court. — A proceeding to try the right of property levied on is not, it has been held, a "suit" within the meaning of the statute relating to the removal of "suits" to a federal court, and hence such a proceeding cannot be removed to a federal court independent of the main action.²

4. Dismissal of Proceeding. — A claimant cannot, it has been held, dismiss a proceeding to try the right of property without

trial of the right of property and continue it until final judgment in the attachment suit and a ruling upon the validity of the attachment could be had by the Supreme Court. It was held that the motion was properly denied. *Blum v. Addington*, (Tex. 1888) 9 S. W. Rep. 82.

Withdrawal of Claim. — In *National Exch. Bank v. Walker*, 80 Ga. 281, it was held that where a claimant withdraws his claim and the plaintiff in execution demands damages because of the delay caused him by the interposition of the claim, a continuance is properly refused the claimant on the ground of absence, as he is chargeable with notice that damages may be demanded.

1. Gielt v. McGannon Mercantile Co., 74 Mo. App. 209, wherein it was said: "The right to interplead being an independent right or cause of action, separate and distinct from the attachment, the parties hereto, like the parties to any other action, have the right for the statutory causes to have the venue changed to the end that there may be a fair and impartial trial." See also *Crow v. Stevens*, 44 Mo. App. 137. And see article CHANGE OF VENUE, vol. 4, p. 373.

Notice of Transfer of Cause. — Where a claim to goods attached for rent has been determined adversely to the claimant by a justice of the peace who was without jurisdiction, and in consequence of the claimant's successful appeal to the Circuit Court, the papers are sent back and transferred for trial to a justice having jurisdiction, the claimant is not entitled to a notice of the transfer. *Pierce v. Watkins*, 74 Miss. 394.

2. Alexandria First Nat. Bank v. Turnbull, 16 Wall. (U. S.) 190, wherein it was said: "Conceding it to be a suit and not essentially a motion, we

think it was merely auxiliary to the original action — a graft upon it, and not an independent and separate litigation. A judgment had been recovered in the original suit, final process was levied upon the property to satisfy it, the property was claimed, and this proceeding resorted to, to settle the question whether the property ought to be so applied. The contest could not have arisen but for the judgment and execution, and the satisfaction of the former would at once have extinguished the controversy between the parties. The proceeding was necessarily instituted in the court where the judgment was rendered and whence the execution issued. No other court, according to the statute, could have taken jurisdiction. It was provided to enable the court to determine whether its process had, as was claimed, been misapplied, and what right and justice required should be done touching the property in the hands of the officer. It was intended to enable the court, the plaintiff in the original action, and the claimant to reach the final and proper result, by a process at once speedy, informal, and inexpensive. That it was only auxiliary and incidental to the original suit, is, we think, too clear to require discussion." See also *Flash v. Dillon*, 22 Fed. Rep. 1; *Poole v. Thatcherdeft*, 19 Fed. Rep. 49. And see generally article REMOVAL OF CAUSES, *ante*, p. 150.

Substitution of Parties. — But where in an action of replevin commenced in a state court by a resident citizen against a sheriff who had seized goods at the instance of nonresident creditors, the latter under a statute of the state by order of the court are substituted as defendants "in lieu" of the sheriff who was discharged from liability, the nonresident creditors, being thus made sole defendants, are entitled on filing

first restoring the property to the possession of the officer from whose custody it was taken by virtue of the claimant's bond.¹

5. Death of Party — Revival of Proceeding. — On the death of one of the parties to a proceeding for the trial of the right of property the proceeding may, it seems, be revived in the name of the personal representative of the deceased.²

6. Consolidation of Claims. — Where several persons interplead

the requisite petition to have the cause removed to a federal court. *Beecher v. Gillett*, 1 Dill. (U. S.) 308.

1. *Mosely v. Gainer*, 10 Tex. 578, wherein it was said: "The plaintiff in error attempts to sustain his motion to dismiss the suit on various objections relative to the proceedings of the sheriff in returning the oath, bond, and copy of the execution. The alleged errors of the sheriff were cured by the amendment of his original return, and whether they had been or not, they formed no ground for the dismissal of the suit on the part of the plaintiff, unless he had, previously to making the motion, voluntarily restored the slaves to the possession of the sheriff, from whose custody they had been taken at the instance of the plaintiff in error, and on a claim of property in them, the prosecution of which he was now attempting to dismiss." See also, as to dismissal of proceeding, *Carpenter v. Decatur First Nat. Bank*, (Tex. 1892) 20 S. W. Rep. 130.

Consent of Plaintiff. — In *Alabama* the claimant cannot dismiss or otherwise discontinue his claim without the consent of the plaintiff. *Gayle v. Bancroft*, 22 Ala. 316.

In *Georgia* it has been held that Code, § 3740, which provides that a claimant shall not be permitted to withdraw or discontinue his claim more than once without the consent of the plaintiff in execution, does not prevent a claimant, who had been surety on the claim bond of a former claimant whose claim had been withdrawn, from withdrawing his claim. *Mercer v. Baldwin*, 85 Ga. 651. Nor does such section make a dismissal of the claim at the instance of the plaintiff in execution, for failure to make parties, a withdrawal, so as to prevent it from being interposed a second time. *Lynch v. Bond*, 19 Ga. 314. See also *Benton v. Benson*, 32 Ga. 354; *Bethune v. Barker*, 14 Ga. 694.

Default in Joining Issue. — In *Royce v. Small*, 94 Ga. 677, it was held that a

claimant could not move to dismiss the claim because of his own default in joining issue on the claim.

Stipulation Not to Withdraw Claim. — In *Royce v. Small*, 94 Ga. 677, it was held that where a motion by the claimant to withdraw his claim was denied because of a stipulation not to withdraw, it was proper to refuse a subsequent motion by the claimant to dismiss the claim as there was no mode of dismissing a claim at the claimant's instance otherwise than by withdrawing it.

Refusal to Sign Stipulation. — In garnishment proceedings, where the fund constituting the subject matter of the litigation has passed into the custody of the court of another state, the court has the power to order an intervening petitioner to sign a stipulation agreeing that the fund in question be restored to a receiver of the court, and on the refusal of the interpleader to sign such stipulation may strike his petition from the files. *Brown v. Gary*, 43 Ill. App. 482.

Harmless Error. — In *Jordan v. Grogan*, 87 Ga. 533, it was held that although it was irregular to dismiss, for want of evidence to support it, the claim of a third person to property levied on under a fieri facias, yet if the claimant, after admitting possession in the defendant on fieri facias at the time of the levy, thus making a *prima facie* case for the plaintiff, closed his evidence without showing anything to overcome the effect of his admission, the error was immaterial.

2. *Gayle v. Bancroft*, 22 Ala. 316. See also *Hadden v. Powell*, 17 Ala. 318, wherein the proceeding was revived in the name of the executor of the original plaintiff without objection.

Death of Joint Claimant. — Where a joint claim to land which had been levied upon was filed by several persons and one of them subsequently died, it was error, over objection of the plaintiff in execution, to order the case to trial without having a proper party

in an attachment, each claiming the property, it is within the discretion of the court to order the issues to be tried separately as to each claimant or all at one time.¹

XII. TRIAL — 1. Trial by Jury — Right to Jury Trial. — As a rule the statutes provide for the submission to a jury of the issues raised in a proceeding to try the right of property.²

or parties made in place of the deceased claimant. *Fulghum v. Connor*, 99 Ga. 237.

Death of Animal Attached. — The death of the animal attached before the trial of the claim suit does not affect the right of recovery. *Derrett v. Alexander*, 25 Ala. 265.

1. *Heyer v. Alexander*, 108 Ill. 385; *Dreyfus v. Mayer*, 69 Miss. 282.

Consolidation of Attachments. — Where attachments by different persons are levied on the same property and the property is claimed by a third person, it is within the discretion of the court to consolidate the causes and to try in one action the respective rights of the several persons to the property. *Davis v. Dallas Nat. Bank*, 7 Tex. Civ. App. 41; *Elser v. Graber*, 69 Tex. 222; *Blankenship v. Thurman*, 68 Tex. 671.

Claim Case and Equitable Petition. — Where a plaintiff in fi. fa. files an equitable petition against the defendant in fi. fa. and a claimant who asserts title to the property, which petition charges collusion between the defendant and the claimant and attacks the title relied upon by the claimant, and upon such petition an injunction is granted restraining the prosecution of the claim case and a receiver appointed to take charge of the property in dispute; it is not error for the judge upon the call of the case for trial to direct that the claim case and the case made by the equitable petition be consolidated and tried together. *White v. Interstate Bldg., etc., Assoc.*, 106 Ga. 146.

2. See the statutes of the several states, and the following cases: *Laclede Bank v. Keeler*, 103 Ill. 425; *Lawson v. Johnson*, 5 Ark. 168; *Maze v. Griffin*, 65 Mo. App. 377; *Anderson v. Johnson*, 32 Gratt. (Va.) 558. And see generally article JURY, vol. 12, p. 223.

Trial Before Justice. — In *Nebraska* where personal property taken on execution or attachment issued by a justice of the peace is claimed by a third person, the trial of the right of property is had before a justice without a jury. *State v. Powell*, 10 Neb. 50. But where the property is taken on a writ

issued out of a court of record a jury must be summoned to try the right of property. *Schell v. Husentine*, 15 Neb. 9.

In *Ohio* it has been held that a proceeding before a justice of the peace to try the right of property seized under execution, is a summary one and not triable by jury. *B'Hymer v. Sargent*, 11 Ohio St. 682.

Equitable Issues. — In *Laclede Bank v. Keeler*, 103 Ill. 425, it was held that where a third person interpleads in an action by attachment claiming the land attached, and an issue is formed as to whether the debtor has an equitable interest subject to the writ, such issue should be submitted to the jury. The court said: "The statute in terms provides that when the issue is made on filing an interpleader the court shall cause a jury to be impaneled to try the issue. Nor does the statute make any distinction between legal and equitable titles. It is peremptory that the issue shall be tried, and tried by a jury. Had the lawmakers intended that in case a levy was made on an equitable interest in land, a trial should be had on a creditor's bill, it would have been so provided; or had it been intended that the equities should be settled by the judge and not by a jury, such issues would have been excepted and the judge been required to try them; and failing to so provide, we cannot thwart the intention of the statute, but must enforce it as we find it." See also *Caruth-Byrnes Hardware Co. v. Wolter*, 91 Mo. 484.

On Dismissal of Motion to Quash. — In *Ferrall v. Farnen*, 67 Md. 76, it was held that the garnishee and claimant in an attachment suit who had elected to try his case before the court upon a motion to quash the attachment may, even after the evidence has been partly taken, dismiss his motion and by filing a plea try the same question before a jury.

Waiver of Jury Trial. — In *Howard v. Oppenheimer*, 25 Md. 350, it was held that an objection to the court's taking cognizance without a jury, of a claim

Composition of Jury. — A statutory provision requiring a jury on a trial of the right of property, of not less than six nor more than twelve persons, does not prohibit the parties from agreeing on a less number than six nor prevent the excusing of a juror by consent nor even the waiving a jury altogether.¹

2. Right to Open and Close. — In a trial of the right of property, as in actions generally, the party who has the affirmative of the issue is entitled to open and conclude the argument.²

3. Issues Determinable—*a.* **TITLE TO PROPERTY.** — As a rule, the only issue determinable in a statutory proceeding to try the right of property is the claimant's title to the property.³

of a third person to property attached, came too late on appeal where no such objection was raised below.

1. *Kreuchi v. Dehler*, 50 Ill. 176, wherein the court said: "It is true the statute directs that the jury shall consist of six persons. Yet the statute must be understood as absolutely prescribing that number, only in cases where the parties are not present to agree upon a less number. Neither is the provision in the statute authorizing the constable to summon not exceeding twelve jurors, by consent, to be considered as prohibiting the parties from agreeing upon less than six. The legislature undoubtedly intended to prevent more than twelve persons being called from their business to serve upon a jury, but to allow the parties to take any number under twelve upon which they could agree. We cannot suppose they intended to require them, against their wishes, to have at least six jurors, or to prevent their excusing a juror by consent after the trial had commenced, or waiving a jury altogether and taking the judgment of the justice. If the parties consent to accept the finding of the justice in lieu of that of six jurors there is no reason why they should not be permitted to do so."

Authority of Sheriff to Summon Jury. — In *Vulcan Iron Works v. Edwards*, 27 Oregon 563, it was held that where a person notifies the sheriff in writing that he owns property seized under execution by such sheriff as the property of the defendant in the execution, and demands possession thereof, he thereby authorizes the sheriff to summon a jury to have the validity of such claim determined, and cannot deprive the sheriff of the right to protect himself by a trial of the claim by a subsequent notice not to proceed with the trial while at the same time insisting on his claim.

2. *Grady v. Hammond*, 21 Ala. 427; *Mansur, etc., Implement Co. v. Davis*, 61 Ark. 627; *Excelsior Mfg. Co. v. Owens*, 58 Ark. 556; *Bones v. Printup*, 64 Ga. 753; *Doyle v. Donovan*, 76 Ga. 44; *Royce v. Gazan*, 76 Ga. 79; *Johnson v. Palmour*, 87 Ga. 244; *Baker v. Lyman*, 53 Ga. 339; *Cassell v. Vincennes First Nat. Bank*, 169 Ill. 380; *Hazell v. Tipton Bank*, 95 Mo. 60; *Latham v. Selkirk*, 11 Tex. 314. See generally article OPEN AND CLOSE, vol. 15, p. 181.

Defendant in Possession. — On the trial of a claim case, if it appear that the defendant in *feri facias* was in possession at the time of the levy, the burden of proof is cast upon the claimant, and he is entitled to the opening and conclusion of the argument. *Lamkin v. Clary*, 103 Ga. 631; *Bartlett v. Russell*, 41 Ga. 196. But where neither by the entry of levy nor the admission of the claimant the possession of the property levied upon is shown to be in the defendant in *feri facias*, and the plaintiff taking the burden of proof establishes the fact, he and not the claimant is entitled to the conclusion unless the claimant introduces no evidence. *New v. Driver*, 89 Ga. 434.

Possession Not Taken by Levying Officer. — Where the officer making a levy under an execution does not take actual possession of the property, the claimant has the right to open and close though the execution plaintiff had voluntarily assumed the burden of proof in the introduction of testimony. *Marsh v. Thomason*, 6 Tex. Civ. App. 379.

Discretion of Court. — In *Meredith v. Wilkinson*, 31 Mo. App. 1, it was held that no error available to the interpleader was committed in awarding to the plaintiff in attachment the right to open and close, as the matter was one resting in the discretion of the court.

3. *Alabama.* — *Mundine v. Perry*, 2

b. DAMAGES FOR DETENTION OF PROPERTY. — The claimant cannot therefore, in a proceeding to try the right of property, recover damages for the detention of the property in the absence of a statutory provision authorizing such recovery.¹ Where,

Stew. & P. (Ala.) 130; Crosby v. Hutchinson, 53 Ala. 5; Foster v. Goodwin, 82 Ala. 384.

Arkansas. — Jefferson v. Dunavant, 53 Ark. 133.

Florida. — Price v. Sanchez, 8 Fla. 136; Baars v. Creary, 23 Fla. 311; Moody v. Hoe, 22 Fla. 309.

Georgia. — Lamar v. Coleman, 88 Ga. 417; Parker v. Mathews, 106 Ga. 49; McCrory v. Hall, 104 Ga. 666.

Illinois. — Marshall v. Cunningham, 13 Ill. 20; Lowry v. Kinsey, 26 Ill. App. 309.

Indiana. — Tyner v. Gapin, 3 Blackf. (Ind.) 370.

Iowa. — Clarinda Valley Bank v. Wolf, 101 Iowa 51.

Louisiana. — Lee v. Bradlee, 8 Mart. (La.) 20; Emerson v. Fox, 3 La. 178; Fleming v. Shields, 21 La. Ann. 118, 99 Am. Dec. 719; Harper v. Commercial, etc., Bank, 15 La. Ann. 136.

Mississippi. — Tupper v. Cassell, 45 Miss. 352.

Missouri. — Rindskoff v. Rogers, 34 Mo. App. 126; Springfield Engine, etc., Co. v. Glazier, 55 Mo. App. 95; Williams v. Braden, 57 Mo. App. 317; Beck v. Wisely, 63 Mo. App. 239; Teichman Commission Co. v. American Bank, 27 Mo. App. 676; Nolan v. Deutsch, 23 Mo. App. 1; Hewson v. Tootle, 72 Mo. 632.

New Jersey. — Folwell v. Fuller, 53 N. J. L. 572.

North Carolina. — Springfield First Nat. Bank v. Asheville Furniture, etc., Co., 120 N. Car. 475; McLean v. Douglass, 6 Ired. L. (N. Car.) 233.

But see Trice v. Walker, 71 Miss. 968, wherein it was held that on a claimant's issue for property seized under execution, the true inquiry is whether the property is liable to the execution, and not whether the claimant's title or lien is paramount.

In *Alabama* it has been held that on a trial of the right of property the only proper issue is an affirmation by the plaintiff in the process that the property levied on is subject to the process, and a denial of that fact by the claimant. Lehman v. Warren, 53 Ala. 535; Treadway v. Treadway, 56 Ala. 390; Pollak v. Graves, 72 Ala. 347; Jackson v.

Bain, 74 Ala. 328; Pace v. Lee, 49 Ala. 571; Starnes v. Allen, 38 Ala. 316; Dryer v. Abercrombie, 57 Ala. 497.

In *Florida* it has been held that the "right of property" or issue to be tried under the claim statute is an issue of the liability of the property to the plaintiff's execution as against the claimant's title. Baars v. Creary, 23 Fla. 311; Moody v. Hoe, 22 Fla. 309.

Infancy of Claimant. — In *Mundine v. Perry*, 2 Stew. & P. (Ala.) 130, it was held that where on a trial of the right of property, the title to the property was alone put in issue, it was incompetent for the court to determine the fact of the claimant's infancy.

Whether Deed Is Mortgage. — Where an attachment is levied on land and an interplea is interposed setting up title by deed absolute in form, which by replication is declared to be only a mortgage, the court may try the issue so raised without remitting the parties to equity. Laclede Bank v. Keeler, 103 Ill. 425. See also Bodwell v. Heaton, 40 Kan. 36.

Foreclosure of Mortgage. — In *Cabot v. Armstrong*, 100 Ga. 438, it was held that a claimant of property levied on under a judgment could not, by equitable pleadings offered as an amendment to the claim, foreclose a mortgage against the defendant in execution and thereupon obtain a decree for the satisfaction of such mortgage out of the proceeds of the property when sold. If the lien of the mortgage was superior to that of the judgment, it would not be divested by the sale. If the mortgage lien was inferior to that of the judgment, there would be no reason for injecting foreclosure proceedings into the trial of the claim case.

Claim of Exemption. — A claim of the execution debtor that if the property levied on belongs to him it is exempt, will not be determined on the trial of a claim to the property. McCaughan v. Picard, (Miss. 1897) 21 So. Rep. 796.

1. Jefferson v. Dunavant, 53 Ark. 133, wherein it was said: "The statute authorizing intervention contemplates only the trial of the right of property or of the claimant's interest therein. When determined in his favor the court

however, the statute provides for the assessment of damages if the title is found to be in the claimant, all questions relating to the right of property and damages for its seizure and detention may be settled in such proceeding.¹

c. VALIDITY OF SEIZURE PROCESS OR PROCEEDINGS. — By what is apparently the weight of authority, a claimant in a proceeding to try the right of property cannot question the validity of the process or proceedings under which the property was seized.²

is directed 'to make such order as may be necessary to protect his rights,' but that can refer only to the protection of the right the jury has tried, not the award of damages." See also *McLean v. Douglass*, 6 Ired. L. (N. Car.) 233; *Shattuck v. Miller*, 50 Miss. 386; *Jennings v. Hoppe*, 44 Iowa 205.

1. *Turner v. Lytle*, 59 Md. 199, wherein it was said: "The main object of the statute was to establish a form of proceeding which would give full redress in one proceeding for the wrongful taking by attachment or by execution of another's property. The language of the statute very clearly, we think, indicates that both the right to the property and damages for its seizure and detention was to be settled in the summary proceeding if it was resorted to. We do not mean to decide that the claimant is compelled, if he knows of the levy and seizure, to resort to this method of asserting his rights, to secure the property and recover damages. But what we do decide is that, if resort be had to this method, both the right of property and the damages are then and there to be settled." See also *Schluter v. Jacobs*, 10 Colo. 449.

Interposition of Claim for Delay. — In *Alabama* it has been held that the statute (Code 1876, § 3343), authorizing a jury to award damages against the claimant in the trial of the right of property if it be shown that the claim was interposed for delay, applies only where there is a levy of execution on the property; it cannot be applied where the levy is of an attachment. *Murphy v. Butler*, 75 Ala. 381.

2. *Alabama*. — *Sloan v. Hudson*, (Ala. 1898) 24 So. Rep. 458; *Crosby v. Hutchinson*, 53 Ala. 5.

Arkansas. — *Sannoner v. Jacobson*, 47 Ark. 31.

Florida. — *Price v. Sanchez*, 8 Fla. 136; *Baars v. Creary*, 23 Fla. 311.

Georgia. — *Wash v. Albany First Nat. Bank*, 99 Ga. 592.

Iowa. — *Markley v. Keeney*, 87 Iowa 398.

Louisiana. — *Fleming v. Shields*, 21 La. Ann. 118; *Goodman v. Allen*, 11 La. Ann. 246; *Gilkeson Sloss Commission Co. v. Bond*, 44 La. Ann. 841.

Mississippi. — *Meridian First Nat. Bank v. Solomon*, 71 Miss. 889.

North Carolina. — *Springfield First Nat. Bank v. Asheville Furniture, etc., Co.*, 120 N. Car. 475; *Blair v. Puryear*, 87 N. Car. 101.

Void and Voidable Process. — In *Alabama* it has been held that the claimant cannot take advantage of defects in the process levied on the property rendering it merely voidable; but if on its face the process is void, not authorizing the levy, he is entitled to take advantage of its invalidity. *Nordlinger v. Gordon*, 72 Ala. 239; *Jackson v. Bain*, 74 Ala. 328; *Pace v. Lee*, 49 Ala. 571; *Sandlin v. Anderson*, 76 Ala. 403; *Ellis v. Martin*, 60 Ala. 394; *Carter v. O'Bryan*, 105 Ala. 305.

Fatal Irregularities. — In *Kansas* it has been held that an intervening claimant of attached property can only avail himself of such irregularities in the prior proceedings as are fatal to the process or to the jurisdiction. *Dickenson v. Cowley*, 15 Kan. 269.

In *Texas* it has been held that a claimant of property seized on execution is not entitled to assert the invalidity of the execution unless it is void. *Portis v. Parker*, 22 Tex. 699; *Meader Co. v. Aringdale*, 58 Tex. 447; *Seligson v. Staples*, 1 Tex. App. Civ. Cas., § 1070. See also *Webb v. Mallard*, 27 Tex. 80; *Latham v. Selkirk*, 11 Tex. 314.

Nor can one claiming property as against an attaching creditor go behind the attachment and inquire into the validity of the debt on which it was founded, in the absence of an allegation of fraud or collusion. *Saunders v. Ireland*, (Tex. Civ. App. 1894) 27 S. W. Rep. 880; *Livingstone v. Wright*, 68 Tex. 706. Nor can the invalidity

d. PRIORITY OF LIENS. — It has also been held that in a proceeding for the trial of the right of property a question as to the priority of liens on the property cannot be determined.¹

c. EQUITIES OF THIRD PERSONS. — On a trial of the right to property in possession of, and claimed by, a partnership, neither the rights of the partners nor the equities between the partners nor those between the partnership and its creditors can be adjudicated.²

4. Defenses. — On a trial of the right of property it has been held that the claimant may make the same defense that he could if sued in detinue for the same property.³

5. Instructions — Defining Issue. — On a trial of the right of property the court should define to the jury the issue to be determined by them.⁴

of the attachment writ be contested except by a special plea pointing out the grounds relied on for its invalidity. *Ft. Worth Pub. Co. v. Hitson*, 80 Tex. 216; *Yarborough v. Weaver*, (Tex. Civ. App. 1893) 22 S. W. Rep. 771; *Roos v. Lewyn*, 5 Tex. Civ. App. 593.

Grounds of Attachment. — A claimant of property levied on by an execution issued on a judgment founded on an attachment cannot, on the trial of the claim, traverse the grounds on which the attachment was issued. *Foster v. Higginbotham*, 49 Ga. 263; *Curtis v. Wortsman*, 26 Fed. Rep. 36; *New England Mortg. Security Co. v. Watson*, 99 Ga. 733. See also *Rice v. Adler-Goldman Commission Co.*, 71 Fed. Rep. 151.

Sufficiency of Attachment Affidavit. — In *Roos v. Lewyn*, 5 Tex. Civ. App. 593, it was held that where an attachment has been merged in a judgment, a claimant of the attached property cannot, in the trial of the right of property, question the sufficiency of the affidavit on which the attachment issued. To the same effect see *Landauer v. Victor*, 69 Wis. 434.

1. Raysor v. Reid, 55 Tex. 266. In this case property subject to a deed of trust was levied on under execution. The trustee under the deed of trust interposed a claim to the property, and demanded that his debt be first paid out of the proceeds thereof. The court said: "If the claimant was endangered in respect to his lien by the levy which the appellees caused to be made, his remedy was to invoke the equitable powers of the court by an original proceeding. *Belt v. Raguet*, 27 Tex. 472. A sale of the property, made under the

execution, would convey the interest only of the mortgagor, and would not affect the rights of the mortgagee to enforce his lien against it. The statutory writ given to the lienholder of sequestration, and the equitable remedy of injunction, furnish ample means to him to protect himself against danger from another creditor seeking to subject the property to the ordinary process of the law, whenever his rights require protection."

2. Grant v. Williams, 1 Tex. App. Civ. Cas., § 363; *Schley v. Hale*, 1 Tex. App. Civ. Cas., § 930. See also *Kern v. Wyatt*, 89 Va. 885; *Stein v. Seaton*, 51 Iowa 18.

Equities of Creditors of Insolvent Corporation. — In *City Ins. Co. v. Commercial Bank*, 68 Ill. 348, it was held that in a claim by an interpleader the court would not determine the equities of the creditors of an insolvent corporation, the assets of which were in the hands of a receiver, such creditors not being parties to the attachment suit.

3. Claughton v. Black, 24 Miss. 185, holding also that if the claimant, or the person from whom he claimed, acquired his title to the property before the lien of the judgment attached, or if the lien of the judgment had expired before the execution was issued, the defense of the statute of limitations was proper.

4. Neill v. Rogers Bros. Produce Co., 41 W. Va. 37, wherein the court said: "The petitioner had a right to call the attention of the jury by an instruction to the true inquiry or question before them, and the refusal of such an instruction had a direct tendency to prejudice his case."

Issues Not Raised by Pleadings. — Instructions should not be given on issues not made by the pleadings.¹

Direction of Verdict. — As in other cases the court should not direct a verdict where different inferences may be drawn from the evidence.²

Misstatement of Fact. — Where the *bona fides* of a sale to the claimant is in issue, an erroneous statement in an instruction that the claimant was in possession of the property at the time of the levy is prejudicial. *What Cheer v. Hines*, 86 Iowa 231.

Credibility of Witness. — A requested instruction that if the jury believe the testimony of the claimant they should find for him, and that it is their duty to believe his testimony in the absence of evidence or facts tending to show it to be false, is properly refused. *Nelson v. Warren*, 93 Ala. 408.

Weight of Evidence. — An instruction which makes the insolvency of the defendant in attachment the sole test of bad faith in the sale of the property to the claimant is a charge upon the weight of the evidence. *Alexander v. Dulaney*, (Ala. 1894) 16 So. Rep. 355. See also *Chambers v. Meaut*, 66 Miss. 625.

Repetition of Instruction. — Where the court has charged that the claimant must prove his title to the property by a preponderance of the evidence it is proper to refuse a special charge to the same effect requested by the plaintiff. *Wilson v. Lucas*, 78 Tex. 292.

Question of Fraud. — On a trial of the right of property it was shown that the debt upon which the attachment was founded was in existence at the date of the transfer challenged by the plaintiff. It was held that the question of fraud should have been submitted to the jury. *Yarborough v. Weaver*, (Tex. Civ. App. 1893) 22 S. W. Rep. 771.

1. *Wollner v. Lehman*, 85 Ala. 274; *Nelson v. Warren*, 93 Ala. 408; *Detroit Steel, etc., Co. v. Whitney*, 57 Ill. App. 164; *King v. Bird*, 85 Iowa 535; *Martin v. Fox*, 40 Mo. App. 664; *Springfield Engine, etc., Co. v. Glazier*, 55 Mo. App. 95; *Wear v. Sanger*, 91 Mo. 348; *Huston v. Curl*, 8 Tex. 239; *Peterston v. Woolery*, 9 Wash. 390.

Illustrations. — On trial of the right of property to certain slaves seized on attachment, where no question of adverse title is raised, a charge on that branch is properly refused. *Yarborough v. Moss*, 9 Ala. 382.

Where the claimant in his pleadings says nothing about a half interest in the goods in a person other than the defendant in attachment, it is proper to refuse to charge as to such interest. *Choate v. McIlhenny Co.*, 71 Tex. 119.

In a proceeding to try the right of property the question whether the property was exempt from execution should not be submitted to the jury where it was not raised by the pleadings. *Ward v. Wofford*, (Tex. Civ. App. 1894) 26 S. W. Rep. 321.

Where, in a trial of the right of property, all the evidence tended to show that possession of the property was in the claimant at the time of the levy, it was proper to withhold from the jury as an issue such possession. *Brown v. Lessing*, 70 Tex. 544.

2. *Cole v. Propst*, (Ala. 1898) 24 So. Rep. 884, wherein it was held that where the claimant's case depended on whether the horse levied on by the plaintiff was one the claimant sold to the defendant or was one obtained by the defendant in exchanging it for another, and there was no direct evidence that this was such horse, but it was at most a matter of inference to be drawn or not drawn by the jury as the evidence, assuming their belief of it, might impress them, an affirmative charge should not have been given, but the question should have been left to the jury. See also, as to direction of verdict, *Tait v. Murphy*, 80 Ala. 440; *Fink v. Phelps*, 30 Mo. App. 431; article DIRECTING VERDICT, vol. 6, p. 667.

Evidence of Fraud. — Where, in a claim case, the attaching party introduces evidence that the property was fraudulently conveyed to the claimant by the defendant in attachment, it is erroneous to direct a verdict for the claimant. *St. Louis Wire-Mill Co. v. Lindheim*, (Tex. App. 1892) 18 S. W. Rep. 675. And where the plaintiff in attachment alleges that the transfer to the claimant by the defendant in attachment was fraudulent, and there is evidence that the debt upon which the attachment was founded was in existence at the date of such transfer, an affirmative instruction for the claimant

6. Verdict — Responsiveness to Issue. — The verdict in a proceeding for the trial of the right of property must be responsive to the issues submitted.¹

Disposing of Issue. — The verdict must, of course, dispose of the issue submitted.²

is improper. *Yarborough v. Weaver*, (Tex. Civ. App. 1893) 22 S. W. Rep. 771.

1. *Neill v. Billingsley*, 49 Tex. 161; *Nolan v. Deutsch*, 23 Mo. App. 1; *Plano Mfg. Co. v. Cunningham*, 73 Mo. App. 376. See in general article VERDICT.

In *Missouri* it has been held that though attached property has been sold the issue on an interplea is still whether the property is that of the interpleader or not, and the verdict must respond to that issue instead of being for the money. *Plano Mfg. Co. v. Cunningham*, 73 Mo. App. 376; *Hewson v. Tootle*, 72 Mo. 632; *Mills v. Thomson*, 61 Mo. 415; *Nolan v. Deutsch*, 23 Mo. App. 1; *Rindskoff v. Rogers*, 34 Mo. App. 126.

Signing by Jury. — In *Illinois* it was early held that the jurors need not sign the verdict where the trial is in the circuit court, but only where it is before the officer. *Harrison v. Singleton*, 3 Ill. 21.

Setting Out Name of Defendant in Process. — In *Hall v. Dargan*, 4 Ala. 696, it was held that the omission of the jury to insert in the verdict the surname of the defendant in execution was immaterial.

Reason for Imposing Damages on Claimant. — In *Bettis v. Taylor*, 8 Port. (Ala.) 564, it was held that it was not necessary that a verdict imposing damages on the claimant for vexatiously interposing the claim should express any reason for such imposition.

Setting Aside Verdict. — In *New York* the determination by a sheriff's jury as to the validity of a claim made by a third person to property levied upon under an attachment is not such a judicial determination as entitles either party to review it by a motion to set aside the verdict. *Cohen v. Climax Cycle Co.*, 19 N. Y. App. Div. 158.

2. *State Bank v. Byrd*, 8 Ark. 152. In this case an interplea was filed, claiming three negroes levied on under attachment. The jury reported that one of the negroes was the property of the interpleader but that they were unable to agree as to the other two.

The court said: "The state bank in her interplea claimed each and all of the negroes attached, and the title to all was involved in a single issue. The investigation of the jury was not confined to one only, but they were bound under the issue to make a final disposition of the whole. 'True it is that they were not required to find that all belonged to the same party, yet the verdict to support a judgment should have found either in whole or in part for the one or the other. They were legally bound to dispose of the whole issue, and in so doing they must necessarily have assigned the entire property to the one, or partly to the one and partly to the other. The verdict therefore is a mere nullity, and as such cannot support the judgment rendered upon it.'" But see *Lewis v. Lewis, Minor* (Ala.) 95, wherein it was held that a finding that part of the property levied on was subject to the execution but silent as to the residue was equivalent to finding that the residue was not subject.

Ownership of Property. — A verdict, on the trial of the right of property, that the execution is "a lien upon and bound the property" is equivalent to a finding that it is the property of the defendant in the execution. *Tucker v. Bond*, 23 Ark. 268. See also *Thomas v. Estes*, 2 Smed. & M. (Miss.) 439. A verdict finding the title to be in the defendant in attachment is sufficiently explicit, as such finding negatives title in the claimant. *Sheldon v. Reihle*, 2 Ill. 519.

Ownership at Time of Levy. — Where a jury is impealed to inquire whether the claimant was the owner and entitled to the possession of property at the time an attachment on it was levied, and a verdict in the claimant's favor is returned, such verdict will be deemed a finding that the property was the claimant's at the time of the levy, though no time was specified in the verdict. *Schwein v. Sims*, 2 Met. (Ky.) 209.

Extent of Interest. — Where property has been attached and sold as perishable and an interplea is filed therefor

Assessing Value of Property. — In some states the value of the property should be assessed in the verdict if the finding is against the claimant.¹

Assessing Each Article Separately. — Some statutes also require the jury, on finding against the claimant, to assess separately as far as practicable the value of each article levied on.²

in the attachment proceeding, and it appears that the interpleader has only a special interest in the property derived from the attachment defendant, a verdict for the interpleader should find the extent of his interest. *Nelson Distilling Co. v. Hubbard*, 53 Mo. App. 23. See also *McLaughlin v. Ham*, 84 Ga. 786.

General Verdict. — In *Wilber v. Kray*, 73 Tex. 533, it was held that a verdict generally "for the plaintiff" or "for the defendant" would be decisive of the issues in favor of the party for whom a verdict was so found. See also *Williams v. Jones*, 2 Ala. 314; *Perkins v. Mayfield*, 5 Port. (Ala.) 182; *Swofford Bros. Dry-Goods Co. v. Smith-McCord Dry-Goods Co.*, (Indian Ter. 1896) 37 S. W. Rep. 103.

1. *Linn v. Wright*, 18 Tex. 317, wherein it was said: "In the ruling of the court refusing to instruct the jury to find the value of the property, we are of opinion there is error. In order to render the judgment contemplated by the statute it is essential that the value of the property should be ascertained." See also *Neill v. Billingsley*, 49 Tex. 161; *Floegel v. Wiedner*, 77 Tex. 311; *Wollner v. Lehman*, 85 Ala. 274; *Peterson v. Wright*, 9 Wash. 202.

In *Missouri* it has been held that the verdict on trial of issues under an interplea in attachment, if for the interpleader, should be simply that he is the owner, and need not find the value. *S. Albert Grocer Co. v. Goetz*, 57 Mo. App. 8.

Value Not in Issue. — In *Latham v. Selkirk*, 11 Tex. 314, it was held that the jury need not find the value of the property where its value was not expressly put in issue. See also *Peterson v. Wright*, 9 Wash. 202; *Ratcliff v. Hicks*, 23 Tex. 173.

Striking Out Valuation. — In *Clouser v. Patterson*, 122 Pa. St. 372, it was held that where, on a feigned issue for property levied on by the defendants as the property of the plaintiff's husband, the verdict was for the plaintiff for all but two articles, it was proper

to strike out a valuation placed on the husband's interest in the two articles.

2. *Brumby v. Langdon*, 10 Ala. 747; *Jordan v. Collins*, 107 Ala. 572; *Townsend v. Brooks*, 76 Ala. 308; *Tait v. Murphy*, 80 Ala. 440; *Weil v. Shedd*, (Miss. 1890) 8 So. Rep. 329; *Penrice v. Cocks*, 1 How. (Miss.) 227; *Walker v. Sinking Fund Com'rs*, 1 Smed. & M. (Miss.) 372; *Pritchard v. Myers*, 3 Smed. & M. (Miss.) 42; *Kibble v. Butler*, 14 Smed. & M. (Miss.) 207.

Practicability of Separate Assessment — Oxen and Carts. — Where the property in controversy consists of four yoke of oxen and certain carts, it is practicable for the jury to assess separately the value of each article involved. *Tait v. Murphy*, 80 Ala. 440.

Lint and Seed Cotton. — Where the property consists of several bales of lint cotton and several thousand pounds of seed cotton, the value of each must be assessed separately where no difference in the quality of the cotton is shown. *Townsend v. Brooks*, 76 Ala. 308.

Impracticability of Separate Assessment — Chemical and Philosophical Apparatus. — In *Brumby v. Langdon*, 10 Ala. 747, it was held that where the property levied on consisted of a chemical and philosophical apparatus it would be impracticable to assess the value of each instrument separately.

Sawmill Irons and Apparatus for Running Saw. — In *Kibble v. Butler*, 14 Smed. & M. (Miss.) 207, it was held that it was not erroneous in a jury to assess the value of "sawmill irons and the apparatus for running the saw" as a single article, nor to assess as one item the "hoop, hopper and apparatus" of a mill levied on.

Presumption of Practicability. — In *Jordan v. Collins*, 107 Ala. 572, it was held that where the jury failed to assess separately the value of each article levied on, it would be presumed on a motion in arrest of judgment that it was impracticable to make such separate assessment.

Amendment. — Where on a trial of the right of property the verdict of the

XIII. JUDGMENT — 1. Conformity to Verdict. — The judgment, in a proceeding to try the right of property, should, of course, follow and conform to the verdict.¹

2. When Against Claimant — Dependency on Statute. — The form of judgment entered against a defeated claimant in a trial of the right of property is dependent on the statute.²

jury assessed the value of the property in gross, and at a subsequent day of the term and after the discharge of the jury the court on motion altered the verdict so as to assess the separate value of each article levied on, whereby the gross sum of the amended verdict was considerably less than the original verdict, this was held to be error. *Walker v. Sinking Fund Com'rs, 1 Smed. & M. (Miss.) 372.*

Estoppel of Claimant to Object. — The claimant cannot object that the jury on finding against him did not assess by their verdict the separate value of each article of property claimed, as the failure so to do places him in a more favorable condition than he would otherwise be. *Hardy v. Gascoignes, 6 Port. (Ala.) 447; Phelan v. Fancher, 5 Ala. 449.* See also *Burnett v. Maxey, 9 Port. (Ala.) 410.*

1. *Thomas v. Estes, 2 Smed. & M. (Miss.) 439; Been v. Lindsey, 2 Smed. & M. (Miss.) 581.*

In Alabama a judgment following the verdict should specify the separate value of the several articles levied on. *Townsend v. Brooks, 76 Ala. 308.*

Description of Property. — In *Doane v. Glenn, 1 Colo. 495*, it was held that a judgment in favor of interpleading claimants in attachment should recite that the property adjudged to be restored was the property described in the interplea.

2. In Alabama where the claimant of property is defeated on the trial of the right of property the proper judgment is a condemnation of the property to the satisfaction of the levy, and not a judgment for the value of the property. *Gray v. Raiborn, 53 Ala. 40; Wallis v. Rhea, 10 Ala. 451; Seamans v. White, 8 Ala. 656; Derrett v. Alexander, 25 Ala. 265; Seisel v. Folmar, 103 Ala. 491; Gayle v. Bancroft, 17 Ala. 351; Roberts v. Burgess, 85 Ala. 192; Fryer v. Dennis, 2 Ala. 144; Langworthy v. Goodall, 76 Ala. 325; Tobias v. Treist, 103 Ala. 664; Ramey v. W. O. Peoples Grocery Co., 108 Ala. 476.* And where the levy is made under an execution, it is sufficient if the

judgment declares that the property "be condemned to the satisfaction of the plaintiff's debt." *Townsend v. Brooks, 76 Ala. 308.*

In Arkansas on the trial of an interplea, if the property be found subject to the attachment, the judgment should be that the plaintiff have execution against the property, and, if the same is not delivered to the sheriff by the intervener on demand, that execution issue, on the return of the facts in the scire facias by the sheriff, against the interpleader and his securities. *Adams v. Hobbs, 27 Ark. 1; Box v. Goodbar, 54 Ark. 6.*

And on the trial of an interplea in an action of replevin no judgment for either property or money (except for costs) can be rendered against the interpleader, where the property has never been delivered to him. *Chandler v. Smith, 34 Ark. 527.*

In Iowa it has been held that the court can only pass on an intervener's claim to the property and cannot render a money judgment against him for its value. *Clarinda Valley Bank v. Wolf, 101 Iowa 51.*

In Michigan it has been held that a claimant in garnishment proceedings, on a verdict that he is not entitled to the fund deposited in court by the garnishee, cannot be made liable to a money judgment in favor of the plaintiff for the amount of his claim, but can only be concluded by the judgment from recovering of the garnishee. *Pecard v. Home, 91 Mich. 346.*

In Texas in a proceeding under the statute to try the right of property levied upon to satisfy a judgment, if the issue is determined against the claimant, judgment should be rendered against him and the sureties on his bond for the value of the property with interest from the date of the bond. *Livingstone v. Wright, 68 Tex. 706; Wills Point Bank v. Bates, 76 Tex. 329; Martin v. Harnett, 86 Tex. 517; Floege v. Wiedner, 77 Tex. 311; Dupree v. Woodruff, (Tex. 1892) 19 S. W. Rep. 469; Harris v. Schuttler, (Tex. Civ. App. 1893) 24 S. W. Rep. 989; Muenster v. Tremont Nat.*

In Alternative. — In some states it is held that on a verdict against the claimant judgment should be rendered in the alternative, for the specific property, if to be had, and if not, for its value as assessed by the jury.¹

Assessing Value of Property. — It is also held in some states that a judgment against a defeated claimant should set out the value of the property.² In such states, where no issue is made as to the correctness of the sheriff's assessment of the value of the property, and there is no other evidence of value offered, the court is warranted in finding the value so assessed as the real value.³

Bank, (Tex. Civ. App. 1898) 46 S. W. Rep. 277; *Gilmour v. Heinze*, 85 Tex. 76. See also *Blakenship v. Thurman*, 68 Tex. 671; *Pittman v. Rotan Grocery Co.*, 15 Tex. Civ. App. 676.

In West Virginia it has been held that in a proceeding to determine an adverse claim to property levied on under process no judgment for the value of the property can be entered against the claimant. *Bartlett v. Loundes*, 34 W. Va. 493.

1. *Thomas v. Estes*, 2 Smed. & M. (Miss.) 439, wherein the court said: "The judgment is not in keeping with the verdict. A trial of the right of property is assimilated by the statute, after issue made, to the action of detinue. After a verdict for the plaintiffs in execution, the court should have pronounced a judgment in the alternative, for the specific property if to be had, and if not, for its value as assessed by the jury. This and no more is the proper judgment, as based on the verdict, that the court should render." See also *Been v. Lindsey*, 2 Smed. & M. (Miss.) 581.

2. *Martin v. Hartnett*, 86 Tex. 674.

Value of Use of Property. — In *Ft. Worth Pub. Co. v. Hitson*, 80 Tex. 216, it was held that on a trial of the right of property taken under several writs of attachment in favor of several plaintiffs, a judgment against the claimant should not be a joint one in favor of all the plaintiffs, but it should establish the priorities of the several plaintiffs and it should determine the value of the use of the property. See also *Keating v. Julian*, (Tex. Civ. App. 1893) 23 S. W. Rep. 607.

Value at Time of Trial. — In *Johnston v. Standard Oil Co.*, 71 Miss. 397, it was held that a judgment in favor of a successful plaintiff in a claimant's issue should be for the value of the property at the time of the trial and not at the time it was received by the claimant.

Writ of Inquiry. — In *Clarke v. Parker*, 63 Miss. 549, which was a trial of a claimant's issue as to twenty bales of cotton seized under attachment, the jury awarded part to the claimant, and the rest to the plaintiff. The value of the cotton was not assessed by them. The lower court adjudged that the claimant be paid according to the verdict of the jury out of the proceeds of the cotton in controversy, and that the remainder be paid to the plaintiff as being the money of the defendant in the attachment. The sheriff in making his return valued the cotton at so much per bale, and not by the pound. No writ of inquiry was asked in the court below. It was held that the verdict of the jury must stand, but that the case be remanded so that a writ of inquiry might be prosecuted, and a proper judgment rendered on the verdict.

3. *Wright v. Henderson*, 12 Tex. 46, wherein it was said: "It is objected that the court gave judgment upon the value of the property as assessed by the sheriff, without other evidence of its value. There was no averment or offer on behalf of the claimant to prove that the property was of a less or different value from that assessed by the officer. No question was made at the trial as to the value of the property. It may be conceded that the primary object of the statute, in requiring the sheriff to assess the value of the property, was to regulate the amount of the bond required of the claimant; yet where the correctness of his assessment was not questioned and no other evidence of value was offered, the court, we think, was warranted in regarding the value thus assessed as the real value, and might properly adopt it as the rule in estimating the damages, which by the statute it was the duty of the court to award against the claimant." See also *Chapman v. Allen*, 15

3. When in Favor of Claimant. — The statute also governs as to the judgment to be entered when the issue on a trial of the right of property is found in favor of the claimant.¹

Money Judgment. — In some states it is held that a money judgment cannot be rendered in favor of the claimant.²

4. By Default. — A judgment by default, in a trial of the right of property, should contain such recitals as are required by statute to be set out in a judgment on the merits.³

5. Amendment. — Clerical errors in a judgment in a trial of the right of property may be amended.⁴

Tex. 278; *Saunders v. Ireland*, (Tex. Civ. App. 1894) 27 S. W. Rep. 880; *York v. Le Gierse*, 1 Tex. App. Civ. Cas., § 1327; *Ratcliff v. Hicks*, 23 Tex. 175; *Aiken v. Kennedy*, 1 Tex. App. Civ. Cas., § 1321; *Peterson v. Woolery*, 9 Wash. 390.

1. See the statutes of the several states, and the following cases: *Swift v. Guy*, (Indian Ter. 1899) 49 S. W. Rep. 46; *Williams v. Braden*, 57 Mo. App. 317; *Fly v. Grieb*, 62 Ark. 209.

In *Texas* it has been held that on a trial of the right of property, where the claimant recovers, the proper judgment is that the plaintiff take nothing by his suit and that the claimant recover costs. *Ross v. Williams*, 78 Tex. 371.

Proceeds of Sale of Property. — In *Fly v. Grieb*, 62 Ark. 209, it was held that a judgment for the intervener in an attachment suit should be for costs and the proceeds of the property in the sheriff's hands, and not for the property or its value, where the attached property has been sold, and the proceeds delivered to the sheriff. See also *Williams v. Braden*, 57 Mo. App. 317; *Rogers, etc., Hardware Co. v. Randell*, 69 Mo. App. 342; *St. Louis Brewing Assoc. v. Drulinger*, 62 Mo. App. 485.

Satisfaction of Claim. — In *Whalen v. McMahon*, 16 Colo. 373, an intervener claimed garnished property by reason of an assignment of the property to him by the debtor. It appeared that the assignment was not absolute, but was executed as security for such indebtedness as the assignor might incur to the assignee. It was held that judgment should be given for the intervener for only so much of the fund as was necessary to satisfy his debt.

2. *Williams v. Braden*, 57 Mo. App. 317; *Hewson v. Toole*, 72 Mo. 632; *Plano Mfg. Co. v. Cunningham*, 73 Mo. App. 376; *Nolan v. Deutsch*, 23 Mo. App. 1; *Mills v. Thomson*, 61 Mo.

415; *Rindskoff v. Rogers*, 34 Mo. App. 126; *McLean v. Douglass*, 6 Ired. L. (N. Car.) 233.

3. *Martin v. Harnett*, 86 Tex. 517, wherein it was held that where a claimant to property levied on makes default, judgment should be entered against him fixing the amount of the claim of the plaintiff for which execution may issue, as well as ascertaining the value of the property levied on.

Before Tender of Issue. — In *Texas* after an appearance by the claimant and an order of court directing issues to be made up, a judgment by default cannot be taken against the claimant without a tender of issues by the plaintiff. *Harry v. City Nat. Bank*, 10 Tex. Civ. App. 51; *Field v. Fowler*, 62 Tex. 68.

Specification of Amount. — In *Cloughton v. Black*, 24 Miss. 185, it was held that, in a trial of the right of property, a judgment by default which failed to specify the amount for which it was rendered, was void.

4. *Gray v. Raiborn*, 53 Ala. 40, wherein it was held that a judgment against the claimant for the assessed value of the property was a mere clerical misprision, amendable on motion. See also *Ramey v. W. O. Peeples Grocery Co.*, 108 Ala. 476; *Wallis v. Rhea*, 10 Ala. 451; *Hinzle v. Ward*, 1 Tex. App. Civ. Cas., § 1314.

Judgment in Singular Instead of Plural. — A judgment in the singular number "that the plaintiff recover of the claimant," there being several plaintiffs, will be deemed a mere clerical error, as the intentment is that the recovery is against those who are parties to the issue. *Phelan v. Fancher*, 5 Ala. 449.

Amendment on Appeal. — Where a judgment against the claimant in a trial of the right of property failed to fix the amount of the claim of the plaintiff but the record on appeal disclosed the

XIV. COSTS. — The costs in a proceeding to try the right of property are, as a rule, regulated by the statute authorizing the proceeding.¹

XV. SECOND INTERPOSITION OF CLAIM. — Where a party has filed one interplea in an attachment suit and on the trial has taken a nonsuit, it is not error for the court to strike out a second interplea filed by him in the same cause without leave.²

XVI. RETURN OF PROPERTY — **Consent of Plaintiff in Seizure Process.** — Under a statute providing that if the claimant within a certain time after the rendition of a judgment adverse to him shall return the property in as good condition as he received it, and pay for the use of the same, together with the damages and costs, such delivery and payment shall operate as a satisfaction of such judgment, the consent of the plaintiff in the process under which the property was levied on is not necessary to a return of the property to the officer.³

amount, the judgment will be reformed by the appellate court. *Martin v. Hartnett*, 86 Tex. 674.

1. See the statutes of the several states, and generally article COSTS, vol. 5, p. 100.

Discretion of Court. — In *Stewart v. Outhwaite*, 141 Mo. 562, it was held not to be an abuse of discretion to tax all the costs against an interpleader in attachment who claimed all the property, where the court found against him except as to a small part of the property.

Both Parties Partially Successful. — In *Lansing v. Bates*, 11 Ill. 550, it was held that where, on a trial of the right of property, both parties are partially successful, each is entitled to a judgment against the other for his costs.

Taxation Against Property. — In *Fryer v. Dennis*, 2 Ala. 144, it was held that where the claimant of property was unsuccessful upon the trial of the right, he became liable for the costs of the proceeding, and the property in dispute cannot be sold in order to relieve him from the charge.

2. *Keiser v. Moore*, 16 Mo. 179, wherein it was said: "As the interposition of a claim to the property attached delays the proceedings in the original action it is certainly important that it should be made and determined as speedily as practicable. In the present case the same parties who had claimed the property and had their right to it tried in March, 1850, and the judgment of the court affirmed in this court, come again in May, 1851, and without any permission of the court

renew their claim. If this proceeding be allowable, the plaintiffs, whatever may be the merits of their claim, will never get a judgment against the garnishee. The court rightly struck out the claim filed by the interpleaders, under the circumstances of this case."

Dismissal for Irregularity. — In *Benton v. Benson*, 32 Ga. 354, it was held that a claim interposed pending an attachment and dismissed for irregularity was no bar to the interposition of a similar claim after judgment.

Invalid Verdict. — In *State Bank v. Bryd*, 8 Ark. 152, it was held that a verdict in favor of the interpleader in an action by attachment for one of three slaves claimed in the interplea, without a finding for either party as to the other two, was a nullity upon which no valid judgment could be rendered; and after such verdict the interpleader had no right to file a second interplea.

3. *Willis v. Chowning*, 90 Tex. 619.

Return Before Trial. — In *Durst v. Padgitt*, 5 Tex. Civ. App. 304, it was held that where property was levied on by execution and claim made thereto, and oath and bond returned into the proper court for the trial of the right of property, the claimant could not relieve his sureties from liability on the bond by returning the property to the sheriff before the case was tried.

Sufficiency of Return. — A direction by the claimant to the officer to repossess himself of cattle running at large on a range is a delivery to him within the meaning of the statute set out in the text where the cattle had been origin-

XVII. APPEAL — Observance of Statutory Requirements. — The provisions of the statutes relating to appeals in trials of the right of property must be strictly followed.¹

ally taken under a range levy. *Willis v. Chowning*, 18 Tex. Civ. App. 625.

And a direction to the officer to re-take goods in a storehouse easily accessible is a delivery within such statute. *Willis v. Chowning*, 18 Tex. Civ. App. 625.

Dispossessing Claimant. — In *Russell v. Slayton*, 17 Ga. 277, it was held that the superior court had authority to order its sheriff to dispossess a claimant who was in possession of land, the title and right of present possession to which had been determined against him, upon trial of an issue formed under the claim statute, and judgment entered directing the same to be sold; and to put the purchaser into possession thereof.

Discharge from Custody of Sheriff. — In *Pease v. Waters*, 66 Ill. App. 359, it was held that a plaintiff in a proceeding to try the right of property levied upon and in the custody of the sheriff was a mere claimant of the property, and the parties having the control of the process by which the sheriff retained possession of the same might consent that it be discharged from such possession without the consent of such claimant.

Disposition of Proceeds of Sale. — Where several separate attachment suits are begun against an insolvent debtor, and a third person files an interplea in each suit claiming the attached property, and the property is sold by consent of the court, the proceeds to await the order of the court, no disposition of such proceeds can be made till all of the suits have been determined. *State v. Hockaday*, 132 Mo. 227.

1. Appeal Bond. — *Rozier v. Williams*, 92 Ill. 187, wherein it was held that where the bond on appeal was not given within five days from the entry of judgment, as the statute required, the court acquired no jurisdiction and could not try the appeal without the consent of the appellee. See also *Pearce v. Swan*, 2 Ill. 266; *McGowan v. Duff*, 41 Ill. App. 57; *People v. Ward*, 41 Ill. App. 464.

In *Sheldon v. Reihle*, 2 Ill. 519, it was held that a bond on appeal from the decision of a sheriff's jury, on trial of the right to property taken on attach-

ment, may be executed by an attorney in fact.

Right to Appeal. — In *Pennsylvania* it has been held that no appeal lies from an order of the court of common pleas granting a sheriff's interpleader rule and subsequently awarding an issue. *White v. Rech*, 171 Pa. St. 82. See also *Bain v. Funk*, 61 Pa. St. 185; *Zacharias v. Totton*, 90 Pa. St. 286.

To What Court Appeal Lies. — In *Illinois* it has been held that a proceeding in a county court for the trial of the right of property was not a suit at law or in chancery within the meaning of the statute providing for an appeal to the appellate court in suits at law or in chancery, but was a statutory proceeding from which an appeal would lie to the circuit court. *Pease v. Waters*, 66 Ill. App. 359.

Parties to Appeal. — In *Farrell v. Patterson*, 43 Ill. 52, it was held that where a sheriff levies upon the same property by virtue of two executions in favor of two distinct parties against the same defendant, and the property is claimed by a third party as against both executions, and a joint trial of the right of property is had before a sheriff's jury and a verdict rendered in favor of the claimant, the plaintiff to either execution has a separate and independent right to an appeal without reference to the action of the other.

Possession of Property Pending Appeal.

— Where a person claims money attached in an action to which he is not a party, and has a trial of the right to such property before a justice, and the justice enters judgment that the plaintiff is entitled to recover from the defendant the amount claimed by him in his bill of particulars with costs, that the order of attachment was properly issued, that the property attached is the property of defendant, and that it be disposed of according to law, and no judgment is entered against the claimant for the costs that have accrued on account of the trial; and thereafter the claimant undertakes to appeal, and executes an appeal bond conditioned that he will prosecute his appeal to effect and without unnecessary delay, and satisfy such judgment and costs as may be rendered against him; such

Appeal from Justice. — On a trial of the right of property before a justice of the peace it has been held that no particular form of "prayer" for the allowance of an appeal is required, nor need any notice be given the opposite party of an intention to appeal.¹ On such an appeal the issues are such as are necessary to determine the proper disposition of the property.²

claimant is not entitled by virtue of his appeal or the filing of his appeal bond to the possession of the property attached pending the appeal. *Edwards v. Ellis*, 27 Kan. 344.

Waiver of Right to Dismiss Appeal. — The fact that a party to a trial of the right of property had not properly perfected his appeal by praying for it on the day of the trial cannot be urged for the first time in the appellate court as a ground for the dismissal of the appeal. *Aldridge v. Glover*, 53 Ill. App. 137.

1. *Hughes v. Glover*, 53 Ill. App. 141, wherein it was held that a desire or intention to appeal made known in any way to the justice was sufficient.

2. **Issues Determinable.** — In *Tyner v. Gapin*, 3 Blackf. (Ind.) 370, it was held that where, on trial in a justice court in an attachment proceeding, title to the attached property is adjudged to be in a third person claiming the same, on appeal by the plaintiff to the circuit court the only question is that of ownership of the property, and the suit cannot be dismissed at the instance of the claimant for any irregularity in the writ.

In *Dreyfus v. Mayer*, 69 Miss. 282, it was held that where an attachment suit in a justice's court is decided against the plaintiff, and he appeals, the circuit court has jurisdiction, though after

dismissal by the plaintiff, to allow claimants' issues to be made up and tried, although no trial thereof was had in the justice's court, for the appeal of the plaintiff on the main issue carries with it all such ancillary issues as are necessary to determine the proper disposition of the property.

In *Sims v. Goettle*, 82 N. Car. 268, property seized under attachment before a justice was replevied, under a decision of the justice that it was the only remedy, by a claimant who gave an undertaking to pay the plaintiff such judgment as he might recover against the defendant. Subsequently the claimant was permitted to interplead, and an undertaking was substituted for the one originally filed, stipulating to pay the plaintiff's judgment if the attached property should be found to belong to the defendant. It was held to be proper on appeal to submit to the jury an issue as to the ownership of the property, and to direct the claimant to pay into court the proceeds of the sale of the property.

Writ of Error. — In *Indiana* it has been held that to the judgment of a circuit court on an appeal from the decision in a trial of the right of property taken in execution, a writ of error lies. *Jacobs v. Levenworth*, 1 Blackf. (Ind.) 192.

RIOT.

By JAMES B. CLARK.

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As to matters of *Substantive Law and Evidence*, see AM. AND ENG. ENCYC. OF LAW, title *RIOT*, and the cross-references there given.

I. CHARGING AND PROVING THE OFFENSE — 1. Averments Generally — Common-law Offense. — An indictment or information at common law must sufficiently charge the common-law offense and observe the requirements of such pleadings generally.¹

1. See generally the article *INDICTMENTS, INFORMATIONS, AND COMPLAINTS*, vol. 10, p. 344.

Sufficiency. — An indictment which in substance charges that the defendants unlawfully, riotously, and routously assembled together to disturb the peace of the state, and being so assembled did make great noise, riot, tumult, and disturbance for a long space of time, to the great terror and dis-

turbance of the people, etc., charges all the essential ingredients of a riot. *State v. Brazil*, Rice L. (S. Car.) 257.

Defective Counts. — Where there is a conviction on an indictment containing several counts, the judgment will not be arrested if one of the counts is sufficient, although the others may be defective. *State v. Connolly*, 3 Rich. L. (S. Car.) 337.

Reasonable Certainty. — An inquisition,

Statutory Offense. — Where the prosecution is for the statutory offense, all the facts and circumstances which constitute the offense as defined in the act must be so set forth as to bring the defendant precisely within it. The defendant must with certainty and precision be charged with having committed all of the acts constituting the offense under the circumstances and with the intent mentioned in the statute.¹

Averments in Language of Statute. — The offense need not be charged in the language of the statute, but it will be enough if words or terms are employed from which by fair intendment the violation of the statute is apparent.² Where the offense is otherwise

indictment, or presentment under the Virginia Act entitled "An Act for the suppression and punishment of riots, routs, and unlawful assemblies," was required to charge the offense with reasonable certainty, and to be at least as special and certain as an indictment by a grand jury in ordinary cases. *Mackaboy v. Com.*, 2 Va. Cas. 268.

1. *McWaters v. State*, 10 Mo. 167; *Martin v. State*, 9 Mo. 286.

Particularity — Alternative Statement. — Where by statute it is declared that if any fire company, the members thereof or its adherents, shall be guilty of rioting or fighting in the public streets of a city, or certain incorporated districts of a county, while going to, at, or returning from a fire, or to or from a false alarm, complaint may be made by citizens, and if the complaint shall be determined to be well founded such company may be declared out of service, etc., a complaint which sets forth that certain members and adherents of a designated fire company located within the prescribed district were guilty of rioting and fighting in a public street within said territory, on a day and at a time specified, while they were returning from a fire or false alarm thereof, is not insufficient for want of particularity nor because of the alternative statement that the defendants were returning from a fire or a false alarm thereof. *In re Northern Liberty Hose Co.*, 13 Pa. St. 193.

Proclamation under Riot Act. — An indictment is not objectionable because it fails to allege that there was a proclamation under the riot act, or that the defendants remained assembled after such a proclamation. *State v. Russell*, 45 N. H. 83.

An indictment for remaining assembled one hour after proclamation,

which in setting out the proclamation omits the words "of the reign of" which were contained in the proclamation itself and which was read, is variant although it is amendable. *Rex v. Woolcock*, 5 C. & P. 516, 24 E. C. L. 434.

Sufficiency of Information. — In *Gould v. People*, 89 Ill. 216, there was an affidavit charging the commission of a riot, which stated the time and place of the alleged riot, but there was no information, nor was the affidavit in the form of an information, nor did it purport to supply its place. Neither was there any statement that the proceeding was carried on in the name and by the authority of the people of the state and against the peace and dignity of the same, and it was held that there was no sufficient information upon which a trial and conviction could be had.

Under Wisconsin Statute. — An information stating that at a certain time and place the defendants, to the number of three and more, "then and there being together, did then and there, in a violent, unlawful, and tumultuous manner, to the disturbance of the peace and to the terror and disturbance of others then and there present, assault," etc., sufficiently charged the offense denounced by section 4511 of the Wisconsin Revised Statutes. *State v. Dean*, 71 Wis. 678.

2. **Violence.** — In charging the offense the word "riotous" is a substantial equivalent of the word "violent." *State v. Kutter*, 59 Ind. 572.

When to constitute the offense it is necessary that the act should have been done in a violent manner, it is sufficient that the information shows by its allegations that there was violence in fact, although the word "violent" is not used. *Kiphart v. State*, 42 Ind. 273.

sufficiently made out, the insufficiency of unnecessary averments is immaterial.¹

2. Averments of Time and Place. — The time and place of the commission of the offense for which the conviction is sought must be set out with reasonable particularity.²

3. Designation of the Defendants. — The indictment or information must show that the offense was committed by the joint action of at least the number of persons whose co-operation or participation is necessary.³

Defendants Known. — Unless the necessity of designating the defendants known is dispensed with by statute, the indictment should name or designate those who can be named or designated.⁴

Unknown Defendants. — As to those defendants who cannot be named, the indictment should aver that they are unknown.⁵

1. Characterization of Act. — It is unnecessary that the indictment should state that the act charged was "riotously" committed, if enough appears elsewhere to make out the offense. *State v. Dillard*, 5 Blackf. (Ind.) 365.

2. See generally article INDICTMENTS, INFORMATIONS, AND COMPLAINTS, vol. 10, pp. 511, 520.

An Inquisition under the Virginia Act entitled "An Act for the suppression and punishment of riots, routs, and unlawful assemblies," which merely charges that the defendants were guilty of a riot, without setting forth the time, place, or manner of committing the offense, or any facts which in law constitute a riot, is defective. *Mackaboy v. Com.*, 2 Va. Cas. 268.

"Then and There." — An indictment charging that on a certain day, month, and year, at and within the county of P., the defendants "then and there, being together, did riotously and with force and violence assault, beat, wound, and ill-treat P. M.," etc., sufficiently avers when and where the riot occurred. Considering the character of the offense charged, the words "then and there" may be read "then and there being together, did," etc. *Lambert v. People*, 34 Ill. App. 638.

3. Number Participating in Offense. — At common law and in the most of the states of the Union there must be three at least engaged in the commission of the offense, to constitute it a riot. In *Georgia*, *Illinois*, and *Indiana* the offense may be committed by two. See title *Riot*, Am. and Eng. Encyc. of Law.

4. Naming All. — In *Thayer v. State*, 11 Ind. 287, an information charging

that "three persons and more, to wit," etc., naming twenty-one, did, etc., commit the offense charged, was held to be a direct charge against all.

Effect of Misnomer of Codefendant. — In *Davenport v. State*, 38 Ga. 184, the last name of one of the defendants was spelled differently in different parts of the indictment. Upon a separate trial of the other defendant it was held that although the evidence disclosed the true name of the defendant so misnamed, yet as there was no doubt as to his identity there was no reason shown for disturbing the conviction.

Failure to Give Christian Name of One. — Though an affidavit in a prosecution before a justice which omits the Christian name of one defendant may be a ground of dismissal as to that defendant, it will not be available to the others as such a ground. *State v. Kutter*, 59 Ind. 572.

Sufficiency of Designation. — In *Rex v. Hastings*, 1 Bulst. 183, there was no addition of place to any of the defendants but to the last, and for want of addition of the place where the others dwelt the indictment was quashed.

5. Guilty with Persons Unknown. — The indictment may charge the defendants to have been guilty together with other persons unknown. *Chitt. Crim. Law* 490a, citing *Rex v. Scott*, 1 W. Bl. 350; *Anonymous*, 3 Salk. 317.

Failure to Allege Inability to Give Names. — In *State v. O'Donald*, 1 McCord L. (S. Car.) 532, the indictment was against the defendant and two other persons for a riot, all of whom were named, and against "divers other persons, to wit, to the number of five," without alleging that such five others

Number. — Since to justify a conviction it must be shown that a sufficient number of persons known and unknown actually participated in the commission of the offense charged and for which the conviction is sought,¹ there should be appropriate averments showing such a participation by such of the defendants as were sufficient in point of numbers to commit the offense.²

4. The Unlawful Assembly. — Riot at common law is a compound offense, and an unlawful assembly of a sufficient number of persons to commit the offense is a necessary ingredient; consequently, unless this element of the offense is dispensed with by statute, it is necessary that an unlawful assembly of the defendants should be charged,³ and such averment must be sustained

were unknown or setting out their names; there was a true bill only against the defendant and one other; and it was held that the indictment was bad, and the defendant having pleaded guilty the judgment was arrested.

An Allegation of the Number of Unknown Persons charged with those known to have committed the riot is not material, and more or less may be proven. Chitty Crim. Law, 490a.

Proof of Allegation. — In *South Carolina* it has been held that an allegation that some of the persons concerned in the riot are unknown is a negative insusceptible of precise proof, and it is unnecessary that it should be proved by the prosecution. *State v. Blair*, 13 Rich. L. (S. Car.) 93, explaining *State v. Calder*, 2 McCord L. (S. Car.) 462, wherein is a *dictum* apparently *contra*. And see article INDICTMENTS, INFORMATIONS, AND COMPLAINTS, vol. 10, p. 508.

Aider by Verdict. — Where it is alleged that certain of the alleged rioters were unknown, after verdict and where there is no pretense of proof to the contrary, the truth of the allegation will be presumed. *State v. Blair*, 13 Rich. L. (S. Car.) 93.

1. See Am. and Eng. Encyc. of Law, title *Riot*.

Proof as to Defendants Named. — To sustain an indictment for a riot it is not necessary to prove that all three of the persons mentioned by name actually combined and acted in concert for a common riotous purpose, but it will be enough to show that the defendant joined in the riot with the other two persons named, or any other two persons though unknown to the grand jury. *Com. v. Berry*, 5 Gray (Mass.) 93.

Proof Confined to One Defendant. — If

but one of the defendants is shown to have been concerned in the riot charged, all must be acquitted. *Pennsylvania v. Huston*, Add. (Pa.) 334.

Participation by Master and Servant. — In *State v. Blair*, 13 Rich. L. (S. Car.) 93, the indictment charged the commission of a riot by defendant with three of his slaves who were named, and with others of his slaves who were unknown, and it was held that proof of the commission of the riot by the defendant in combination with several of his slaves was sufficient to sustain the conviction, although but one of those named was proved to have been present. *State v. Blair*, 13 Rich. L. (S. Car.) 93. See also *State v. Calder*, 2 McCord L. (S. Car.) 462; *State v. Jackson*, 1 Spears L. (S. Car.) 13.

2. Naming Three. — It is necessary to allege that the riot was committed by three persons named in the indictment. It is sufficient to name those who are known and to allege that the others are unknown. *State v. Brazil*, Rice L. (S. Car.) 257, distinguishing *State v. O'Donald*, 1 McCord L. (S. Car.) 532.

"With Many Others." — An indictment charging that the defendant with many others at a place named did commit a riot is good. Anonymous, 3 Salk. 317, per Holt, C. J.

3. Com. v. Gibney, 2 Allen (Mass.) 150; *McWaters v. State*, 10 Mo. 168; *State v. Hughes*, 72 N. Car. 25; *State v. Stalcup*, 1 Ired. L. (N. Car.) 30; *Blackwell v. State*, 30 Tex. App. 672; *Reg. v. Soley*, 11 Mod. 115, 2 Salk. 594; Archb. Cr. Pl. 589; 1 Hawk. Pl. Cr. 514; 4 Chitt. Bl. Com. 164, note (11); Russell on Crimes, book ii. 403.

Sufficiency of Averment — Instances. — An indictment charging that the defendants, five in number, together with divers others unknown, being evil dis-

by appropriate proof of facts showing the illegality of the assembly, or facts must be proved from which such illegality can be inferred.¹

5. Intent or Purpose of the Assembly. — The assembly is unlawful by reason of the common intent or purpose to do an act which will effectuate the crime. Hence it is necessary that there should be proper averments of such intent or purpose.²

6. Performance of Acts Pursuant to Assembly. — The indictment or information must contain averments that the intent of the unlawful assemblage was executed by the commission of an unlawful act or when the offense may be so completed by the commission of a lawful act in an unlawful manner;³ but as the offense will be complete if an inhibited act is done, it is not necessary to aver

posed and riotous persons and disturbers of the peace, with certain dangerous and offensive weapons did unlawfully, riotously, and routously attack and beset a certain building, the property of a person named, and did then and there unlawfully, riotously, and routously make a great noise, disturbance, and affray near to and about the said building, and did unlawfully, riotously, and routously continue near to, about, and in the said building making such noise, disturbance, and affray, for a long space of time, and did unlawfully, riotously, etc., with the dangerous and offensive weapons aforesaid, break the windows of the said building, to the damage of the said owner, and to the great terror, etc., is insufficient, because failing to properly charge the offense. *Com. v. Gibney*, 2 Allen (Mass.) 150.

Assisting in Execution of Process. — If the assembly were lawful, as upon summons to assist an officer in the execution of lawful process, the subsequent illegal conduct of the persons so assembled will not make them rioters. *State v. Stalcup*, 1 Ired. L. (N. Car.) 30.

"Assembled and Agreed." — An indictment founded upon a statute providing that if three or more persons shall assemble together with the intent, or having assembled shall mutually agree, to assist one another to do any unlawful act, with force and violence, etc., which charges that the defendants "assembled and agreed," is sufficient. *State v. Berry*, 21 Mo. 504.

Under the Illinois Statutes an indictment for a riot need not contain an averment of unlawful assembly. *Dougherty v. People*, 5 Ill. 179.

1. Assembly by Two. — An information charging three defendants with

unlawfully assembling together, and, while so assembled, committing a riot, is not sustained by proof that any two of the defendants assembled with others. *State v. Kuhlmann*, 5 Mo. App. 588.

Province of Jury — Cessation of Assembly. — Whether or not there is a cessation of a riotous assembly is for the jury. *Rex v. Woolcock*, 5 C. & P. 516, 24 E. C. L. 434.

2. Martin v. State, 9 Mo. 286; *McWaters v. State*, 10 Mo. 169.

Averment of Reason of Assembly. — An indictment for a riot must explicitly show for what act the rioters assembled, that the court may judge whether it was lawful or not. *Reg. v. Gulston*, 2 Ld. Raym. 1210.

Assembly for Purpose of Riot. — In *Reg. v. Soley*, 11 Mod. 116, Holt, C. J., said that the books were obscure as to the definition of riots, and that he considered it unnecessary to say that the defendants assembled for the purpose of a riot, though an unlawful assembly must be charged.

Execution of Acts for Which Rioters Assembled. — An indictment alleging that the defendants with others riotously, etc., assembled to disturb the peace of the state is not defective because failing to aver that the defendants assembled to assist each other in an act of a private nature, or that they executed the act for which they assembled, or that they assembled to do the act which it is averred they did do. *State v. Russell*, 45 N. H. 83.

Purpose of Disturbing the Peace. — An indictment need not allege any other unlawful purpose for which the rioters assembled than that of disturbing the peace. *State v. Renton*, 15 N. H. 169.

3. Blackwell v. State, 30 Tex. App.

that the act committed was the identical one which was contemplated by the defendants.¹

Attempt. — It is not always necessary to show the actual commission of an unlawful or violent act, but it may be sufficient if it is shown that there was an attempt to commit such an act

672; *U. S. v. Fenwick*, 4 Cranch (C. C.) 675; *Reg. v. Soley*, 2 Salk. 594; *Russell on Crimes*, book ii. 403.

Actual Commission of Act. — Where by statute the offense of riot is made out where it appears that two or more persons actually did unlawfully act with force or violence against the person or property of another with or without a common cause of quarrel, or even did a lawful act in a violent and tumultuous manner, an indictment is sufficient if it avers that two or more persons actually did an unlawful act against the person or property of another with violence. *Dougherty v. People*, 5 Ill. 179.

Necessity of Characterizing Act as "Unlawful." — Where it is apparent from the statute denouncing the offense that the word "unlawful" as therein used never was intended to enter into the definition of the offense, it is not necessary to charge that the defendants assembled unlawfully or unlawfully did the acts set out in the indictment, but it will be sufficient to show that an unlawful act was committed. *McWaters v. State*, 10 Mo. 168.

Ownership or Occupation of Property Invaded. — In *State v. Martin*, 3 Murph. (N. Car.) 533, defendants were convicted upon an indictment for a riot consisting in pulling down, breaking, removing, and destroying the dwelling house of one L. S., she the said L. S. being in the peaceable possession thereof. The evidence showed that L. S. was a married woman whose husband did not reside with her, and a new trial was awarded for the reason that as the indictment was for pulling down and for entering a dwelling house there should have been an allegation as to whose house it was; that in the case in hand it appeared that the dwelling house was that of the husband and should have been so charged. Furthermore, the court said that if a person inhabit a dwelling house as the wife, guest, servant, or part of the family of another, by law the house is in the occupation of such other person, and that fact must be laid in the indictment.

The Precedents of Indictments for Riot do not state any specific purpose or act which the rioters intended or assembled to accomplish, but they all state that the persons assembled "to disturb the peace," and in some of the forms the unlawful acts they committed are specified. *Davy's Precedents* 304; 4 *Burn's Justice* 117; 4 *Wentw. Pldgs.* 309; *Davis Civ. and Crim. Just.* 600. And see *Com. v. Runnels*, 10 Mass. 518; *State v. Renton*, 15 N. H. 169.

Unlawful Act with Force and Violence. — In *Martin v. State*, 9 Mo. 286, *approved* in *McWaters v. State*, 10 Mo. 169, the indictment charged that the defendants did "unlawfully, riotously, and maliciously assemble themselves together with the intent to commit an assault," but the character of that assault and the intention of the defendants at the time of assembly were not stated. The statute declared that it must be in the mind or the contemplation of the defendants not only to do an unlawful act, but to do such act "with force or violence," and it was held that the failure to insert the latter words in the indictment after the word "assault" rendered it insufficient.

1. *State v. Blair*, 13 Rich. L. (S. Car.) 93; *U. S. v. Fenwick*, 4 Cranch (C. C.) 675.

Execution of Act Contemplated by Assembly. — Riotous assembly and an act of violence constitute a riot, and where such an assembly and act are sufficiently alleged, the indictment is not defective because of the want of an averment that the defendants executed the act for which they assembled. *State v. Russell*, 45 N. H. 83.

Specification of Act Intended. — An indictment setting forth that the defendants with others riotously assembled to the disturbance of the public peace, and then riotously began to pull down a certain dwelling house, is sufficient, although the unlawful act which the defendants were assembled to commit is not specified. *Com. v. Jenkins, Thatch. Crim. Cas. (Mass.)* 118.

although it proved abortive.¹

Alleging Facts as to Unlawful Act. — Good practice requires that the facts constituting the alleged unlawful act,² or the violent, riotous, or tumultuous conduct necessary to constitute this element of the offense at common law, or which is made an element of the statutory offense, should be set forth with such substantiality as the circumstances of the case will permit.³ However, the

1. *Blackwell v. State*, 30 Tex. App. 672.

Attempt. — An indictment charging facts which constitute an attempt to commit an act of violence which if completed would be an indictable offense is sufficient, and it is unnecessary that the facts charged should amount to a distinct and substantive indictable offense. *State v. York*, 70 N. Car. 66.

Perpetration of Act Intended. — It is not necessary, in order to convict the defendants of a riot, that the intended act of violence should have been perpetrated, or that they should all have been present doing the act. *U. S. v. Fenwick*, 4 Cranch (C. C.) 675.

2. **Setting Out Act.** — An allegation that the defendants assembled to do something unlawful is insufficient; the unlawful act must be alleged. *Reg. v. Gulston*, 2 Ld. Raym. 1210.

Occupation of Dwelling House at Place of Disturbance. — An indictment charging that certain defendants named, together with others, with force and arms, at and in a specified county, unlawfully, riotously, and routously did assemble, and did then and there, being so assembled and gathered together unlawfully, etc., make a great noise and disturbance in and near the dwelling house of one W. S., proclaiming that they the said W. S. and his wife were persons of color, offering them for sale at auction, and calling them foul and opprobrious names, etc., to their great damage and terror, and against the peace and dignity of the state, etc., fails to charge any offense because of the absence of an averment that the said W. S. or his wife were in the dwelling house in question at the time. *State v. Hathcock*, 7 Ired. L. (N. Car.) 52.

3. **Fighting.** — An indictment which avers, not that the defendants committed any act in a violent and tumultuous manner, but merely that the defendants fought or had a fight, is insufficient. *Prince v. State*, 30 Ga. 27.

An indictment alleging that the de-

fendants "fought through and with each other" is not defective because it fails to allege that the fighting was done riotously. *State v. Dillard*, 5 Blackf. (Ind.) 365.

Obstruction of Justice's Court. — An indictment which charges that the defendant and others, being assembled, did in a violent and tumultuous manner obstruct and break up a justice's court held by one B., to the terror of the people, etc., sufficiently charges the offense of a riot. *State v. Boies*, 34 Me. 235.

Force and Arms. — In *Rex v. Myne*, Gibb. 63, the indictment charged that the defendants assembled illicitly, riotously, and routously, and illicitly, riotously, and routously committed an alleged unlawful act, but did not say with force and arms. It was held that as the act implied force the addition of the words "force and arms" was immaterial, there being a necessary implication of force and trespass in the other language of the indictment.

An indictment is sufficient which alleges that the defendants assembled with force and arms, and being so assembled did the act charged, without further alleging that the several acts were done with force and arms. In such a case the words "force and arms" in the first part of the indictment may be properly construed to apply to every distinct allegation thereafter. *Com. v. Runnels*, 10 Mass. 518.

Effect of Word "Riotously." — The indictment need not contain the words *vi et armis*, as the term "riotously" sufficiently implies violence without their insertion. *Rex v. Wynd*, 2 Stra. 834.

Noise and Disturbance. — An indictment charging that defendants made a great noise and disturbance of the peace, is too vague and uncertain. The way and manner in which the great noise and disturbance were made should be stated. *Whitesides v. People*, 1 Ill. 21.

Riotous Assault. — An indictment

unlawful act need not be characterized with the particularity which would be required in an indictment or information for the commission of the act itself when such commission would be punishable as an offense.¹

Allegations and Proof — Variance. — It is not necessary that the commission of the particular act of violence charged in the indictment should be proved.² Thus the commission of the unlawful act may be shown by proof of a forcible trespass on land³ or of

charging that the defendants "riotously and with force and violence" did assault, beat, wound, and ill-treat a person named, sufficiently charges, *prima facie* at least, an unlawful act. *Lambert v. People*, 34 Ill. App. 637.

An indictment charging the defendants with bursting the outer door of and carrying off a window shutter from a dwelling house, throwing missiles at the house, and assaulting a person named, sufficiently charges an unlawful act of violence. *State v. Scaggs*, 6 Blackf. (Ind.) 37.

In *Kiphart v. State*, 42 Ind. 273, the affidavit and information both stated that the defendants "did do an unlawful act, by then and there in a riotous and tumultuous manner, with stones and brickbats, in a rude, insolent, and angry manner, touching, striking, and beating F. G., and by then and there in a riotous and tumultuous manner threatening to use violence on the persons of P. L. and F. G., then and there being," etc. It was held that the offense of riot was sufficiently made out.

Noise, Tumult, Disorder. — A charge that the defendants assembled, etc., and then and there made a great noise, tumult, and disorder, to the terror of the citizens, etc., sufficiently describes an unlawful act of violence done *in terrorem populi*, which is obviously a riot. *State v. Voshall*, 4 Ind. 589. And see *Bankus v. State*, 4 Ind. 114.

Disturbing Peace. — The only unlawful purpose of the riotous assembly which need be alleged in the indictment is that of disturbing the peace. *State v. Renton*, 15 N. H. 169.

1. Charging Assault and Battery. — In *Kiphart v. State*, 42 Ind. 273, it was urged against the sufficiency of the affidavit and information that they did not contain a proper charge of an assault and battery, which as contended constituted the gravamen of the offense, but it was held that as the illegality of the act was not an ingredient

of the statutory offense of riot, the allegation that the act done was an unlawful one was immaterial, because it was not descriptive of the offense charged.

Aider by Verdict. — Where the indictment charges the riot to consist in assault and battery by three or more persons upon peace officers, riotously and routously, though it does not distinctly allege that the assault and battery was committed upon the officers while they were in the discharge of their duty, yet where such was the testimony it may be regarded after verdict as the legal intentment of the indictment. *State v. Sims*, 16 S. Car. 486.

2. Necessity of Proving Act Charged. — If three or more persons assemble with intent forcibly and violently to disturb the public peace in a tumultuous manner, and with intent mutually to assist each other against any who should oppose them in the execution of such purpose; and if, with force and violence, and in a tumultuous manner, they proceed to disturb the peace, either by a show of arms, threatening speeches, or turbulent gestures, to the terror of the people, this constitutes a riot, whether or not they committed the particular act of violence charged in the indictment. *U. S. v. Fenwick*, 4 Cranch (C. C.) 675.

3. Proof of Illegal Breaking. — In *Douglass v. State*, 6 Yerg. (Tenn.) 525, where one of the counts in the indictment charged a riot that had been committed by violently, etc., breaking open a smokehouse or outhouse and taking therefrom certain property of the prosecutor, it was insisted that it must be taken that a smokehouse was an outhouse, and that no permission to enter it was necessary. There were five counts in the indictment, to which "not guilty" was pleaded, and the defendants relied on authority furnished by legal process with which they were armed; and it was held that for the purpose of showing that the conduct of the officer and another of the defend-

the forcible destruction or injury of the property of another, or other like offense, under such circumstances as will constitute a breach of the peace.¹ But proof of riotous acts other than those involved in the offense charged is inadmissible.²

7. Charging Riot and Other Offenses. — Where the unlawful act which is a necessary ingredient of the offense of riot is of itself an indictable offense, the indictment is not objectionable because it charges riot and also, as a distinct offense, the commission of an unlawful act which was an ingredient of the offense of riot charged.³

8. Conclusion of Indictment or Information — *a.* **IN TERROREM POPULI.** — Whether or not it is necessary that the indictment should conclude *in terrorem populi*, depends upon the character of the offense committed in pursuance of the unlawful assembly, and the correct rule appears to be that if the apparent tendency of the act is to inspire terror, or an unlawful or violent act was committed in fact, it is neither necessary to allege nor to prove that the conduct of the defendants was *in terrorem populi*.⁴ But

ants who was with him was illegal notwithstanding the legal authority, and as rebutting evidence, it was competent for the state to prove that the lock was broken off the smokehouse door with an axe in a violent and riotous manner, and that the smokehouse was no part of the curtilage, and this notwithstanding that there was no count charging the breaking into a house within the curtilage.

1. Proof of Force and Violence. — An indictment for unlawfully, with force and violence, breaking and defacing a certain fence, charging that the breaking was unlawful and done in a riotous and tumultuous manner, is not sustained by proof that one of the defendants and others acting as his servants entered upon land belonging to him, though occupied by another, and peaceably and without loud talking or disturbance removed a fence wrongfully erected upon such land. *Riley v. People*, 29 Ill. App. 139.

2. See *Gallaher v. State*, 101 Ind. 411.

3. *U. S. v. McFarlane*, 1 Cranch (C. C.) 163. See *Rex v. Sudbury*, 1 Ld. Raym. 484, 12 Mod. 262.

Propriety of Charging Assault — *In Additional Count.* — In Chitty's Criminal Law, p. 490a, it is said that it is advisable to add to the indictment a count for common assault where an individual has been attacked, but that a grand jury may return a true bill as to the latter count, and indorse *ignoramus* as to the count for riot. *Citing Rex v. Fieldhouse*, 1 Cowp. 325.

In Same Count. — An indictment charging a riot and assault and battery in the same count is not objectionable because charging two distinct offenses. *State v. Russell*, 45 N. H. 83.

Matters of Aggravation. — Where an indictment avers that the defendants "unlawfully and riotously did assemble, and with force did demolish and pull down the house of a person named, and did pull down and scatter a rick of hay," upon the hypothesis that the defendants demolished the house not feloniously but in the assertion of a supposed right, the indictment is sustainable as for a misdemeanor at common law, *i. e.*, for a riot with a statement of the demolition of the house as matter of aggravation. *Reg. v. Casey*, Ir. R. 8 C. L. 408.

Proof of Lesser Offense. — An indictment charging a riot and forcible trespass to the land of one cannot be supported by proof that the land belonged to him, but was then in the possession of another as his tenant. To authorize such proof the indictment should charge the trespass to have been to the land in the possession of the latter. *State v. Wilson*, 1 Ired. L. (N. Car.) 32.

Proof of Assault. — To maintain an indictment for a riot and a riotous assault the assault must be proved as alleged. *Com. v. Berry*, 5 Gray (Mass.) 93.

4. *Thayer v. State*, 11 Ind. 287; *State v. Boies*, 34 Me. 235; *Com. v. Runnels*, 10 Mass. 518, 6 Am. Dec. 148; *State v.*

as to those riots in which no act was done such a conclusion is necessary.¹

b. CONTRA FORMAM STATUTI. — As to the necessity of a conclusion *contra formam statuti* in an indictment or information for riot, it is apprehended that the general rules governing indictments are applicable to this class of cases. If the offense is not denounced by statute such a conclusion is of course unnecessary.²

Alexander, 7 Rich. L. (S. Car.) 5; State v. Sims, 16 S. Car. 486; State v. Whitesides, 1 Swan (Tenn.) 88. And see Reg. v. Soley, 11 Mod. 116. And see generally article INDICTMENTS, INFORMATION, AND COMPLAINTS, vol. 10, pp. 441, 444.

Rescuing Goods from Officer. — An indictment charging a riot consisting of the unlawful and forcible taking from the custody of an officer certain personal property levied upon by him by process of execution is good though it fails to allege that the act charged as a riot was done to the terror of the people. State v. Whitesides, 1 Swan (Tenn.) 88.

Statutory Offense. — An indictment under the statute of 1 Geo. I., stat. 2, c. 5, § 1, for unlawful assembly one hour after proclamation has been made, need not conclude with a charge of *in terrorem populi*. Rex v. Cox, 4 C. & P. 538, 19 E. C. L. 516.

Original Riot. — An indictment on 1 Geo. I., stat. 2, c. 5, § 1, for remaining assembled one hour after proclamation made, need not charge the original riot to have been *in terrorem populi*. Rex v. James, 5 C. & P. 153, 24 E. C. L. 251.

1. Rex v. Birt, 5 C. & P. 154, 24 E. C. L. 252; Rex v. Haigh, 31 How. St. Tr. 1092; Rex v. Penn, 6 How. St. Tr. 951; Rex v. Sacheverell, 10 How. St. Tr. 30. And see the cases cited in preceding note.

The Doctrine Stated. — In indictments for that species of riot which consists in going about armed without committing any act, the indictment must charge that the acts of the defendants were *in terrorem populi*, but in those riots in which an unlawful act is committed the words are unnecessary. Holt, C. J., in Reg. v. Soley, 11 Mod. 116.

Riot and Assault. — There can be no conviction on an indictment for a riot, and assault which does not conclude *in terrorem populi*, in the absence of evidence of an assault. Rex v. James, 5 C. & P. 153, 24 E. C. L. 251.

Twelve persons were indicted for a riot and assaulting J. W. The indictment did not conclude *in terrorem populi*. Several of the defendants had been convicted, and at an ensuing assize, at which the remaining defendants were tried, there was evidence that they had joined in the riot, but there was no proof of any assault, except the words "po. se" and "guilty" written on the indictment, over the names of the convicted defendants. It was held that this was no proof of an assault as against the present defendants, and that they could not be convicted of the riot only, as the indictment did not conclude *in terrorem populi*. Rex v. Hughes, 4 C. & P. 373, 19 E. C. L. 425.

If Persons Are Charged with a Riot and Cutting Down Fences, and the indictment does not conclude *in terrorem populi*, they cannot on that indictment be convicted of a riot, but may be convicted of an unlawful assembly. Rex v. Cox, 4 C. & P. 538, 19 E. C. L. 516.

2. See the article INDICTMENTS, INFORMATION, AND COMPLAINTS, vol. 10, p. 444.

Surplusage. — If the conclusion is unnecessary it will not vitiate the indictment, but may be rejected as surplusage. State v. Russell, 45 N. H. 83.

Conclusion in Lieu of Charge in Statutory Language. — An inquisition for a riot need not specifically pursue the words of the statute, but may conclude generally *contra formam statuti*. Reg. v. Pugh, 6 Mod. 140.

Designation of Statute. — An indictment for riot and battery, etc., *contra formam diversorum statutorum* is good though no particular statute is mentioned. Darcy's Case, Noy 132; 19 Vin. Abr., Riots (D).

Propriety of Conclusion. — In Rex v. Monk, 1 Vent. 43, the information concluded *contra formam statuti*, designating the statute. After verdict it was moved in arrest of judgment that the information was not good because the

9. **Surplusage.** — The fact that the indictment or information contains unnecessary words or averments will not vitiate it, but such words or averments may be rejected as surplusage.¹

II. THE TRIAL — 1. Separate Trials — Conduct of Defense — Separate Trials. — Unless there is an absolute right to a separate trial, the granting or refusal of such a trial to a defendant is within the discretion of the trial court, which discretion, as in other cases where the exercise of discretion is involved, will not be interfered with unless its exercise has been clearly abused.²

Peremptory Challenges. — Whether or not each defendant is entitled to the full number of peremptory challenges allowed by statute,

statute upon which it was grounded only mentioned riots and prescribed their punishment in the manner there expressed. Keyling, C. J., however, was of opinion that the offense being a crime at common law and mentioned in the statute, the conclusion was proper, but the other justices inclined to the contrary.

1. *Thayer v. State*, 11 Ind. 287; *State v. Russell*, 45 N. H. 83; *Rex v. Harris*, 8 Mod. 327.

"Having Then and There the Present Ability So to Do." — An affidavit and information charging that five persons named did then and there, in a riotous, tumultuous, and violent manner, assemble themselves together, and then and there, in a riotous, tumultuous, and violent manner, having then and there the present ability so to do, unlawfully attempt to commit a violent injury on the person of said affiant, by then and there violently and unlawfully threatening to beat, cut, and shoot said affiant, contrary to the form of the statute, sufficiently charges the offense denounced by Rev. Stat. Ind. 1881, § 1981, which provides that "if three or more persons shall do an act in a violent and tumultuous manner, they shall be deemed guilty of a riot," etc. The allegation "having then and there the present ability so to do" is surplusage. *State v. Acra*, 2 Ind. App. 384.

Naming the Defendants. — An information charged that "three persons and more, to wit," etc., naming twenty-one, "did in a violent, riotous, and tumultuous manner unlawfully break open the doors of the house of [the person named], and destroy certain" property, etc., and it was held that this was a direct charge against all the persons named, and that the words "three persons and more, to wit," might be

treated as surplusage. *Thayer v. State*, 11 Ind. 287.

2. *Hibbs v. State*, 24 Ind. 140; *People v. Judson*, 11 Daly (N. Y.) 1. See also *People v. O'Loughlin*, 3 Utah 133.

Possible Prejudice by Joint Trial. — Where several persons are indicted together, they are not entitled as a matter of right to separate trials, but it is within the discretion of the court to grant any of them a separate trial, which discretion will be exercised where there is reason to apprehend that by trying them all together the one to whom a separate trial is granted may not have a fair trial, or that the trial may operate seriously to his detriment. *People v. Judson*, 11 Daly (N. Y.) 1. See also *State v. Littlejohn*, 1 Bay (S. Car.) 316; *State v. Sims*, 16 S. Car. 486.

Trying Particular Defendant — Abiding Result. — In *Anonymous*, 3 Salk. 317, several were indicted for a riot. It was moved that the prosecutor might name two or three and try an indictment against them, and that the rest might enter into a rule to plead not guilty (guilty if the others were found guilty), and the rule was made accordingly, this being done as stated in the report to prevent the charges in putting them all to plead. This practice was also recognized in *Reg. v. Middlemore*, 6 Mod. 212, wherein it was said that the practice was frequent.

Order of Proof. — On an indictment for a riot the parties charged must be proved to have been present before the fact of the riot can be given in evidence. *Rex v. Nicholson*, 1 Lewin C. C. 300.

But it has since been held that the prosecutor is entitled to prove the acts of any of the rioters before he connects the others with the riot. *Reg. v. Cooper*, 1 Russ. C. & M. 585.

is, when the matter is not specially prescribed, governed by the general rules respecting the right of defendants jointly indicted and tried to join or sever in their challenges.¹

Examination of Witnesses. — It has been held that where the defendants are tried jointly the cross-examination of the witnesses for the prosecution may be confined to one counsel.²

2. Instructions. — The jury should be properly instructed as to the rules of law applicable to the facts and circumstances brought out by the testimony, and their relation to each other, so as to enable them to judge of the guilt or innocence of the accused as established by the evidence. The court should not ignore evidence as to material facts.³ Facts should not be assumed as to which no evidence was adduced,⁴ nor should the jury be informed as to the elements of an offense as to which no conviction is sought.⁵

1. See the article **JURY**, vol. 12, p. 485.
Joint or Several Challenges. — Where on trial of an indictment all the defendants waive the privilege of a separate trial and elect to be tried jointly, their defense is joint and not several. No one of them has authority to control the defense, and their challenges must be joint. *People v. O'Loughlin*, 3 Utah 133.

Number of Peremptory Challenges Permitted. — On trial of a number of persons for riot each is entitled to five peremptory challenges, that being the number given by statute to persons tried for misdemeanors. *People v. Judson*, 11 Daly (N. Y.) 1.

2. *State v. Sims*, 16 S. Car. 486, wherein the defendants were tried jointly for riot and rescue, and in which there was held to have been no error in refusing to allow more than one counsel to cross-examine the witnesses for the state. And see generally article **EXAMINATION OF WITNESSES**, vol. 8, p. 70.

3. *Logg v. People*, 92 Ill. 598.

Unnecessary Charge as a Charge upon Facts. — Where the inquiry of a jury is whether or not certain peace officers were riotously assaulted and beaten, and whether a prisoner subsequently arrested by them had been rescued, an instruction as to facts as to which the jury have nothing to do, and which cannot affect the verdict, is not a charge upon the facts of the case within the provisions of a constitutional inhibition of such a charge. *State v. Sims*, 16 S. Car. 486.

4. An Instruction Which Assumes the Fact of a Riot is bad, even though the

evidence tends to show a technical riot. If the word "riot" is used technically and as a legal term, it should be explained. If used in its popular sense, it assumes a fact. In either case its use would mislead the jury. *State v. Kuhlmann*, 5 Mo. App. 588.

Assumption of Guilt. — Where the offense of riot consists in three or more persons committing an act in a violent and tumultuous manner, an instruction that if after the conclusion of a fight between a person named and the codefendants of the appellant, and while the blood of his codefendants "was still hot with the controversy," the appellant, who during the fight was thirty rods distant, came up and beat such person in a violent and tumultuous manner, he would be guilty of a riot, etc., is error requiring reversal, for the reason that it assumes the guilt of the appellant as charged, because of the act of violence committed by him alone. *Sloan v. State*, 9 Ind. 565.

5. Defining Assault and Battery. — Where the evidence sustains an indictment for the statutory offense of riot there is no error in refusing to charge the jury as to what would constitute an assault and battery. *Perkins v. State*, 78 Ga. 316.

Offense Not Denounced. — The refusal to charge the ingredients of the common-law offense of riot is unavailable as an assignment of error, where the jury were informed as to what constitutes the offense under the statute. *Whitley v. State*, 66 Ga. 656.

Offense Not Charged. — A charge that one accused of an assault with intent to murder could be found guilty of a

In **Defining the Offense** the court should specify its constituents or elements,¹ including a statement of what will constitute an unlawful assembly, and the necessity of a common intent to do an act prohibited by law;² also the necessity of the actual commission

riot is properly refused where the defendant is indicted alone and where no riot is charged or even disclosed by the indictment. *Robinson v. State*, 84 Ga. 674.

Aider by Verdict.—In *Georgia* it is provided that if any two or more persons, either with or without a common cause of quarrel, do an unlawful act of violence, or any other act in a violent and tumultuous manner, such persons shall be guilty of a riot. In *Rachels v. State*, 51 Ga. 374, it was held that a charge which in effect informed the jury that they might find the defendant guilty under either clause of the section, though possibly incorrect, would not require reversal where the defendant was found guilty of nothing but the act charged, and the verdict was supported by the evidence.

Authorizing Punishment for Offense Not Charged.—An instruction which defines the offense of riot at common law, yet informs the jury that if they convict the defendants they must inflict the penalty for the offense denounced by statute, and not the punishment for the common-law offense, is erroneous. *Smith v. State*, 14 Mo. 147.

1. Misleading Instruction.—A requested instruction which is so framed as to impair the force of an instruction given defining the offense of riot, and which is calculated to mislead and confuse the jury, is properly refused. *Williams v. State*, 9 Mo. 273.

Matters of Defense.—Where the ingredients of the offense of riot are made out, the court is not obliged to instruct as to matters of defense as to which no request is made, but it devolves upon the defendants to present the circumstances relied on by them to escape conviction. *Logg v. People*, 92 Ill. 598.

2. Inference of Intent.—In *U. S. v. McFarland*, 1 Cranch (C. C.) 140, it was held that the court properly instructed the jury that if they found that an injury was done by four persons to the person or property of another, accompanied with force, it was not necessary to prove that they should have met with an intention to commit such acts in order to constitute a riot, but that

without having met with a previous intention, if the acts were committed because of an intention or agreement formed after their meeting, they amount to a riot, and the jury may judge of and infer their intention or agreement from the acts committed.

Ignoring "Common Intent."—On the trial of a person accused jointly with others of the offense of riot it is error to charge that "when two or more persons unite, with or without a common intent, in doing an unlawful act, the acts and words of each one become the acts and words of every one engaged," for the reason that the instruction ignores the fact that there must be a common intent to do one of the acts inhibited by the state. *Dixon v. State*, 105 Ga. 787.

In *Whitley v. State*, 66 Ga. 656, there was held to be no error in refusing to charge that "while in common parlance the fighting of a number of persons among themselves at the same time may be called a riot, yet two or more persons may illegally fight together under such circumstances that none of them would be guilty of riot in its technical legal sense, and yet be guilty of affray, assault and battery, stabbing, or some other penal offense, because the 'common intent' to do the same act, which is an absolutely necessary ingredient in the crime of riot, may be lacking. To illustrate this principle: If two persons should get into a sudden quarrel and fight, and each of such combatants should happen to have a friend present, and these friends should thereupon become involved in a fight between themselves, while all four might be guilty of affray, assault and battery, or some other offense, neither would be guilty of riot, for the reason that each of the four would be trying to do a different act—each trying to whip the particular man he was fighting—and therefore there would be lacking that common intent of two or more persons to do the same act without which there can be no riot."

Legal Presumption as to Purpose of Assembly.—It is error to instruct the jury, on trial of an indictment founded upon a statute providing that at least three persons shall assemble together with

of the act completing the offense,¹ the co-operation of the defendants or some of them in its commission,² and generally the participation of those present and sought to be charged.³

the intent, or being assembled shall agree, mutually to assist one another to do any unlawful act with force and violence, etc., that it is not necessary to a conviction that the jury should believe that there was an expressed intent or agreement to do the alleged unlawful act, in this case the beating and wounding of a person, but that if the jury believed that the defendants, with one or more others, acted in concert and jointly inflicted the wounds as alleged, or that one of the defendants inflicted the wounds, and that the other defendant with one or more others was then present aiding and abetting and countenancing the one inflicting such wounds, then and in such case the law presumes that they assembled with the intent, or having assembled did agree, mutually to assist one another to inflict said wounds. *State v. Kempf*, 26 Mo. 429.

1. An Instruction Which Ignores Evidence as to the commission of the acts that would constitute the offense of riot or which assumes it to be unimportant is necessarily erroneous. *Logg v. People*, 92 Ill. 598.

Conflicting Evidence. — Where the evidence is conflicting as to whether a defendant did or did not do a certain act, it is error to charge the jury, in effect, that where two persons are at the same place, and one swears that a particular fact happened, and the other that it did not, the affirmative witness must be believed. *State v. Dean*, 71 Wis. 678.

2. Joint Commission of Unlawful Act. — Where by statute it is provided that "if any two or more persons, either with or without a common cause of quarrel, do an unlawful act of violence or any other act in a violent and tumultuous manner, such persons so offending shall be guilty," etc., it is proper to instruct the jury that the defendant is guilty of the offense if he and another jointly did an unlawful act of violence. *Rachels v. State*, 51 Ga. 374.

Under a statutory provision that "if any two or more persons, either with or without a common cause of quarrel, do an unlawful act of violence or any other act in a violent and tumultuous manner, such persons so offending shall be guilty of a riot," it is error to direct an acquittal on the trial of an indictment

charging a riot to have been committed in the performance of an unlawful act, though there is no proof of an assault by the defendants upon the prosecutor. *Jacobs v. State*, 20 Ga. 839.

Whether or Not a Third Person Was Aiding and Abetting Two Others in rioting is a question for the jury, which is properly submitted to them by an instruction that if two were engaged in an illegal act, and a third was aiding and abetting by his presence, the offense would be made out. *State v. Straw*, 33 Me. 554.

3. Participation — Obscurity. — In *Hibbs v. State*, 24 Ind. 140, wherein the trial judge was requested to instruct that "there must be three or more persons engaged assisting one another, and if a person at some distance when the riot is done comes up immediately afterwards and does violence on the same object, he is not guilty of a riot. If the jury are satisfied from the evidence that T. H., one of the defendants named in the information, was not present during the time of the commission of the fight between C. H. and R. W., the prosecuting witness, and until they were separated, he would not be liable under the information for a riot, even although he may have made a great noise in swearing, or otherwise, and offered to fight W. L., another person in the same crowd." The request was held to have been properly refused, the court saying: "A person at 'some distance' may have been engaged in assisting and encouraging those actively engaged in the riot, and if it is intended to hold him discharged because he 'immediately' came up and committed the same acts of violence, we cannot regard the instruction as improperly refused. Nor is the meaning of the word 'present' very clearly conveyed to the jury, when they are told that a person may not be present, and yet 'have made a great noise by swearing, and offering to fight W. L., another person in the same crowd.'"

Presumption as to Participation of Those Present. — There is no presumption of law that in riots and tumultuous assemblies all who were present and not actually assisting in the suppression in the first instance are partici-

3. Verdict — General Requisites. — As in trials for other criminal offenses the verdict must be supported by the evidence and must be sufficient to justify the sentence imposed.¹

General Verdict of Guilty. — It has been held that riot, rout, and unlawful assembly being kindred offenses, as riot includes the other two, a general verdict of guilty will be sufficient though the evidence establishes no more than that the defendants were guilty of a rout or unlawful assembly.² However, there appears to be no doubt that unless there is a finding of guilt as to the riot there can be no conviction for a lesser offense which is involved in the offense of riot and constitutes one of its necessary elements, and which is not made the subject of a special charge.³

pants, and an instruction to that effect and that the obligation is cast upon persons so circumstanced to prove their non-interference is erroneous. *State v. McBride*, 19 Mo. 239.

Adoption of Unlawful Act. — It is not reversible error to charge that those who stood by and encouraged an assault and battery adopted that offense and made it their own, when it does not appear that the jury were informed that such adoption would transfer the assault and battery into a riot. *Scott v. U. S.*, 1 Morr. (Iowa) 191.

Inaccurate Statement of Law. — Where the evidence is of such a character and in such a condition of conflict as to require that the instructions should accurately state the law to the jury, a charge that "if you believe from the evidence, beyond a reasonable doubt, that the defendants or some two of them riotously and with force and violence assaulted, beat, and wounded [a person named], then you should find the defendants guilty," is erroneous for the reason that such an instruction would authorize a conviction of all the defendants although but two of them might have been guilty of the crime charged. *Lambert v. People*, 34 Ill. App. 638.

Co-operation with Persons Not Charged. — Where upon the separate trial of one defendant the jury were instructed that if he and more than one other person committed the acts charged they should find him guilty, the court said: "The information assumes to name all the persons engaged in the riot, and unless two or more of the persons thus named acted jointly with the defendant, * * * he could not be guilty. But under the instruction the jury were authorized to convict him, though the persons with whom he acted

were not charged in the information. The charge may have misled the jury." *Hardebeck v. State*, 10 Ind. 459.

1. A Verdict Against a Party Which Incorrectly States His Name as indicted is not sufficient to support a judgment of conviction. *State v. McBride*, 19 Mo. 239. And see generally article VERDICT.

Correction of Error after Separation of Jury. — Such an error cannot be corrected after the separation of the jury. *State v. McBride*, 19 Mo. 239.

Fixing Term of Imprisonment. — At common law the jury did not fix the term of imprisonment. *U. S. v. McFarlane*, 1 Cranch (C. C.) 163.

2. State v. Sumner, 2 Spears L. (S. Car.) 599; *State v. Brazil*, Rice L. (S. Car.) 257.

Conviction for Unlawful Assembly. — If the indictment does not conclude *in terrorem populi* there can be no conviction for a riot, though there may be a conviction for an unlawful assembly. *Rex v. Cox*, 4 C. & P. 538, 19 E. C. L. 516.

3. Price v. People, 9 Ill. App. 36; *Ferguson v. People*, 90 Ill. 510.

Conviction for Affray. — If the term "riotously and routously" is to be found throughout the indictment, the defendants cannot be convicted of an affray or receive judgment for an inferior offense when two only are found guilty. *Chitt. Crim. Law* 490a; *Rex v. Heaps*, 2 Salk. 593, 1 Ld. Raym. 484, 12 Mod. 262; 19 Vin. Abr., Riots, E 1, E 6.

Diversion of Watercourse. — In *Rex v. Colson*, 3 Mod. 72, the information charged that the purpose of the riotous assembly was the diversion of a watercourse, and its actual diversion by the setting up of a bank. The jury found the defendants guilty of setting up the

Conviction of Less than Number Necessary to Commit Offense. — Less than the number whose co-operation is necessary to commit the offense may be convicted. Hence it is of no avail to a defendant that he alone was convicted either because those jointly indicted with him were not brought to trial, or because having been tried they were acquitted.¹ There are decisions, however, to the contrary, which seem to rest on the ground that the offense is not made out unless there is a conviction of the requisite number.²

III. THE JUDGMENT. — The judgment or sentence is now as a rule regulated by statute, either generally or by reference to the

bank, but not of the riot, and for that reason the judgment was arrested.

Conviction of One for Assault. — On trial of an indictment for a riot and riotous assault and battery, one of the defendants may be convicted of the assault and battery and the other may be acquitted. *Shouse v. Com.*, 5 Pa. St. 83.

1. Conviction of One. — On trial of an indictment charging the commission of the offense by the defendant and his three codefendants, together "with divers other evil disposed persons to the number of ten or more, to the inquisition aforesaid as yet unknown," the acquittal of such three other defendants will not furnish a ground for arresting the judgment against the one found guilty. *State v. Egan*, 10 La. Ann. 698.

Where three are indicted, and one who was tried separately was found guilty, and there was no trial to the others, judgment on the verdict must be given against him. *State v. Allison*, 3 Verg. (Tenn.) 428.

Conviction of Two. — In *Rex v. Scott*, 3 Burr. 1262, 1 W. Bl. 350, six persons were indicted for a riot, of which number two died before the trial, two were acquitted, and two convicted, and the court declined to arrest the judgment, Lord Mansfield saying: "Six were indicted; two of them are acquitted; two are dead, untried; the jury have found these two to be guilty of a riot; consequently it must have been together with those two who have never been tried, as it could not otherwise have been a riot."

Reasons for Arrest of Judgment Confined to Record. — Where three persons are indicted and tried separately, and there is an acquittal of one and a conviction of another, the court cannot look to extrinsic facts to find reasons to arrest the judgment, but must find them in the record of the defendant

convicted, and no facts appearing which would justify the arrest of the judgment, judgment must be pronounced against such defendant without regard to the fact of the acquittal of his codefendant. *State v. Allison*, 3 Verg. (Tenn.) 428.

The Acquittal of One Defendant Who Is Tried Separately will not entitle his codefendants to quash the indictment as to himself, where by statute it is provided that the acquittal or conviction of one or two persons jointly indicted, but tried separately, shall not operate as an acquittal or conviction of any of the others not tried, but that they shall be subject to be tried in the same manner. *Rachels v. State*, 51 Ga. 374.

2. Conviction of One. — In *Turpin v. State*, 4 Blackf. (Ind.) 72, there was a verdict of guilty as to one and not guilty as to the others, and it was held that as to the defendant against whom the verdict was rendered there could be no judgment.

A verdict against one guilty of a riot, on trial of an indictment against three, is void. *Harrison v. Errington*, Popham 202.

Conviction of Two. — In *Rex v. Sudbury*, 12 Mod. 262, the indictment was for riotous and routous assembly, and charged that so assembled the defendants committed a battery. Two of the defendants were convicted and all the others acquitted, but the judgment was arrested upon the ground that the two could not commit a riot. In this case Holt, C. J., said: "If the indictment had been that the defendants with divers other disturbers of the peace had committed this riot, and the verdict had been in this case the king might have judgment."

Two or More Must Be Convicted to make the conviction good for the offense of riot. *State v. Littlejohn*, 1 Bay (S. Car.) 316.

particular offense. Unless, therefore, the sentence in any case is not the one prescribed by law, it will not be allowed to stand.¹

1. See generally article SENTENCE.

Sentence Prescribed by Statute.— Under a statute providing that if any fire company, the members thereof or its adherents, shall be guilty of rioting or fighting in the public streets of a city named while going to, at, or returning from a fire, or to or from a false alarm, on conviction thereof it shall be competent to declare such company out of service, and that it shall be unlawful for the members thereof to act as a fire company for the space of six months, and to order their doors to be closed, etc., it was held that on conviction of the offense denounced, a sentence ordering the company out of service, and directing the sheriff of the city and county to lock the doors of the engine house of the company and retain the keys in his possession for six months, was not excessive. *In re Northern Liberty Hose Co.*, 13 Pa. St. 193.

Unauthorized Sentence.— In *Clellans v. Com.*, 8 Pa. St. 223, the indictment contained two counts, the first one for a riot in the common form, and the

second for riotously rescuing certain fugitive slaves from another state, who were found and arrested in the state, from the lawful custody of their owners or masters. There was a verdict of guilty against a number of the defendants, but not guilty as to the others, and the defendants convicted were sentenced to the penitentiary. It was held that the punishment provided by the English common law, which was the law of the state, was fine and imprisonment in the county jail, and that therefore the sentence inflicted was not authorized, and for that reason the judgment was reversed.

Imprisonment is not necessarily a part of the punishment at common law. *U. S. v. McFarlane*, 1 Cranch (C. C.) 163.

Several Judgment.— Where by statute it is provided that each defendant found guilty of a riot shall be separately fined, the judgment is several, though the sentences against several defendants may constitute but one entry on the record. *State v. Cripe*, 5 Blackf. (Ind.) 7.

RIPARIAN RIGHTS.

- I. IN GENERAL, 1213.
- II. INJURIES TO RIPARIAN LANDS, 1213.
 - 1. *Unlawful Entry — Removal of Soil or Its Products*, 1213.
 - 2. *Deposit of Waste or Refuse*, 1214.
 - 3. *Obstruction of Access*, 1215.
- III. SUITS TO DETERMINE TITLE, 1215.

CROSS-REFERENCES.

See also article *WATERS AND WATERCOURSES*, and the General Index to this work.

And for *Matters of Substantive Law and Evidence*, see AM. AND ENG. ENCYC. OF LAW, title *RIPARIAN RIGHTS*, and the cross-references there given.

I. IN GENERAL — Legal or Equitable Remedy. — While equity will sometimes interfere to protect riparian rights which have been determined and established, the general remedy for their violation is by an action at law.¹

Jurisdiction — Federal Questions. — Where the United States grants to a private individual lands lying on a navigable stream and within the borders of a state, whether the title of the grantee exists to high or low water mark, or to the middle of the stream, is a question to be determined by the state and not by the federal courts.²

II. INJURIES TO RIPARIAN LANDS — 1. Unlawful Entry — Removal of Soil or Its Products — Trespass. — A riparian owner who also has title by grant or otherwise to the bed of a lake or stream, or to lands lying below high-water mark on tidal waters, may maintain trespass against a person who enters thereon without a license,³ or who interferes with his right to build or use wharves

1. *Mason v. Cotton*, 2 McCrary (U. S.) 82. And see articles REMEDY AT LAW, *ante*, p. 108; INJUNCTIONS, vol. 10, p. 887.

2. *Webb v. Demopolis*, 95 Ala. 116.

3. *Ensminger v. People*, 47 Ill. 384.

Action for Use and Occupation. — Where a party enters upon the land of a riparian owner below high-water mark, and fastens a boat to a tree, he becomes liable in an action of trespass, but if the land lying below high-water mark has not been reclaimed or improved by the owner of the adjacent upland the

latter cannot maintain an action for use and occupation against a person who moors rafts thereon, unless an express contract exists between the parties. *Stewart v. Fitch*, 31 N. J. L. 17.

In *Massachusetts* it has been held that a riparian owner who has not enclosed the shore in front of his property cannot maintain an action of tort against a person who enters thereon, below high-water mark, for the purpose of fishing, but who does not create any permanent obstruction on the land. *Packard v. Ryder*, 144 Mass. 440.

on his premises,¹ or who unlawfully removes therefrom any sand, gravel,² or other portion of the realty,³ or who takes ice from the surface of the water in violation of his rights.⁴

Replevin. — It has also been held that rock or gravel taken from the bed of a stream may be recovered by the owner in an action of replevin.⁵

Forcible Entry and Detainer may be maintained by the owner of lands on a navigable stream against a party who has invaded his possession of soil formed by accretion.⁶

2. Deposit of Waste or Refuse. — Where waste or refuse has been deposited on the land of a riparian owner, or near the land in such a manner as to cut off his access to the water, his remedy is by an action on a case for damages, against the party responsible for the deposit.⁷

1. *Hamlin v. Pairpoint Mfg. Co.*, 141 Mass. 51; *Hastings v. Grimshaw*, 153 Mass. 497.

2. *Ross v. Faust*, 54 Ind. 471; *Whitnack v. Tunison*, 16 N. J. L. 77.

Ohio and Mississippi Rivers. — In *Kentucky* it has been held that a riparian proprietor on the banks of the Ohio river owns all accretions as far as the middle thread of the stream, and that he may maintain trespass against any one who removes sand from a sand-bar in the river. *Berry v. Snyder*, 3 Bush (Ky.) 266.

In *Iowa*, on the contrary, it has been held that a riparian owner on the banks of the Mississippi river cannot maintain trespass against a person who removes sand from a sand-bar below high-water mark, although within the middle line of the stream; but if he has any rights in the premises peculiar to himself, an indictment or an action on the case may lie. *McManus v. Carmichael*, 3 Iowa 1.

3. Removal of Grass. — A grantee of uplands, who also has verbal permission to occupy adjacent flats, and who has occupied them for a period less than twenty years, may maintain trespass against a stranger who enters thereon and cuts and carries away grass. *Clancey v. Houdlette*, 39 Me. 451.

Removal of Manure. — A riparian owner on navigable waters may have trespass *quare clausum fregit* for an entry upon the shore below high-water mark, and the removal therefrom of manure mixed with the soil. *Clement v. Burns*, 43 N. H. 609.

4. Removal of Ice. — *Washington Ice Co. v. Shortall*, 101 Ill. 46; *Clute v. Fisher*, 65 Mich. 48; *Myer v. Whitaker*,

(Supm. Ct.) 55 How. Pr. (N. Y.) 376; *Marshall v. Peters*, (Supm. Ct. Spec. T.) 12 How. Pr. (N. Y.) 218.

Indictment for Trespass — Essential Averments. — In *Indiana* the removal of ice from a stream or pond without the permission of the owner of the bed thereof is an indictable trespass under § 14, 2 G. & H. 462 (*Horner's Stat. Ind.* 1896, § 1961). An indictment has been held sufficient which alleged that the defendant did then and there unlawfully cut, saw, and remove from land belonging to one A., in a given county, one hundred cubic feet of ice, of the value of ten dollars, being then and there the property of said A., without a license. *State v. Pottmeyer*, 33 Ind. 402.

A Person Who Has No Title to the Bed of a stream, but who has staked off the ice on a certain portion thereof, and has expended money in its preservation, may have trespass against a party who wrongfully removes the same. *Hickey v. Hazard*, 3 Mo. App. 480.

5. *Griffin v. Kirk*, 47 Ill. App. 258; *Braxon v. Bressler*, 64 Ill. 488.

6. *Griffin v. Kirk*, 47 Ill. App. 258.

7. Penalty Prescribed by Statute — Effect on Private Action. — The fact that a penalty is prescribed by statute to be recovered by the public, for an obstruction of navigation by the deposit of waste and refuse, does not prevent the institution of a private action for damages by a riparian proprietor whose lands are injured by such nuisance, where the plaintiff suffers some special and particular injury therefrom, beyond that suffered by the general public. *Garitee v. Baltimore*, 53 Md. 422.

3. Obstruction of Access. — A riparian owner has a right of access to and from the water on which his land lies, and where such access has been unlawfully cut off by the erection of wharves, railroads, or other structures, he may recover damages in an action on the case,¹ or may sue in equity to enjoin the maintenance of the obstruction.²

Indictment or Information in Equity. — If the obstruction is such as to amount to a public nuisance, an indictment will lie,³ but where it simply amounts to a purpresture on the land of the state, the proper remedy is by an information in equity on the relation of the attorney-general.⁴

III. SUITS TO DETERMINE TITLE — **In General.** — Whether the owner of lands lying on tidal waters can maintain ejectment to recover land below high-water mark, depends upon the laws of the state in which the question arises.⁵

The Pleadings. — A bill in equity claiming title to lands resulting

Variance Between Pleadings and Proof. — Under proper pleadings a riparian owner may recover damages against a person who leases premises with a coal washer built upon them in such a way that its operation inflicts injury on the plaintiff's land, but in such an action, where the declaration alleges that the defendant occupies the premises and operates the mine, and the evidence shows that the mine is occupied by a tenant of the defendant, and that the injury has resulted from the wrongful acts of said tenant, the plaintiff cannot recover. *Coal Run Coal Co. v. Giles*, 49 Ill. App. 585.

1. *Stevens v. Paterson, etc., R. Co.*, 34 N. J. L. 532.

2. **Injunction.** — *Shirley v. Bishop*, 67 Cal. 543; *Maine Wharf v. Custom House Wharf*, 85 Me. 175.

Joint Suit by Co-owners. — Where lands bordering on a navigable river have been partitioned, but without reference to the riparian rights of the owners, and it has been agreed that these rights shall remain undivided and be held in common, the owners may maintain a joint suit against a party who cuts off their right of access to the water by the erection of railroad tracks and buildings. *Organ v. Memphis, etc., R. Co.*, 51 Ark. 235.

In Florida, under the Act of 1856, riparian owners on the bank of a navigable stream or bay own to the adjoining channel. Such a proprietor who sues to enjoin the erection of a wharf which threatens to obstruct access to his land, in setting forth his title to the land, must allege that he has water

boundary. *Sullivan v. Moreno*, 19 Fla. 200.

In New York it has been held that an owner of land fronting on the East river in the city of New York, who has obtained a grant of land under water to the exterior line, cannot have an injunction to prevent the building of a pier beyond his grant, and in front of his pier, by parties claiming under a grant from the common council, where no authority has been given to fill up outside of the exterior line; if he has any title his remedy in such a case is by an action for damages or of ejectment. *Taylor v. Brookman*, 45 Barb. (N. Y.) 106. And see *Jenks v. Miller*, 14 N. Y. App. Div. 474.

3. *Revell v. People*, 177 Ill. 468.

Erection of Buildings. — The driving of piles and erection of tenements in the waters of a navigable bay is a public nuisance for which an indictment lies, but a riparian owner whose lands are injured by such nuisance, and who suffers otherwise than as a member of the public at large, may also maintain a private action therefor. *Blanc v. Klumpke*, 29 Cal. 156.

4. **Information in Equity.** — *Revell v. People*, 177 Ill. 468. And see *Engs v. Peckham*, 11 R. I. 210.

5. **Ejectment May Be Maintained in Connecticut** to recover land lying below high-water mark. *Nichols v. Lewis*, 15 Conn. 137.

And also in *New York*, where such land has been filled up and improved by the riparian owner. *People v. Mauran*, 5 Den. (N. Y.) 389. Or where the lands above and below high-water

from accretion must set forth the manner of their formation;¹ and in some jurisdictions where an action is brought to determine the title to lands under water, the claimant must allege in his pleadings that he also claims title to the adjacent upland.²

mark are both embraced in the same action, and are recovered in the same judgment. *Nolan v. Rockaway Park Imp. Co.*, 76 Hun (N. Y.) 458; *Sisson v. Cummings*, 35 Hun (N. Y.) 22, *reversed* on another point in 106 N. Y. 56.

In New Jersey the title to lands below high-water mark is in the state until such lands have been reclaimed and improved by the riparian proprietor, and therefore until they have been so reclaimed the riparian owner cannot maintain ejectment, but he will be protected in equity from any appropriation of such lands or encroachment thereon. *Stockham v. Browning*, 18 N. J. Eq. 390.

In Washington, lands lying below high-water mark on tidal waters belong to the state, and the owner of the adjoining upland cannot maintain ejectment against a person who enters upon the shore below high-water mark and erects buildings thereon. If the owner has any remedy in such a case, it is in equity. *Pierce v. Kennedy*, 2 Wash. 324.

Validity of Patent — How Determined. — Where a patent to land under water, issued by the commissioners of the land office, is not void on its face, and where evidence *dehors* the instrument is necessary to show its invalidity, it cannot be attacked in an action of ejectment brought by a person holding a subsequent patent to the same lands.

Such patent can only be assailed in a direct proceeding to review the action of the commissioners or by a suit in equity to set it aside. *New York Cent., etc., R. Co. v. Aldridge*, 135 N. Y. 83.

1. *Jefferis v. East Omaha Land Co.*, 134 U. S. 178. In this case a bill was held to be sufficient which alleged that the land in question was formed by "imperceptible degrees;" that the process, begun in 1853 and continued until 1870, resulted in the production by accretion of a tract of forty acres and more; and that the process "went on so slowly that it could not be observed in its progress, but at intervals of not less than three or more months it could be discerned by the eye that additions greater or less had been made to the shore."

2. In New York the complaint in an action to determine title to lands under water should allege that the plaintiff also claims title to the adjacent upland; but where this averment has been omitted, the omission may be remedied by amendment, provided it is within the spirit of the complaint. Furthermore, when the evidence shows that the plaintiff has been in possession of a strip of adjacent upland for many years, the complaint should not be dismissed, even though such averment is lacking and is not supplied by amendment. *Benson v. McNamee*, (Supm. Ct. Gen. T.) 12 N. Y. St. Rep. 503.

ROBBERY.

BY CHARLES H. STREET.

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I. DEFINITION. — Robbery is the felonious taking of the personal property of another from his person and against his will by violence or intimidation.¹

II. THE INDICTMENT — 1. *In General* — *At Common Law.* — Under the common law an indictment for robbery should allege a felonious taking of the personal property of another, from his person, or in his presence, by force or intimidation and against his will.²

Similarity to Indictment for Larceny. — The facts to be stated are substantially the same as in an indictment for larceny, with the

1. See Am. and Eng. Encyc. of Law, title *Robbery*.

2. *Com. v. Brooks*, 1 Duv. (Ky.) 150; *Houston v. Com.*, 87 Va. 257.

General Form at Common Law. — That A. O. with force and arms, in the king's highway, in and upon one A. J. feloniously did make an assault, and him the said A. J. in bodily fear and danger of his life then and there feloniously did put, and one gold

watch of the value of ten pounds, of the goods and chattels of him the said A. J., from the person and against the will of the said A. J., in the highway aforesaid, then and there feloniously and violently did steal, take, and carry away, etc. 3 Chitty's Crim. L. 806.

Averment of Former Conviction. — An allegation in an indictment for robbery that the defendant has formerly been convicted of petty larceny is surplus-

additional averments that the property was taken from the person of another or in his presence, by force or intimidation.¹

By Statute. — In some jurisdictions the common-law form of indictment is still sufficient,² but in a majority of the states indictments for the offense are now framed under statutes. Where this is the case, the language of the statute should be followed,³

age. The indictment does not charge two offenses. *People v. Boyle*, 64 Cal. 153.

1. *Com. v. Cahill*, 12 Allen (Mass.) 540; *People v. Nelson*, 56 Cal. 77; *People v. Jones*, 53 Cal. 58. See article LARCENY, vol. 12, p. 946.

Asportation. — In *Massachusetts* the indictment must allege that the property was carried away. *Com. v. Clifford*, 8 Cush. (Mass.) 215. In *Tennessee* an indictment is not bad for duplicity because it contains the words "steal, take, and carry away." *McTigue v. State*, 4 Baxt. (Tenn.) 313. But it has been held that asportation need not be alleged in *Texas*. *Thompson v. State*, 35 Tex. Crim. 511. And the same ruling has been made in *Indiana*. *Terry v. State*, 13 Ind. 70.

2. In *Arkansas* the common-law form is good. *Clary v. State*, 33 Ark. 561.

In *Louisiana* it has been held that the essential substantive averments in an indictment for robbery, required by the common law, were not dispensed with by the statute of 1885. *State v. Patterson*, 42 La. Ann. 934; *State v. Cook*, 20 La. Ann. 145.

In *Texas* an indictment which pursues substantially the common-law precedents is sufficient. *Burns v. State*, 12 Tex. App. 269; *Trimble v. State*, 16 Tex. App. 115; *Bell v. State*, 1 Tex. App. 598; *Reardon v. State*, 4 Tex. App. 602.

In *Virginia* the offense is defined by statute (Code 1887, § 3674), but this statute simply prescribes the punishment, and does not change the essential elements of the offense, and an indictment sufficient at common law is also good under the statute. *Houston v. Com.*, 87 Va. 268.

3. *People v. Colburn*, 105 Cal. 648; *State v. Ready*, 44 Kan. 697; *Com. v. Tanner*, 5 Bush (Ky.) 316; *State v. Henry*, 47 La. Ann. 1587; *State v. O'Neil*, 71 Minn. 399; *State v. Howard*, 66 Minn. 309; *Acker v. Com.*, 94 Pa. St. 284; *State v. Swafford*, 3 Lea (Tenn.) 162; *Williams v. State*, 10 Tex. App. 8.

In *California*, under the provisions of

the Penal Code, the particularity of averment necessary at common law is no longer required. It is only necessary that the substantial facts constituting the crime should be alleged with sufficient certainty to enable the court to pronounce a proper judgment, and the party to defend against the charge. The offense is sufficiently charged in the language of the statute without further particularity as to acts, and any defect of form not tending to the prejudice of a substantial right of the defendant must be disregarded. *People v. Ah Sing*, 95 Cal. 654, citing *People v. Rozelle*, 78 Cal. 84.

In *Louisiana*, an indictment has been held sufficient under the statutes which charged that A. with force and arms in and upon one B. feloniously did make an assault, and the said B. in bodily fear did then and there put, and twenty-five dollars of the lawful money of the United States of America of the goods, property, money and chattels of said B. from the person and against the will of him the said B. then and there feloniously and violently did steal, take, and carry away, contrary to the form of the statute, etc. *State v. Devine*, 51 La. Ann. 1296. And see also *State v. Corcoran*, 50 La. Ann. 453.

Qualification of the Rule. — In following the statute all the essential elements of the crime as therein defined must be alleged. An indictment for a statutory offense is sufficient where it alleges the commission of the crime in the words of the statute, if by that means all that is necessary to constitute the offense is distinctly charged, otherwise it is not. *State v. O'Neil*, 71 Minn. 399; *Trimble v. State*, 16 Tex. App. 115; *Moore v. State*, 7 Tex. App. 608.

Where the Offense Is Purely Statutory, and the statutes have no reference to the common law, it is generally sufficient to follow the words of the statute, in framing the indictment. But where the statute recognizes the common law, and simply provides for the punishment of the common-law crime,

or equivalent words should be used.¹

Armed with a Dangerous Weapon. — In some jurisdictions it is necessary to show in the indictment whether or not the accused was armed with a dangerous weapon at the time of committing the offense.²

2. Felonious Intent. — At common law it is absolutely essential to allege an assault, feloniously made.³

By Statute. — And under some statutes it is also necessary to

all the elements of the offense at common law must be alleged. *Boles v. State*, 58 Ark. 35.

1. *State v. Barnett*, 3 Kan. 250; *Taylor v. Com.*, 3 Bush (Ky.) 508; *State v. Davidson*, 38 Mo. 374; *State v. Bohn*, 19 Wash. 36. And see generally as to following the language of the statute in charging a statutory offense, article INDICTMENTS, INFORMATIONS, AND COMPLAINTS, vol. 10, p. 483 *et seq.*

Although the crime is not charged in the precise words of the statute defining it, if it is alleged in words conveying the same meaning the variance is unimportant. *Taylor v. Com.*, 3 Bush (Ky.) 508; *Buntin v. State*, 68 Ind. 38.

2. In Michigan robbery is divided by statute into two offenses; one by assault armed with a dangerous weapon, and the other by assault without such weapon. The common-law form of indictment is therefore insufficient; the indictment must be framed under the statute, and must distinctly charge either one grade or the other of the offense. *People v. Calvin*, 60 Mich. 113.

Description of the Weapon. — In a *Massachusetts* case the indictment was objected to on the ground that while it charged that the accused, at the time of committing the offense, was armed with a dangerous weapon, to wit, a pistol, with intent, etc., it did not charge that the pistol was capped, loaded with ball, powder or cartridges, or capable of being discharged; nor that the pistol was aimed at the person named in the indictment, or discharged, or used as a fire-arm or club; nor did it appear that the pistol was a dangerous weapon. *Lathrop, J.*, said: "We have no doubt that the indictment is sufficient in form. The gist of the offense is the being armed with a dangerous weapon. [It is not necessary] to allege either that the assault was committed with the dangerous weapon, or that the intent to kill or maim was to be carried out, in case of resistance, by

means of such dangerous weapon. The indictment does not allege an assault with a pistol, and therefore it is unnecessary to allege how the weapon was used or intended to be used. The remaining question is whether it is sufficient to charge that the accused was armed with a dangerous weapon, to wit, a pistol, without other allegations to show in what way it was dangerous. We have no doubt that the indictment is sufficient in this respect." *Com. v. Cody*, 165 Mass. 133, *citing Com. v. Martin*, 17 Mass. 359; *Com. v. Gallagher*, 6 Met. (Mass.) 565; *Com. v. Mowry*, 11 Allen (Mass.) 20.

That Weapon Was Used in Striking and Wounding. — Under Gen. Stat. Mass., c. 160, § 22, an indictment sufficiently alleges a striking with a dangerous weapon which charges that the defendant being armed with a dangerous weapon "the said A., in and upon the face and head of the said A., then and there did strike and wound." It is not necessary to allege that the wounding or striking was done with the dangerous weapon. *Com. v. Mowry*, 11 Allen (Mass.) 20.

3. *Sledge v. State*, 99 Ga. 684; *Ward v. Com.*, 14 Bush (Ky.) 233; *State v. Patterson*, 42 La. Ann. 934; *Randolph v. Com.*, 6 S. & R. (Pa.) 398; *Hardy v. Com.*, 17 Gratt. (Va.) 592; *Houston v. Com.*, 87 Va. 257; *Rex v. Philipps*, 6 East 464. And see in general as to charging intent article INDICTMENTS, INFORMATIONS, AND COMPLAINTS, vol. 10, p. 491 *et seq.*

The Animus Furandi is as much involved in the commission of robbery as in the commission of larceny. It is as necessary to be alleged and proven in one case as in the other. *Sledge v. State*, 99 Ga. 684.

In England it has been held that an indictment for highway robbery must charge that the assault was feloniously made, with an offensive weapon. *Rex v. Pelfryman*, 2 Leach C. C. 563.

aver felonious intent; a failure to do so is fatal.¹

The Word "**Feloniously**" is generally used as descriptive of the intent with which the offense is committed,² but other phrases are sometimes prescribed by statute,³ as, for instance, "with intent to deprive the owner thereof."⁴

3. Description of Property.—The property taken must be described with such particularity that the defendant may know what he is accused of having stolen.⁵ Except in the case of money, however, a detailed description is unnecessary, provided a forcible taking from the person is sufficiently alleged, the gist of the offense being force or intimidation.⁶

1. *Chappell v. State*, 52 Ala. 359; *State v. Hollyway*, 41 Iowa 200; *State v. Durbin*, 20 La. Ann. 408; *State v. Cook*, 20 La. Ann. 145; *State v. Brown*, 104 Mo. 365; *Matthews v. State*, 4 Ohio St. 540; *Boose v. State*, 10 Ohio St. 575; *Morris v. State*, 13 Tex. App. 65.

Sufficiency of Averments of Intent.—An indictment which charges that the property was taken from the person and against the will of the owner, feloniously and violently, is sufficient as regards the averment of felonious intent. *State v. Cowan*, 7 Ired. L. (N. Car.) 239.

An indictment is sufficient, as to the averment of felonious intent, which charges that the accused made an assault on L., and with force and violence unlawfully and feloniously did steal, take, and carry away from the person of the said L. certain property. *State v. Kegan*, 62 Iowa 106.

Intent to Steal.—When it is alleged that the defendant feloniously did take and carry away certain property, a further averment that he stole the same is unnecessary. *State v. Brown*, 113 N. Car. 645.

In Texas, under Wilson's Code Cr. Proc., art. 428a, an averment that the defendant attempted to take certain property from the person robbed is equivalent to an allegation of intent to rob, and is sufficient. *Runnells v. State*, 34 Tex. Crim. 431.

Amendment.—The intent of a party charged with the commission of a crime is an essential averment in an indictment, and an indictment which fails to aver a felonious intent cannot be amended by inserting the word "feloniously." *State v. Durbin*, 20 La. Ann. 408.

2. *State v. Cook*, 20 La. Ann. 145. In this case, however, there is a dictum

to the effect that in *Louisiana* equivalent words may be used.

3. In Ohio, it was held in an early case, *Turner v. State*, 1 Ohio St. 422, that where an indictment for robbery alleged that certain property was actually stolen, an express averment of intent to steal was unnecessary. But at the present time, by statute, the felonious intent must be charged by use of the phrase "with intent to steal," or "with intent to rob," and other forms of averment are insufficient. *Boose v. State*, 10 Ohio St. 575; *Matthews v. State*, 4 Ohio St. 539.

4. *State v. Gill*, 21 Mont. 151.

Robbery in Dwelling-house.—The statutory offense of robbing a person in his dwelling-house partakes of the nature of both robbery and larceny, and the elements of both offenses must be alleged in indictment. An averment that the accused intended to deprive the owner of his property, and to convert it to his own use, is essential. *Ward v. Com.*, 14 Bush (Ky.) 233.

5. *Territory v. Bell*, 5 Mont. 565; *State v. Segermond*, 40 Kan. 107.

6. *Burke v. People*, 148 Ill. 70; *McQueen v. State*, 82 Ind. 72; *State v. Burke*, 73 N. Car. 83.

The Gist of the Offense of Robbery is force or intimidation, and the taking from the person of another against his will, a thing of value, belonging to him. This being so it is not necessary or material to describe accurately the particular identity or value of the property taken. But it must be shown that it was the property of the person assaulted, or in his possession, or in his care, and that it had some value. *Burke v. People*, 148 Ill. 70.

Where Several Articles Have Been Stolen.—An indictment which sufficiently describes a part of the property will be sustained on a motion in arrest

Same Description as in Larceny. — By the weight of authority it is not necessary to describe the property with any greater degree of exactness than in an indictment for larceny.¹

Description of Money. — In describing money greater accuracy of statement is generally required than in describing other kinds of property.² In most jurisdictions the aggregate amount of the money taken must be stated, but it is not necessary to give the number upon each bill or note.³ In charging the value of separate pieces of money, the word "denomination" should be used.⁴

Phrases Prescribed by Statute. — In some states certain technical words of description are prescribed by statute,⁵ but the require-

of judgment. *McQueen v. State*, 82 Ind. 72.

1. *Brennon v. State*, 25 Ind. 403; *Terry v. State*, 13 Ind. 70; *Turner v. State*, 1 Ohio St. 422; *Winston v. State*, 9 Tex. App. 143; *McEntee v. State*, 24 Wis. 43; *Reg. v. Sharp*, 2 Cox C. C. 181. See article LARCENY, vol. 12, p. 977 *et seq.*

Defective Description Waived. — An indictment which describes the property as "personal property, to-wit: money, jewelry, and hair ornaments," although imperfect, is sufficient to support a judgment of conviction of robbery, where no objection is taken thereto before judgment. Where an indictment is defective as regards the description of the property taken, but no demurrer is interposed to the indictment, and no objections to testimony upon the ground of the insufficiency of the indictment, the defect is waived. It is generally held that the description of the property taken in robbery is required to be equally specific with that required in larceny. *People v. Chuey Ying Git*, 100 Cal. 437.

2. *Croker v. State*, 47 Ala. 53; *Terry v. State*, 13 Ind. 70; *State v. Segermond*, 40 Kan. 107; *Reg. v. Sharp*, 2 Cox C. C. 181.

3. *Jackson v. State*, 69 Ala. 249; *State v. Gorham*, 55 N. H. 152; *McEntee v. State*, 24 Wis. 43.

Provided the substance of the offense is properly charged, an indictment for robbery of bank bills need not give the name of the bank or the denomination of the bills. *Quinlan v. People*, (Supm. Ct. Gen. T.) 6 Park. Crim. (N. Y.) 9. And see *People v. Loop*, (Supm. Ct. Gen. T.) 3 Park. Crim. (N. Y.) 559.

Reason for the Rule. — In *McQueen v. State*, 82 Ind. 72, Elliott, J., said: "It would be unreasonable to expect one

who is robbed of money, or its representative, to give an accurate description of it, and it would render it almost impossible to convict a thief or a robber, if courts should undertake to require the prosecutor in all cases to give a particular description of the money or note feloniously taken. The failure to give an exact description can never endanger the liberty of an innocent man, but the enforcement [of the opposite rule] would furnish the guilty with ready and easy means of escape."

Alternative Charges. — Where an indictment for robbery describes the property taken as "thirty dollars in greenbacks, national bank-notes, gold or silver coin," it must be construed as a charge of taking dollars of greenbacks, or national bank-notes, or gold or silver coin of the United States, and if the taking of any one of these things does not amount to robbery, the indictment is bad. *Wesley v. State*, 61 Ala. 282.

Use of Word "Personalty." — An information for robbery which describes the property taken as a specified amount of "lawful money of the United States" is sufficient. It need not further describe the property as personalty. *People v. Riley*, 75 Cal. 98.

"Money, Goods, and Chattels." — Where the indictment describes bank-notes as money, goods, and chattels, the latter words are surplusage. *Turner v. State*, 1 Ohio St. 422.

4. *Arnold v. State*, 52 Ind. 281.

5. **The Statutes of Indiana Provide** that in every indictment in which it is necessary to make an averment as to any money, or bank bills or notes, United States treasury notes, postal and fractional currency, or other bills or notes issued by any lawful authority, and intended to circulate as money, it shall be sufficient to describe such money,

ments in the various states differ so widely that a general classification is impossible.¹

Excuse for Defective Description. — Where an exact description of the property taken is unknown to the grand jury, this fact may be alleged in the indictment, and inaccuracy of description is generally held to be remedied by such an averment.²

Variance. — But when a particular description of the property is given, or where it is described as unknown to the grand jury, the proofs must support these allegations, and a variance is generally held to be fatal.³

ills, notes, or currency, simply as money without further specification. But under this statute it has been held that where an indictment described the property as "lawful money of the United States," it must be proved that the money was either coin or legal tender notes issued by the United States government. *Taylor v. State*, 130 Ind. 66.

In *Missouri* it is provided by statute that every indictment which makes any averment as to any sort of money or bank-notes shall be sufficient if it describes such money or notes simply as money without specifying any particular coin or note, etc. Under this statute an indictment which describes the property as "\$500 of the lawful money of the United States, of the value of \$500," has been held sufficient. *State v. Burnett*, 81 Mo. 119.

In *Washington*, § 1253 of the Code provides that in indictment for larceny or embezzlement of money, the coin, number, or denomination need not be alleged, a description of the property as "money" being sufficient; and it has been held that this provision of the code also applies to indictment for robbery. *State v. Johnson*, 19 Wash. 410.

In *Texas* the use of the word "money" as descriptive of the property taken is not prescribed by statute, but that word is generally used, and it has been held that an indictment which alleges the taking of a certain number of dollars in money is sufficient. *Colter v. State*, 37 Tex. Crim. 284; *Thompson v. State*, 35 Tex. Crim. 511.

1. For Descriptions Held to Be Sufficient see *Brown v. State*, (Ala. 1899) 25 So. Rep. 182; *People v. Riley*, 75 Cal. 98; *State v. Stewart*, (Del. 1898) 42 Atl. Rep. 624; *Terry v. State*, 13 Ind. 70; *State v. Carro*, 26 La. Ann. 377; *State v. Shonhausen*, 26 La. Ann. 421; *Com. v. Griffiths*, 126 Mass. 252; *State v. Rush*, 95 Mo. 199; *State v. Moore*, 66 Mo. 372;

Thompson v. State, 35 Tex. Crim. 511; *Colter v. State*, 37 Tex. Crim. 284; *State v. Jackson*, 26 W. Va. 250; *Moody v. State*, 1 W. Va. 337.

2. *Owens v. State*, 104 Ala. 18; *James v. State*, 115 Ala. 83; *State v. Stewart*, (Del. 1898) 42 Atl. Rep. 624; *McQueen v. State*, 82 Ind. 72; *Riggs v. State*, 104 Ind. 261; *Graves v. State*, 121 Ind. 357; *State v. Ready*, 44 Kan. 697; *Territory v. Bell*, 5 Mont. 565.

Where the indictment described the money taken as "thirty-five dollars lawful money of the United States, a more particular description of which is unknown to this affiant," and the proof showed that three ten-dollar bills and five dollars in silver were taken, it was held that there was no variance. *State v. Ready*, 44 Kan. 697.

An Indictment Is Fatally Defective which describes the property taken as "one currency note of the value and denomination of \$10, a further and more particular description of which is to the grand jury unknown." In such a case it is necessary to allege of what nation, country, or state the note was currency. *Winston v. State*, 9 Tex. App. 143.

3. *Brown v. State*, (Ala. 1899) 25 So. Rep. 182; *James v. State*, 115 Ala. 83; *Taylor v. State*, 130 Ind. 66; *People v. Jones*, 5 Lans. (N. Y.) 340; *Com. v. McManiman*, 15 Pa. Co. Ct. 495; *Harris v. State*, (Tex. Crim. 1895) 30 S. W. Rep. 221; *Coffelt v. State*, 27 Tex. App. 615.

The allegation that a more particular description is unknown to the grand jury, where such is the case, is a sufficient excuse. This is not, however, a mere formal allegation, for it has often been held that if it be shown that the particular description was known to the grand jury the indictment would be bad or that the judgment should be arrested. *Territory v. Bell*, 5 Mont. 565.

4. Ownership of Property. — As a General Rule it is necessary to charge the ownership of the property alleged to have been taken; ¹ but in some jurisdictions an erroneous allegation in this particular is held to be immaterial, as it is not, strictly speaking, of the gist of the offense. ²

Qualification of the Rule. — Where an indictment charged the taking of a certain sum of money in treasury notes and silver coin "a further description of which is to the grand jury unknown," and the averments as to the treasury notes were sufficiently specific to comply with the statute, it was held that the words quoted referred to the silver coins only, and that the state need not prove that a certain tear in one of the notes was a description unknown to the grand jury. *Brown v. State*, (Ala. 1899) 25 So. Rep. 182.

Contra. — Where the indictment describes the property as \$20 in paper money, current money of the United States, and the proof shows that it consisted of \$15 in paper currency of the United States, being one five-dollar bill and one ten-dollar bill, the variance is not material. *Harris v. State*, 34 Tex. Crim. 497.

Different Averments in Different Counts. — In an *Alabama* case the indictment averred that the defendants took "four one hundred dollar bills of the lawful currency of the United States of America, a further description of which is to the grand jury unknown." On the trial there was evidence tending to show that in point of fact their description was not unknown to the grand jury. It was held that there was a fatal variance between the allegations of the indictment and the proof, and that a conviction could not be had on the indictment. The difficulty might have been avoided by making proper averments in different counts of the indictment. *James v. State*, 115 Ala. 83.

1. *State v. Absence*, 4 Port. (Ala.) 397; *People v. Vice*, 21 Cal. 345; *People v. Ammerman*, 118 Cal. 23; *Com. v. Clifford*, 8 Cush. (Mass.) 215; *Reg. v. Rudick*, 8 C. & P. 237, 34 E. C. L. 368.

As to this averment in indictments for larceny, see article LARCENY, vol. 12, p. 946.

An indictment which charges that the property taken by the defendant was the corporeal personal property of one —, and within the legal custody and control of the party upon whom the assault was committed, is defective in

not giving the name of the person to whom the property belonged. An indictment for robbery must state correctly the ownership of the property. All the approved forms at common law set forth the ownership of the property as well as the name of the person from whom it is taken, and the *Texas* statute requires the same particularity. It should clearly appear from the indictment that the article taken belongs to some person other than the accused, or that the party deprived of the possession through violence is entitled to such possession, as against the defendant. *Smedley v. State*, 30 Tex. 215.

Ownership Should Be Laid in the Person Robbed, and an indictment which lays the ownership in a certain person, but alleges that the property was taken in the presence and against the will of another, is bad. *State v. Lawler*, 130 Mo. 366.

Averment Held to Be Sufficient. — Averments that the property was the personal property of a named person, and in his possession, and that it was taken from his person and against his will, are sufficient. *People v. Hicks*, 66 Cal. 103; *People v. Ah Sing*, 95 Cal. 654.

Ownership Not Essential — Tennessee. — In Tennessee it has been held, under Mill. & V. Code, § 5380, that the gist of the offense is violence and felonious intent, and that the ownership of the property need not be charged. *Clemmons v. State*, 92 Tenn. 282, citing *State v. Swafford*, 3 Lea (Tenn.) 162.

2. *People v. Anderson*, 80 Cal. 205; *State v. Carr*, 43 Iowa 418.

Variance Between Allegations and Proof. — Where ownership is laid in a certain person, the fact that a part of the property is proved to belong to another person is an immaterial variance. *People v. Clark*, 106 Cal. 32.

An averment that the property belonged to Isaac R. Randolph is supported by proof that it belonged to Isaac B. Randolph. The variance is not fatal. *Miller v. People*, 39 Ill. 457.

Variance Cured by Use of Word "Said." — A variance between the averments in different parts of the indictment as to

Some Person Other than Defendant. — It is not necessary to allege that the owner of the property and the person from whom it was taken are the same, the essential allegation being that the right of ownership is in some person other than the defendant.¹

Where Property Is Taken from a Bailee it may be described either as belonging to the bailee or to the actual owner,² or in one count as the property of the owner and in another as that of the bailee;³ and when ownership is laid in the bailee, the precise character of the bailment need not be alleged.⁴

5. From the Person. — An averment that the property in question was taken from the person of another was absolutely essential in an indictment for robbery at common law; and under statutes, also, its omission is generally held to be fatal.⁵

the ownership of the property is cured where reference is made to a former statement of the name by use of the word "said." *State v. Williams*, 11 Mo. App. 600.

Variance Cured by Amendment. — In *State v. Oliver*, 20 Mont. 318, the name of the person from whose possession the property was taken, as proved on the trial, differed from the name charged in the indictment. It was held that by virtue of the statute relating to amendment of pleadings, this variance might be remedied after the state had closed its evidence, by striking out the name given in the indictment and inserting in its place the name of the owner as proved on the trial.

1. *James v. State*, 53 Ala. 380; *People v. Vice*, 21 Cal. 345; *People v. Clark*, 106 Cal. 32; *Com. v. Clifford*, 8 Cush. (Mass.) 215; *State v. Nelson*, 11 Nev. 334; *Brooks v. People*, 49 N. Y. 436; *Barnes v. State*, 9 Tex. App. 128; *Reg. v. Rudick*, 8 C. & P. 237, 34 E. C. L. 368.

An indictment for robbery which does not allege that the property taken was the property of some person other than the defendant is fatally defective. *People v. Vice*, 21 Cal. 345. *Contra*, *State v. Dilley*, 15 Oregon 70.

2. *State v. Lawler*, 130 Mo. 366; *Brooks v. People*, 49 N. Y. 436; *Reg. v. Rudick*, 8 C. & P. 237, 34 E. C. L. 368.

3. *State v. Chapman*, 6 Nev. 320.

Compelling Election Between Different Counts. — Where the ownership is laid differently in different counts the defendant has no right to demand an election by the district attorney, or to insist upon a voluntary election previously made, unless in consequence of

reliance upon such election being adhered to he has done or omitted to do something by which he is prejudiced. *State v. Nelson*, 11 Nev. 334.

4. *People v. Shuler*, 28 Cal. 490; *State v. Ah Loi*, 5 Nev. 99; *State v. Gorham*, 55 N. H. 152.

5. *People v. Beck*, 21 Cal. 386; *Stegar v. State*, 39 Ga. 583; *Seymour v. State*, 15 Ind. 288; *State v. Leighton*, 56 Iowa 595; *Stevens v. State*, 19 Neb. 647; *Kit v. State*, 11 Humph. (Tenn.) 167; *Rex v. Rogan*, Jebb C. C. 62; *Smith's Case*, 2 East P. C. 783; *Rex v. Donnally*, 1 Leach C. C. 193.

Insufficient Allegations. — An indictment which merely states that the property was taken from another person is defective. It must state that the property was taken from the person of another. *People v. Beck*, 21 Cal. 386; *Stegar v. State*, 39 Ga. 583; *State v. Cook*, 20 La. Ann. 145.

A charge in an indictment for robbery that the defendant did with force, etc., steal, take, and carry away from another certain property, is not equivalent to charging that it was taken from his person, and is not sufficient. *State v. Leighton*, 56 Iowa 595.

From Person or Possession. — In *Texas* the statute defining robbery uses the alternative phrase "from the person or possession of another." Under this statute it is necessary to allege a taking from the possession as well as from the person, and it has been held that an indictment alleging that the property was taken from the person and "possession" of the prosecutor is fatally defective, since the word "possession" is not a valid substitute for the word "possession." *Evans v. State*, 34 Tex. Crim. 110.

In His Presence. — An allegation that property was taken "in the presence" of another is equivalent to the averment that it was taken "from his person," the two methods of taking being constructively the same. These forms of averment are alternative, and if the indictment charges a taking "from the person" it need not also charge a taking "in the presence."¹

The Word "Rob." — According to the rule in one jurisdiction the use of the word "rob" in the indictment implies a taking from the person, and renders its express averment unnecessary;² but in other jurisdictions it has frequently been held that it is not necessary to use the word "rob" in the indictment.³

6. Force and Intimidation. — Force and putting in fear are of the gist of the offense. It is essential that one of these elements be alleged in the indictment, and the better practice is to allege both.⁴

But in Kentucky, under Cr. Code, § 122, subd. 2, an indictment was held sufficient which alleged that the property was taken from an individual who at the time had it in his possession as agent; and that it was taken from him by force and intimidation. *Breckinridge v. Com.*, 97 Ky. 267.

1. *Croker v. State*, 47 Ala. 53; *James v. State*, 53 Ala. 380; *Clary v. State*, 33 Ark. 561; *People v. Ah Sing*, 95 Cal. 654; *Crews v. State*, 3 Coldw. (Tenn.) 350; *People v. Kerm*, 8 Utah 268.

When Charged Conjunctively. — The averment that the taking of the money and whiskey was from the person and presence of the party robbed is not the inclusion of two separate offenses conjunctively in the same count. Property taken in the presence of the owner, under circumstances constituting robbery, is taken from his person. *Croker v. State*, 47 Ala. 53; *State v. Montgomery*, 109 Mo. 645.

Disjunctive Form. — An indictment which alleges that the property was taken from the person or in the presence of A. B. is bad. To allege the taking in this disjunctive form is really not to allege it in either manner. Where both methods of committing the crime are to be alleged in the indictment they should be alleged in the conjunctive form. *Slover v. Territory*, 5 Okla. 506.

Variance Immaterial After Verdict. — Where the indictment alleges a taking from the presence of the person robbed, but the proof shows that the property was taken from his possession, the variance is immaterial after verdict, and after the defendant has twice gone to

trial without objection, under the pleas of not guilty and former acquittal. *People v. Kerm*, 8 Utah 268.

2. The Language of the Criminal Code of Pennsylvania in prescribing the punishment for robbery is, "If any person shall rob another, or shall steal any property from the person of another, etc." Under this statute it is not necessary that all the circumstances which enter into the definition of robbery at common law should be particularly averred in the indictment. The use of the word "rob" in the indictment implies that the property was taken from the person of its owner, and makes an express averment to that effect unnecessary. *Acker v. Com.*, 94 Pa. St. 284.

3. *State v. Ready*, 44 Kan. 697; *State v. Cook*, 20 La. Ann. 145; *State v. Robinson*, 29 La. Ann. 364.

When Omission Is Not Fatal. — Where the facts, as charged in the indictment, constitute the crime of robbery, the mere omission of the word "rob" will not invalidate the indictment. *State v. Robinson*, 29 La. Ann. 364.

Perhaps Necessary in Massachusetts. — In *Com. v. Clifford*, 8 Cush. (Mass.) 215, there is a dictum to the effect that the word "rob" is essential in an indictment under Rev. Stat., c. 125, § 15.

4. *People v. Riley*, 75 Cal. 98; *Collins v. People*, 39 Ill. 233; *State v. Cook*, 20 La. Ann. 145; *Kit v. State*, 11 Humph. (Tenn.) 167; *Parker v. State*, 9 Tex. App. 351; *M'Daniel's Case*, *Foster* 128; *Rex v. Donnelly*, 1 Leach C. C. 193.

With Force and Arms. — An omission to allege that the robbery was committed by violence or intimidation is

Alternative Averments. — Under statutes, force and putting in fear are, in many states, considered alternative charges, and the averment of one renders the allegation of the other unnecessary.¹

not cured by the use of the words "with force and arms." *Com. v. Mills*, 3 Pa. Super. Ct. 161.

Description of the Intimidation. — In *Montana* the precise kind of fear in which the person robbed was put need not be described. *State v. Clancy*, 20 Mont. 498; *State v. Gill*, 21 Mont. 151.

But in *Oklahoma* an indictment for robbery in the first degree must allege that he was put in fear of immediate personal injury, and must allege facts showing what the injury threatened was, and that the danger was immediate. *Slover v. Territory*, 5 Okla. 506.

In *Kansas* an indictment for Robbery in the Second Degree should charge that the property was delivered or suffered to be taken through fear of some injury threatened to be inflicted at some time different from that of the robbery. An indictment, therefore, which alleges that the defendant obtained the property by threats of injury to be inflicted at divers times prior to and at the time when the property was taken, does not properly charge robbery in the second degree, although as an indictment for the first degree of the offense it might be sufficient. *State v. Stoffel*, 48 Kan. 364.

In *Missouri* the statute defining the offense (*Wayn Stat.* 456, § 20; *Rev. Stat.*, § 3530) uses the phrase, "by putting him in fear of some immediate injury to his person." Under this statute it was held in *State v. Davidson*, 38 Mo. 374, that an indictment alleging that the property was taken from the person robbed "by putting him in fear of some great bodily harm" was sufficient. But in the subsequent case of *State v. Howerton*, 59 Mo. 91, a similar allegation, to wit, that the victim was put "in bodily fear and danger of his life" was held to be insufficient.

And in *State v. Smith*, 119 Mo. 439, the allegation "in fear of immediate injury" was held to be fatally defective.

In *State v. Brown*, 104 Mo. 365, it was held that where the assault is charged to have been made feloniously, it need not be further alleged that the putting in fear was done feloniously.

Property Obtained by Means of Force or Intimidation. — Where it is alleged that the person robbed was violently as-

saulted and put in fear, an objection that the indictment does not allege directly that the property was obtained by means of the violence or intimidation is frivolous and will not be sustained. *Burns v. State*, 12 Tex. App. 269; *State v. Cowan*, 7 Ired. L. (N. Car.) 239; *Anderson v. State*, 28 Ind. 22.

By Reference to Prior Allegation. — An indictment which alleges an assault on the person robbed, and that by said assault and by violence the defendant fraudulently obtained certain property, and which further alleges, without repeating the averments as to assault and violence, that the defendant also did then and there fraudulently and without the consent of the person robbed take from his person certain other property, sufficiently charges that the last named property was also obtained by assault and violence. *Wiley v. State*, (Tex. Crim. 1898) 43 S. W. Rep. 995.

Against Whom the Violence Was Used. — The averments as to the person who was assaulted or put in fear must be sufficiently certain to inform the defendant whom he is accused of having robbed. An indictment which does not, except by inference, allege who was assaulted or put in fear, or upon whom violence was used, is fatally defective. *Parker v. State*, 9 Tex. App. 351.

1. *Alabama.* — *Chappell v. State*, 52 Ala. 359.

Arkansas. — *Clary v. State*, 33 Ark. 561; *Young v. State*, 50 Ark. 501.

Iowa. — *State v. Brewer*, 53 Iowa 735.

Louisiana. — *State v. Durbin*, 20 La. Ann. 408; *State v. Patterson*, 42 La. Ann. 934.

Massachusetts. — *Com. v. Humphries*, 7 Mass. 242.

Missouri. — *State v. Stinson*, 124 Mo. 447; *State v. Lawler*, 130 Mo. 366.

Montana. — *State v. Clancy*, 20 Mont. 498.

North Carolina. — *State v. Cowan*, 7 Ired. L. (N. Car.) 239.

Tennessee. — *Hammond v. State*, 3 Coldw. (Tenn.) 129.

England. — *Rex v. Pelfryman*, 2 Leach C. C. 563.

Under the Texas Code the taking of the property must either be by assault,

The Words "Violent" and "Violently" are generally used in describing the manner in which the offense was committed, but other words of the same meaning may be employed.¹

7. Against His Will. — Both at common law and under statutes it is necessary to allege that the property was taken against the will of the person robbed.² The use of the particular phrase "against his will" is not always essential, however, analogous expressions sometimes being held sufficient, and it is generally held that an averment of force or intimidation implies that the property was taken against the will of the person robbed, and renders an express averment to that effect unnecessary.³

or by violence and putting in fear of life and bodily injury. This being the provision of the statute, it follows that an indictment which charges the taking by assault need not allege that the person assaulted was put in fear. On the other hand, when the charge in the indictment is based on the other clause or phrase, the indictment must allege that the taking was by violence and putting in fear. The case of *Wilson v. State*, 3 Tex. App. 63, which holds differently, was decided under an earlier statute, and the decision in that case is no longer the law. *Williams v. State*, 12 Tex. App. 240; *Kimble v. State*, 12 Tex. App. 420.

Proved as Laid. — If the indictment charges a putting in fear, the same must be proved upon the trial. *Glass v. Com.*, 6 Bush (Ky.) 436.

1. *State v. Brewer*, 53 Iowa 735; *State v. Kegan*, 62 Iowa 106; *Com. v. Mowry*, 11 Allen (Mass.) 20; *State v. Brown*, 113 N. Car. 645; *Smith's Case*, 2 East P. C. 784.

In an indictment for robbery the word "violently" is equivalent to the word "forcibly." *McTigue v. State*, 4 Baxt. (Tenn.) 313.

In Louisiana the use of the word "violently" is essential. *State v. Durbin*, 20 La. Ann. 408.

Sufficient Allegation. — Where an indictment charged that the defendant "did make an assault," and "put in bodily fear and danger of his life," and "then and there feloniously and violently did seize, take, and carry away, etc.," it was held that force was sufficiently alleged; indeed, the words "feloniously and violently" were of themselves sufficient. *State v. Brown*, 113 N. Car. 645, citing *State v. Cowan*, 7 Ired. L. (N. Car.) 239.

In England. — The word "violently" need not be used, provided it clearly

appears from the other averments of the indictment that violence was used. *Smith's Case*, 2 East P. C. 784. And under the statute 7 & 8 Geo. IV., c. 29, § 6, it has been decided that an indictment alleging that the defendant robbed A. of certain chattels mentioned need not allege that he did it with violence; the word "rob" necessarily importing force and violence. *Lennox's Case*, 2 Lewin C. C. 268.

2. *Chappell v. State*, 52 Ala. 359; *Kit v. State*, 11 Humph. (Tenn.) 167; *State v. Patterson*, 42 La. Ann. 934.

Illustration of the Rule. — An indictment alleged that the defendant made an assault on one Williams, and put him in fear of his life, and did steal, take, and carry away unlawfully and feloniously the money of said Williams. This indictment was held to be bad, as it did not state that the money was taken from the person of Williams and against his will, which is an essential averment in an indictment for robbery. *Kit v. State*, 11 Humph. (Tenn.) 167.

Where Ownership Is Laid in Two Persons. — Where ownership is laid in the person robbed and another, and it is alleged that the property was taken without the consent of either owner, proof that the robbery was committed against the will of the person robbed is sufficient to support the indictment, without evidence that it was against the will of the other owner. *Stewart v. State*, (Tex. Crim. 1895) 31 S. W. Rep. 407.

3. *People v. Riley*, 75 Cal. 98; *State v. Kegan*, 62 Iowa 106; *State v. Patterson*, 42 La. Ann. 934; *State v. Durbin*, 20 La. Ann. 408. But see *Kit v. State*, 11 Humph. (Tenn.) 167.

Implied by Allegation of Violence. — An indictment charging that the accused did wilfully and feloniously, by force and violence, rob, etc., is sufficient

Where the Property Is Stolen from a Bailee it is not necessary to allege that it was taken against the will of its owner.¹

8. Value of Property. — At Common Law the authorities differ as to whether any allegation of value is required. It is generally held necessary to allege that the property had some value, but particularity of statement in this respect is not essential.²

without the additional words "against his will." While it is true that an indictment for robbery must state upon its face that the goods were stolen against the will of the party assaulted, yet it seems that it may be good without the use of those specific words, if the words used convey the same meaning. The averment in an indictment that the goods were taken by force and violence necessarily implies that they were stolen against his will, and makes the use of those particular words unnecessary. *State v. Patterson*, 42 La. Ann. 934. *Citing State v. Durbin*, 20 La. Ann. 408.

Equivalent Expression. — In an *Alabama* case the indictment contained two counts. The first count was deficient, as it did not aver felonious intent. The second count followed the form prescribed by the code, except that it did not contain the expression "and against his will, by violence to his person." In his opinion, Manning, J., said: "The words 'against his will' were held essential at common law, and are retained in the statutory form of the indictment. [But the code allows alternative statements, the form prescribed being as follows:] 'A. B. feloniously took a gold watch, the property of C. D., from his person and against his will, by violence to his person, or by putting him in such fear as unwillingly to part with the same.' [Two modes are here stated:] one 'against his will, by violence to his person,' the other 'by putting him in such fear as [to cause him] unwillingly to part with the same.' In the former case it is against his will and by violence; in the latter case his will consents, but only because it is subdued and constrained by fear. A charge that the crime was done in either of these modes is sufficient. The second count is therefore a good one," and the indictment was held sufficient. *Chappell v. State*, 52 Ala. 359.

In Indiana. — Where an indictment alleged that the accused made an assault on one Eli Hoff, and did then and there unlawfully, forcibly, and

feloniously take from the person of the said Eli Hoff personal property belonging to him by violence, and by putting him in fear, it was held sufficient without alleging that the taking was against the will of the person robbed. *Terry v. State*, 13 Ind. 70; *Anderson v. State*, 28 Ind. 22.

1. *People v. Shuler*, 28 Cal. 490; *Anderson v. State*, 28 Ind. 22; *Terry v. State*, 13 Ind. 70.

Objection Bad in Arrest of Judgment. — An indictment alleged that the money taken was the property of Mrs. Ann Motley, and was taken from her daughter, Miss Virginia Motley, without the consent of said Virginia. A motion in arrest of judgment was made on the ground that there was no allegation that the money was taken without the consent of Mrs. Ann Motley, the alleged owner. The court said: "This might have been a good objection to the bill of indictment on special demurrer, but we are not prepared to say it is good in arrest of judgment." *Stegar v. State*, 39 Ga. 583.

2. *Jackson v. State*, 69 Ala. 249; *State v. Perley*, 86 Me. 427; *State v. McCune*, 5 R. I. 60.

At Common Law, and Under Maine Statute. — In *State v. Perley*, 86 Me. 427, the objection to the indictment was that it contained no allegation that the property taken had any value. In his opinion Whitehouse, J., said in substance: "If the value of the property is not a necessary ingredient of the offense sought to be charged, and not legally essential to the punishment to be inflicted, an allegation of it is useless, and is properly omitted. There is nothing in the nature of robbery, as defined at common law, from which it appears that the value of the property has ever been deemed of the essence of the crime. The value of the property is therefore immaterial, and need not be alleged in the indictment at common law. The jury, however, must be satisfied that the goods were of some value, and they may infer it from inspection of the article, or from the testimony of the witnesses. The

By Statute. — In framing indictments under the various statutes it is not necessary to state the value of the property,¹ unless the degree of the crime for which the accused may be indicted depends thereon.²

9. Time. — The indictment should state the time of the robbery

statutes of Maine do not make the amount of property taken an essential element of the offense, nor do they divide the crime into degrees, or in any way make the punishment of the offense dependent upon the value of the property taken." It was held, therefore, that the value of the property need not be charged either at common law or under the Maine statute. *Citing State v. McCune*, 5 R. I. 60.

Aggregate Value of Property. — The common-law form of indictment for robbery contains a distinct averment of the value of the goods taken. The form prescribed by the *Alabama* code follows the common-law form in this respect, and requires an express allegation of the value of the property. Without such an averment an indictment for the offense is not sufficient. Where an indictment charged that the "defendant feloniously took one valise containing clothing of the value of twenty dollars," it was construed to mean that the aggregate value of the valise and the clothes was twenty dollars, and was held a sufficient averment of value. Where several articles are taken, the indictment is sufficient if it alleges the aggregate value of the property, but it is better practice to allege the value of each article separately. *Jackson v. State*, 69 Ala. 249.

Averments Less Specific than in Larceny. — The fact that the averments of value in an indictment for robbery are not sufficiently specific to support a conviction for larceny does not vitiate the indictment. *Baldin v. Com.*, 2 Ky. L. Rep. 439.

1. *People v. Townsley*, 39 Cal. 405; *People v. Chuey Ying Git*, 100 Cal. 437; *Buntin v. State*, 68 Ind. 38; *State v. Howerton*, 58 Mo. 581; *People v. Loop*, (Supm. Ct. Gen. T.) 3 Park Crim. (N. Y.) 559; *Rex v. Bingley*, 5 C. & P. 602, 24 E. C. L. 474.

Phrase "Goods and Chattels." — In a case where the indictment charged an assault with intent to rob, it was objected that it did not state the value of the goods which the accused attempted

to take. Worden, J., in delivering the opinion of the court, said that if the charge had been for the commission of robbery instead of assault with intent to rob, it would seem that the property should have been more particularly described; but since it seemed that the words "goods and chattels" used in their ordinary meaning imported of themselves articles of value, and articles which had no value at all could hardly be called goods and chattels, therefore, as the indictment in question charged the taking of goods and chattels, value was implied, and the indictment was sufficient. *Buntin v. State*, 68 Ind. 38.

In *California*, robbery and grand larceny, when the property is taken from the person of another, or when the property taken is a horse, etc., do not depend upon the value of the property taken (Pen. Code, § 487), hence in such cases it is unnecessary to specify the value of the property taken. *People v. Chuey Ying Git*, 100 Cal. 437.

Under the Texas Statute. — Where an indictment for robbery charged the taking of a sheep, but contained no allegation as to the value of the animal, it was held that it embraced all the elements of the Texas Penal Code, which does not mention the value of the property taken, and was therefore sufficient. It mentioned an animal of known value, and sufficiently apprised the accused, in plain language, of what he had to meet on the trial. This is all that is required. *Williams v. State*, 10 Tex. App. 8.

Money the Measure of Value. — In an indictment for robbery the value or description of the article taken is not material, as the gist of the offense is force or fear. But where the indictment charges the taking of "ten dollars in money," this is in fact an allegation that the value of the property was ten dollars, since money is the measure of value. *McCarty v. State*, 127 Ind. 223. And see also *State v. Brown*, 113 N. Car. 645; *Williams v. State*, 34 Tex. Crim. 523.

2. *Burke v. People*, 148 Ill. 70.

as accurately as possible, but absolute precision of statement is not required.¹

10. Place.—The place where the offense was committed is important for the purpose of determining the jurisdiction of the court. For this reason it should be charged in the indictment.²

Highway Robbery.—In that branch of the crime known as highway robbery the place is of great importance, and it should be expressly charged.³

11. Joinder of Counts and Offenses.—Different Degrees of the offense may be charged in the same count.⁴

1. See generally, as to laying time in indictments, article INDICTMENTS, INFORMATIONS, AND COMPLAINTS, vol. 10, p. 511.

An Indictment Sufficient in Other Respects is not vitiated by a failure to charge the time when the offense was committed. *State v. Wilcoxon*, 38 Mo. 370.

Mere Clerical Error Disregarded.—Where an indictment found in May, 1883, alleged that the robbery was committed in December, 1883, this was held to be a mere clerical error, which would be disregarded. *State v. Burnett*, 87 Mo. 119.

Within Statute of Limitations.—The rule is well settled that it is not requisite that the precise time of the commission of the offense should be stated in the indictment. It is sufficient if shown to have been within the statute of limitations. *State v. Barnett*, 3 Kan. 250.

Then and There Stolen.—Where an assault is alleged to have been made at a given time, and it is further alleged that by means of said assault the defendant feloniously stole and carried away property which was then and there in the possession of the prosecutor, with the intent then and there to deprive the latter thereof, the averment as to time is sufficient. *State v. Gill*, 21 Mont. 151.

In Highway Robbery the time when the offense was committed is important, and although it need not be proven strictly as laid in the indictment, still, if there was no statute prescribing a penalty for the offense at the time when it is alleged to have been committed, the indictment must be set aside. *People v. Williams*, 1 Idaho 85.

2. *Clary v. State*, 33 Ark. 561; *Sweat v. State*, 90 Ga. 315. And see article INDICTMENTS, INFORMATIONS, AND COMPLAINTS, vol. 10, p. 520.

3. *Buntin v. State*, 68 Ind. 38; *State v. Cowan*, 7 Ired. L. (N. Car.) 239; *State v. Wilson*, 67 N. Car. 456.

In or Near the Highway.—An indictment for highway robbery may charge the crime either as committed in the highway, or as committed near the highway. The ancient English form charging the crime as committed in or near the highway was lacking as to the element of certainty, but was tolerated upon usage. *State v. Anthony*, 7 Ired. L. (N. Car.) 234.

Description of Highway.—An indictment which alleges that the robbery was committed in the public highway is sufficient without further stating to what points the highway led. *State v. Burke*, 73 N. Car. 83.

Averment Held to Be Sufficient.—In an indictment for highway robbery the averment as to place was as follows: "That W. W., late of the county of Yancey, at and in the county aforesaid, in the common highway of the state, did then and there assault, etc., and did then and there steal, take, and carry away, etc." It was held that there was sufficient certainty of averment to apprise the prisoner of the place where the offense was alleged to have been committed, and that the indictment was good. *State v. Wilson*, 67 N. Car. 456.

Proved as Laid.—If the indictment states that the robbery was committed in the highway, evidence cannot be introduced that it was near the highway. *State v. Cowan*, 7 Ired. L. (N. Car.) 239.

4. *Lampkin v. State*, 87 Ga. 516; *Long v. State*, 12 Ga. 293; *State v. Cook*, 20 La. Ann. 145; *State v. Gorham*, 55 N. H. 152. See for general treatment of this subject, article INDICTMENTS, INFORMATIONS, AND COMPLAINTS, vol. 10, p. 540.

When Robbery May Be Committed by Several Methods the indictment may

Several Persons May Be Jointly Indicted for the crime; and where they are all charged as principals, and one of the number is found guilty, judgment will not be arrested on the ground that the indictment does not allege a conspiracy between them to commit the offense.¹

Felonious Acts Affecting Several Parties may be charged in the same count where all the acts taken together constitute one transaction. Thus the accused may be charged with having assaulted several persons and robbed them of different articles.²

Joinder of Offenses. — Counts for robbery may be joined in the same indictment with counts for larceny,³ or stealing from the person;⁴ but not with counts for cheating and swindling,⁵ or assault with intent to murder;⁶ nor can robbery and assault and battery be charged in the same indictment in a jurisdiction where the former offense is a felony, and the latter a misdemeanor.⁷

III. INSTRUCTIONS. — The Jury May Be Instructed as to what constitutes a taking from the person;⁸ as to what is a material variance;⁹ as to the propriety of a conviction for larceny on an

charge that it was committed by all, provided the different methods are not inconsistent with or repugnant to each other. *State v. Montgomery*, 109 Mo. 645.

1. *Bell v. State*, 1 Tex. App. 598.

In England. — Where several are indicted for robbery it is not necessary to aver that they were together, but where only one of the party is indicted it must be alleged that he committed the offense together with others. *Rex v. Rafferty*, 2 Lewin C. C. 271.

2. *Clark v. State*, 28 Tex. App. 189; *Gregg v. State*, (Tex. App. 1889) 12 S. W. Rep. 732; *Reg. v. Giddins*, C. & M. 634, 41 E. C. L. 344.

Or Several Prosecutions May Be Had. — Where one unlawful act operates on several different objects, as where several different persons are robbed in a railway train, there may be several indictments and trials, and one is not a bar to the others. *In re Allison*, 13 Colo. 525; *Keeton v. Com.*, 92 Ky. 522.

3. *Damewood v. State*, 1 How. (Miss.) 262.

4. *McTigue v. State*, 4 Baxt. (Tenn.) 313. *Contra*, *Doyle v. State*, 77 Ga. 513.

5. *Doyle v. State*, 77 Ga. 513.

6. *State v. Osborne*, 96 Iowa 281.

Qualification of the Rule. — An indictment joining counts for robbery with counts for assault with intent to murder would be bad for duplicity, but this is not the case where the indictment alleges that the accused, being then and there armed with a danger-

ous weapon, with felonious intent then and there to kill and maim A. if said A. should resist him, did wilfully and unlawfully assault and rob said A. of his property. The averments of intent to kill and maim do not, in such a case, amount to a distinct charge of assault with intent to murder, but may be considered as descriptive of the manner in which the robbery was committed, and treated as harmless surplusage. *State v. Osborne*, 96 Iowa 281.

In *State v. Callahan*, 96 Iowa 304, the indictment alleged that the defendant, being armed, made an assault upon a certain person with intent, if resisted, to kill; and also that the defendant put said person in fear of his life, and robbed him of certain property. It was held that the indictment sufficiently charged robbery, and that the additional averment of assault did not render it bad for duplicity.

In Ohio it has been held that an indictment which, in a single count, charges robbery, and also murder in the commission of the offense, is not bad for duplicity. *Jackson v. State*, 39 Ohio St. 37.

7. *Davis v. State*, 57 Ga. 66.

8. *Clements v. State*, 84 Ga. 660.

9. Proof of Ownership. — A refusal to charge that it is a fatal variance, if the evidence does not show that all the property stolen belongs to the person named as owner in the indictment, is not error. *People v. Clark*, 106 Cal. 32.

indictment for robbery; ¹ concerning the burden of proof on the trial; ² and concerning the relative value of positive and circumstantial evidence. ³

Erroneous Instructions. — When the indictment charges robbery in a certain degree or by a certain method, instructions have been held erroneous which assume that the jury may properly find the accused guilty of a different degree of the offense, or of having committed it in a different manner. ⁴ And instructions upon the weight of the evidence, or which invade the province of the jury, should also be avoided. ⁵

Name of the Prosecutor. — In *State v. Carr*, 43 Iowa 418, the indictment charged that the accused made an assault on one John Shattick, and put said John Shattick, in bodily fear, and fifty-five dollars, the property of the said John Shattick, from the person and against the will of the said John Kopeck then and there feloniously did steal. An instruction that the mistake in the name of the prosecutor was immaterial, unless the jury found that the defendant had been misled thereby, was held to be correct.

Under California Pen. Code, § 956, a charge that it is not necessary, in order to find the accused guilty as charged in the indictment, to prove that the articles stolen were the property of the person named in the indictment as owner, has been held proper. *People v. Anderson*, 80 Cal. 205.

1. A refusal to charge that the accused may be convicted of larceny under an indictment for robbery is error. *Com. v. Prewitt*, 82 Ky. 240; *State v. Kegan*, 62 Iowa 106. But see *Farrell v. Com.*, 3 Ky. L. Rep. 474.

Where an instruction contains statements in regard to both robbery and larceny the fact that the statements concerning the larceny are incorrect is immaterial, provided those concerning robbery are correct. *People v. Riley*, 65 Cal. 107.

An Instruction to Find the Defendant Guilty or Not Guilty is not erroneous, as excluding a conviction of petit larceny, when the evidence shows that if guilty at all he was guilty of robbery. *People v. O'Brien*, 88 Cal. 483. And in such a case it is not error to refuse to give an instruction as to petit larceny. *State v. Whalen*, 148 Mo. 286.

2. An instruction that if the jury can reasonably account for or explain the facts and circumstances in evidence in any way consistently with defendant's

innocence, without resorting to unreasonable doubts and theories, then they should do so and acquit, otherwise they must convict, has been held to be defective. *Robertson v. State*, 10 Tex. App. 602.

Burden of Proving an Alibi. — Where the jury have been instructed that the burden of proving every essential element of the crime rests on the commonwealth, it is not error to add that the burden of proving an alibi rests on the defendant. *Thompson v. Com.*, 88 Va. 45.

And where the court has already charged the jury on the subject of reasonable doubt in general, it is not error to refuse a further instruction directing them to acquit the accused if they have a reasonable doubt whether or not he was at or about the place when the robbery was committed. *Gibbs v. State*, 1 Tex. App. 12.

3. An instruction that if the jury believe from circumstantial evidence that a crime has been committed it is as much their duty to convict as if it is proved by positive evidence, has been held to be correct. *Barnard v. State*, 88 Ala. 111.

4. Violence or Intimidation. — Under an indictment charging robbery, by putting the person robbed in fear, a charge directing the jury to find the defendant guilty, if the robbery was committed by force and violence, is erroneous. *State v. Crowell*, 149 Mo. 391.

Where an Indictment Charges Robbery in the First Degree an instruction is erroneous which assumes that the jury may properly find the accused guilty of the second or third degree of the crime. *State v. Davidson*, 38 Mo. 374.

5. Possession of Stolen Property. — The jury should not be instructed that the possession of stolen property by the defendant when unexplained or not satis-

Questions for the Jury. — The presence or absence of felonious intent is generally considered a question for the jury.¹ It is also for the jury to determine whether or not an instrument which the accused carried in his hands, and which he used to bind the person robbed, was a dangerous weapon, as charged in the indictment.²

IV. VERDICT, JUDGMENT, AND SENTENCE. — It is very generally held that a conviction of larceny may be had upon an indictment for robbery,³ and in some states such an indictment will support a conviction of assault and battery,⁴ or of the statutory crime of "larceny from the person."⁵

factorily accounted for tends strongly to establish the guilt of said defendant. Whether the possession was strong or slight evidence is a matter for the jury to pass upon, and not for the court to determine. *State v. Sullivan*, 9 Mont. 174; *State v. Sowls*, Phil. L. (N. Car.) 151.

Instruction to Find for the People. — Where a first information is defective for a failure to allege the ownership of the property, it is not an invasion of the province of the jury, in a trial on a second information, to instruct them to find for the people on the issue of former jeopardy, and acquittal. *People v. Ammerman*, 118 Cal. 23; *Higgins v. State*, (Tex. App. 1892) 19 S. W. Rep. 503.

1. *People v. Woody*, 48 Cal. 80; *State v. Hollyway*, 41 Iowa 200; *State v. Sowls*, Phil. L. (N. Car.) 151.

2. *State v. Calhoun*, 72 Iowa 432.

3. *Alabama*. — *Allen v. State*, 58 Ala. 98.

Arkansas. — *Haley v. State*, 49 Ark. 147.

California. — *People v. Nelson*, 56 Cal. 77; *People v. Chuey Ying Git*, 100 Cal. 437; *People v. Jones*, 53 Cal. 58.

Illinois. — *Burke v. People*, 148 Ill. 70.

Kansas. — *State v. Pickering*, 57 Kan. 326.

Kentucky. — *Com. v. Prewitt*, 82 Ky. 240.

Missouri. — *State v. Keeland*, 90 Mo. 337; *State v. Jenkins*, 36 Mo. 373.

Nebraska. — *Stevens v. State*, 19 Neb. 647.

New York. — *People v. Kennedy*, 57 Hun (N. Y.) 532.

Tennessee. — *Defrese v. State*, 3 Heisk. (Tenn.) 58; *Tucker v. State*, 3 Heisk. (Tenn.) 484; *McTigue v. State*, 4 Baxt. (Tenn.) 313.

Wisconsin. — *McEntee v. State*, 24 Wis. 43.

Defective Indictment. — The accused cannot be convicted of larceny on an indictment for robbery which is defective. *Clary v. State*, 33 Ark. 561.

Double Prosecution. — Larceny is included in robbery and the state may prosecute for either, but if it prosecutes for larceny it cannot also prosecute for robbery. *Hickey v. State*, 23 Ind. 21.

Result of an Acquittal. — Under an indictment for robbery when the defendant may be convicted of larceny, an acquittal of robbery works also an acquittal of larceny. *People v. M'Gowan*, 17 Wend. (N. Y.) 386.

Error — New Trial. — Robbery does not necessarily include grand larceny, and it is error for the court to sentence a man for larceny, and refuse a new trial, where the evidence does not support the charge of robbery, and the jury have not considered the question of larceny. *State v. Howard*, 19 Kan. 507.

Receiving Stolen Property. — An indictment consisted of three counts charging respectively robbery, larceny, and receiving stolen property. The jury found the defendant guilty of each one of the three offenses. This was held to be erroneous, since a person cannot be convicted both of robbery, and of receiving the property obtained by robbery, when only one transaction is involved. *Tobin v. People*, 104 Ill. 565.

4. *Murphy v. People*, 5 Thomp. & C. (N. Y.) 302; *Howard v. State*, 25 Ohio St. 399; *Hardy v. Com.*, 17 Gratt. (Va.) 592.

An Acquittal of the Offense of Robbery works also an acquittal of assault, the latter offense being included in the former. *Fox v. State*, 50 Ark. 528.

5. *People v. Calvin*, 60 Mich. 113; *Brown v. State*, 33 Neb. 354; *Murphy v. People*, 5 Thomp. & C. (N. Y.) 302.

The Value of the Property taken need not be stated in the verdict.¹

General Verdict of Guilty. — Whether a general verdict of guilty, without specifying the degree of the offense, is sufficient, depends upon the practice of the particular state in which the prosecution is had.² As in other offenses, so in robbery, one good count in the indictment will support a general verdict of guilty.³

Contra, Tucker v. State, 3 Heisk. (Tenn.) 484; McTigue v. State, 4 Baxt. (Tenn.) 313.

1: Burke v. People, 148 Ill. 70; State v. Howerton, 58 Mo. 581.

In State v. Howerton, 58 Mo. 581, Wagner, J., said: "It is complained that the jury did not find, in their verdict, the value of the property. But this was not necessary. The charge was the taking of the mules, harness and wagon, and the value was proved upon the trial. The jury found the defendant guilty of taking the property in the manner charged in the indictment, and that was sufficient. The degrees of robbery are not based upon value, and the value of the thing taken is not of the essence of the offense. The putting in fear and taking the property constitute the gist of the crime, and there is no necessity for either charging in the indictment or proving at the trial or specifying in the verdict the value of the property."

2. In Georgia. — Where different degrees are charged in the same count the jury may find the accused guilty generally, and in that event the penalty for the highest degree will be inflicted; or they may find him guilty of a lower grade, in which case the lesser sentence will be imposed. Long v. State, 12 Ga. 293.

In Missouri a person indicted for robbery in one degree cannot be convicted of another degree of the offense; and a verdict of guilty in a lower degree works an acquittal of the higher degrees. State v. Jenkins, 36 Mo. 372; State v. Farrar, 38 Mo. 457. Thus where an indictment for robbery in the first degree contained all the averments necessary in an indictment for grand larceny, it was held that the accused might have been convicted either of robbery or grand larceny, but since he was found guilty of neither of these offenses, but of an entirely different crime, to wit, robbery in the second degree, the verdict operated as an acquittal both of robbery in the first degree and of larceny, and he could not subsequently be tried for either offense. State v. Brannon, 55 Mo. 65.

In Texas. — Where an indictment contains two counts, and the penalty prescribed for each count is different, a verdict which finds the defendant "guilty as alleged" and assesses a punishment applicable to either count is sufficient, although it does not find the manner in which the offense was committed. Gamble v. State, (Tex. Crim. 1899) 50 S. W. Rep. 458.

3. Owens v. State, 104 Ala. 18; State v. Scott, 39 Mo. 424; Hope v. People, 83 N. Y. 419.

RULE.

As to *Rule as an Order*, see article *ORDERS*, vol. 15, p. 315.

Rule to Plead, see articles *DEFAULTS*, vol. 6, p. 1; *TIME TO PLEAD*.

Rules of Court, see article upon that subject *infra*.

RULES OF COURT.

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I. AUTHORITY TO ADOPT RULES — 1. In General. — Independent of statute, courts of record possess inherent power to adopt suitable rules for the regulation of practice in actions pending before them.¹

2. The State Courts. — In the exercise of this power, and in some cases by virtue of further authority expressly conferred by statute, the courts in many of the states have adopted complete systems of rules peculiar to themselves, while in others the practice is regulated partly by rules thus adopted and partly by those prevailing at common law and in the English courts.²

1. See title *Courts*, in the Am. and Eng. Encyc. of Law, (2d ed.) vol. 8, p. 29.

2. In Texas since there are no separate courts of law and chancery the rules of practice in those jurisdictions where these courts are separate cannot be applied. *Metzger v. Wendler*, 35 Tex. 378.

The rules of the common law have never been considered obligatory, as matter of absolute principle, on questions of practice; but the courts have authority to adhere to their former practice, or to adopt such rules of their own as seem dictated by considerations of policy and convenience, rather than to pursue the common-law practice, where the rule which it affords is found to be inconvenient of application. *Grassmeyer v. Beeson*, 13 Tex. 524.

By the Act of May 12, 1846, the Supreme Court was given power to prescribe for itself rules of practice. *St. Clair v. Hotchkiss*, 28 Tex. 474. And a like power was conferred on the court by the constitution of 1876. Under this constitution the power con-

ferred on the Supreme Court designed more than the making of a few short rules such as had formerly been made. In accord with its provisions the rules of the District Court and Supreme Court have been shaped with reference to each other, and are designed to establish a connected system of judicial procedure, from the petition filed in the District or County Court, to the final judgment in the Supreme Court or in the Court of Appeals. *Texas Land Co. v. Williams*, 48 Tex. 602; *Haley v. Davidson*, 48 Tex. 615.

The Supreme Court of New Jersey is governed by the rules of practice which existed in the English court of King's Bench at the time of becoming independent of the crown, except so far as they are inconsistent with its changed circumstances, or have been abrogated by statute or by new and positive rules of the Supreme Court, or become obsolete and useless, or have been superseded by long and approved practice, growing up in the state since the Revolution and becoming a sort of common law of the court. These exceptions

Higher and Subordinate Courts. — In some states the higher courts are empowered by statute to prescribe rules which shall be binding upon subordinate courts, but power is generally reserved to the latter to adopt rules of their own in regard to matters for which the superior court has failed to provide.¹

3. The Federal Courts — Rules in Equity and Admiralty. — The United

have swept away a large portion of the rules as they existed in the court of King's Bench at the time of the Revolution, but many others still remain in force. *Kinney v. Muloch*, 17 N. J. L. 334; *Van Winkle v. Alling*, 17 N. J. L. 446; *West v. Paige*, 9 N. J. Eq. 203.

In Michigan. — In *Eureka Iron, etc., Works v. Bresnahan*, 66 Mich. 489, it was held that the general rules of practice of 4 Wm. IV. (1833) had not been adopted into the practice of that state.

1. In *State v. Call*, 39 Fla. 504, the Supreme Court, in construing section 1308 of the Revised Statutes, said: "While there are many special rules and orders which every court, from necessity, must make in the absence of a rule prescribed by this court under the authority of this legislation, — such, for example, as the time for convening and adjourning the court, placing reasonable limitations upon oral arguments, and many others of temporary or special application, — we are constrained to hold that as to all matters of practice and procedure of a general or permanent nature, which are merely beneficial or convenient, the provisions quoted have divested the inferior courts of, and invested this court with, the power to adopt rules for the government of such inferior courts."

Where the Supreme Court Is Authorized to Provide Uniform Rules of practice for the district courts throughout the state, a rule prescribed by the justices of the Supreme Court supersedes and sets aside any rule made by any District Court in respect to the same matter, yet, in the absence of any action by the judges of the Supreme Court, or in respect to any matter in which they have taken no action, the District Court has power to prescribe rules of its own regulating and controlling the practice before it. *Jones v. Menefee*, 28 Kan. 436.

In *Maryland* the constitution authorizes the Supreme Bench of Baltimore City to make rules of practice for the Superior Court, the Court of Common

Pleas, and the City Court of Baltimore City, but where the Supreme Bench has failed to adopt any rule as to a particular matter of practice the lower courts may provide rules of their own. *Gibbons v. Cherry*, 53 Md. 144.

In *Michigan* the Supreme Court is authorized to prescribe uniform rules of practice for the Circuit Courts and for the Superior Court of Detroit, but the latter courts may adopt rules of their own in regard to matters of practice which are not regulated by any rule of the Supreme Court; the additional rules thus adopted by the Superior Court are inoperative, however, until approved by the Supreme Court. *Wyandotte Rolling Mills Co. v. Robinson*, 34 Mich. 428; *Kegel v. Schrenkheisen*, 37 Mich. 174. It is doubtful whether a Circuit Court has power to adopt a rule providing that appeals from justices' courts shall be discontinued unless noticed for trial as required thereby, since the power to adopt such a rule seems to be vested exclusively in the Supreme Court. *Willis v. Gimbert*, 27 Mich. 91.

In *Minnesota* the Supreme Court acquired no power to make rules to bind the District Court until the passage of the Revised Statutes in September, 1851, and it did not exercise the power till July term, 1852. *Smith v. Valentine*, 19 Minn. 452.

In *Nebraska*, at a time when the judges of the Supreme Court were also judges of the District Court, it was provided by the code that the Supreme Court should make rules applicable to both the Supreme and District Courts, but this section of the code has no application to the District Courts as organized at the present time, and the district judges are no longer of necessity required to follow the rules of the Supreme Court. *Hunter v. Union L. Ins. Co.*, (Neb. 1899) 78 N. W. Rep. 516.

In *North Carolina* the Supreme Court has power to prescribe rules of practice for the subordinate courts. *Barnes v. Easton*, 98 N. Car. 116.

States Supreme Court is authorized by statute to prescribe rules of practice in equity and admiralty for the circuit and district courts, but these latter courts may, in any manner not inconsistent with any law of the United States or with any rule thus prescribed by the Supreme Court, further regulate their practice by the adoption of such rules of their own as may be necessary or convenient for the advancement of justice, and the prevention of delay.¹ The practice in equity and admiralty being thus regulated by Act of Congress and by rules prescribed by the Supreme Court, a state rule regulating such practice is not binding upon the federal courts.²

1. U. S. Rev. Stat., §§ 917, 918; *Steam Stone Cutter Co. v. Jones*, 13 Fed. Rep. 567; *The Hudson*, 15 Fed. Rep. 162; *Wayman v. Southard*, 10 Wheat. (U. S.) 1; *U. S. Bank v. Halstead*, 10 Wheat. (U. S.) 51; *Louisiana Ins. Co. v. Nickerson*, 2 Lowell (U. S.) 310; *Hudson v. Parker*, 156 U. S. 277.

Delegation of Authority by Congress to Federal Courts.—In *Wayman v. Southard*, 10 Wheat. (U. S.) 1, it was held that under section 17 of the Act of September 24, 1789, and section 7 of the Act of March 2, 1793, the Supreme Court had full power to adopt rules for the regulation of practice in the courts of the United States; and that the delegation of this power by Congress to the courts of the United States was constitutional and valid, since "a general superintendence over this subject seems to be properly within the judicial province, and has been always so considered."

Rules Varying Effect and Operation of Final Process.—In *U. S. Bank v. Halstead*, 10 Wheat. (U. S.) 51, it was held that under section 2 of the Act of May 8, 1792, the Circuit Court might by rule so vary the effect and operation of its final process as to reach property formerly exempt from execution, when, by a law of the state in which the court was held, such property was made subject to like process by the state courts. This power to vary the effect of its process cannot be restricted to form as contradistinguished from substance, but must be understood as vesting in the courts authority so to form, mould, and shape the process, as to adapt it to the purpose intended. And to the same effect see *Beers v. Haughton*, 9 Pet. (U. S.) 329; *Ross v. Duval*, 13 Pet. (U. S.) 45; *Amis v. Smith*, 16 Pet. (U. S.) 303; *Duncan v. Darst*, 1 How. (U. S.) 301. But for a qualifica-

tion of this doctrine see *Ward v. Chamberlain*, 2 Black (U. S.) 430.

Rules Regulating Liens.—In *Steam Stone Cutter Co. v. Jones*, 13 Fed. Rep. 567, it was held that a rule adopted by the United States Circuit Court for the District of Vermont, providing that the creation, continuance, and termination of liens, and rights created by the attachment of property or the arrest of a defendant, should be governed by the laws of the state in which the court was held, was valid.

Rule Regulating Attachments.—In *Louisiana Ins. Co. v. Nickerson*, 2 Lowell (U. S.) 310, a rule of the United States District Court in Massachusetts, adopted in 1855, and providing that a warrant to attach the goods and chattels, or in default thereof the credits of the defendant, might be granted in case where an arrest could not legally be made, was held to be valid.

2. **A Rule of the State Courts** that the judge must give his decision in writing upon every issue made by the pleadings is not binding on a federal court held within the state. *Martindale v. Waas*, 11 Fed. Rep. 551.

Injunction Bond—Adoption of State Law.—It is error to subject the parties to an injunction bond given in a proceeding in equity in a court of the United States, to the laws of the state wherein the court is held. The 90th equity rule of the United States Supreme Court declares that, when not otherwise directed, the practice of the High Court of Chancery of England shall be followed, and the 89th rule authorizes the circuit courts (both judges concurring) to modify the process and practice in their respective districts, but this latter rule applies only to forms of proceedings and modes of practice, and does not authorize the adoption of the state law

In Civil Causes Other than Those in Admiralty and Equity it is provided by statute that the practice of the circuit and district courts shall conform as nearly as may be to the practice in like cases in the courts of the state within which such circuit or district courts are held, any rule of court to the contrary notwithstanding.¹ It has been held, however, that this enactment refers only to those rules of practice which are properly such, and does not contemplate the adoption of state regulations which are rules of right rather than of practice;² nor does it include the manner of bringing cases from a lower court of the United States to the Supreme Court.³

II. VALIDITY OF RULES IN RELATION TO PARTICULAR SUBJECTS —

1. Rules in Contravention of Common Law or Statute — *a.* IN GENERAL. — The rules of practice adopted by a court must be in accord with the statutory provisions of the jurisdiction in which they are intended to operate, and a rule which conflicts with a statute is invalid.⁴ Furthermore a rule which does not conflict

defining the rights and obligations of the parties to an injunction bond. *Bein v. Heath*, 12 How. (U. S.) 168; *Gaines v. New Orleans*, 27 Fed. Rep. 411.

1. U. S. Rev. Stat., § 914. See in general upon this subject article UNITED STATES COURTS.

Express Adoption of State Rules Unnecessary. — Before the adoption of the act embodied in section 914 of the U. S. Rev. Stat., it was held that a state law prescribing rules of practice had no efficacy, *proprio vigore*, in the courts of the United States, and that such a rule could only be made effectual by its adoption in proper manner by the federal courts. *Davenport v. Lord*, 9 Wall. (U. S.) 409.

But since the adoption of said act it has been held that the statute is, in itself, a general direction and authority on the subject, rendering unnecessary any express adoption by the federal courts of rules of practice prevailing in the state courts. *Mutual Bldg. Fund, etc., Bank v. Bossieux*, 1 Hughes (U. S.) 386.

2. *Mutual Bldg. Fund, etc., Bank v. Bossieux*, 1 Hughes (U. S.) 386.

3. *Hudson v. Parker*, 156 U. S. 277.

4. *Hixon v. Weaver*, 9 Ark. 133; *Aaron v. Anderson*, 18 Ark. 268; *Linnemeyer v. Miller*, 70 Ill. 244; *Youngs v. Peters*, (Mich. 1898) 76 N. W. Rep. 138; *Purcell v. Hannibal, etc., R. Co.*, 50 Mo. 504; *Lakey v. Cogswell*, (C. Pl. Gen. T.) 3 Code Rep. (N. Y.) 116; *Suckleby v. Rotchford*, 12 Gratt. (Va.) 60;

Gray v. Chicago, etc., R. Co., Woolw. (U. S.) 63; *Hamilton v. Fowler*, 83 Fed. Rep. 321; *In re Herefordshire Banking Co.*, L. R. 4 Eq. 250.

Exceptions to Ruling of Trial Court. — Where a statute provides that all errors of the trial court must be excepted to at once and if not so excepted to are deemed to be waived, a rule of the Circuit Court providing that all questions decided on the trial shall be reserved without formal exceptions taken at the time, is invalid and will not be enforced. *Kennedy v. Cunningham*, 2 Met. (Ky.) 541.

A Rule Providing that Every Material Amendment, after answer to the pleading amended, is cause for a continuance, stretches the statute (Wagn. Stat. 1040, § 10), and so far as it contradicts or goes beyond it should not be enforced. *Colhoun v. Crawford*, 50 Mo. 458.

Additional Findings by Referee After Report Made. — Under the New York Code of Civ. Proc., a judge or referee cannot be required or permitted to make additional findings of fact or law, upon settlement of the case after his report or decision has been rendered, and a rule authorizing findings of fact to be proposed to and passed upon by referees after report made, contrary to the provisions of the Code, is invalid. *Palmer v. Phenix Ins. Co.*, 22 Hun (N. Y.) 224; *Gormerly v. McGlynn*, 84 N. Y. 284.

Rule Preventing Appointment of Receiver. — In *People v. Bruff*, (Supm.

with any particular statute may still be invalid if it operates to deprive a party of a constitutional right, or of a right secured to him by the principles of common law in force in the jurisdiction.¹

b. LIMITING COURT'S DISCRETION.—Where, according to statute or common law, a certain matter is left to the discretion of the court, a rule which prevents the exercise of such discretion is invalid and cannot be enforced.²

Ct. Spec. T.) 9 Abb. N. Cas. (N. Y.) 153, an action was brought by the attorney-general in the name of the people against a corporation for mismanagement, and an application was made for the appointment of a receiver. This application was resisted by the defendant on the ground that another action had been brought against the corporation by private parties, and a receiver appointed therein, and that, under rule 87 of the Supreme Court, such appointment acted as a bar to the appointment of another receiver in the action by the attorney-general. Without deciding as to the general validity of this rule, the court held that it could not operate to prevent the appointment of a receiver in the action by the attorney-general, since the right to bring said action and to have a receiver appointed was expressly conferred by statute (Code 1880, §§ 1808, 1810), and since it further appeared that in this case the suit instituted by private parties was collusive in its nature.

Judgment for Appellant on Non-appearance of Appellee.—The court cannot make a rule that if the appellee, in appeals from justices, does not enter his appearance within a specified time, the clerk, on præcipe, filed shall enter judgment for the appellant. Such a rule is void, being in conflict with the statute which provides that from the entering of an appeal, the suit shall take grade with and be subject to the same rules as other actions where the parties are considered to be in court. *Jones v. Brown*, 1 Pa. Dist. 675.

Time of Return to Certiorari.—All writs and process should be made returnable at a day when the court is by law required to be in actual session. According to the regular course of practice a writ of certiorari is returnable on the first day of the term next after it issues, and a rule of court making such a writ returnable within twenty days is invalid since it is not authorized by the statutes of the state. *North Beaver v. Big Beaver*, 7 Pa. Co. Ct. 340.

Rules Regulating Liens.—The United States Supreme Court has no power to adopt rules making judgments or decrees for the payment of money a lien on land where no such charge is created by law, or to displace any such right where the same is conferred or recognized by Act of Congress. *Ward v. Chamberlain*, 2 Black (U. S.) 430 *distinguishing* *Beers v. Haughton*, 9 Pet. (U. S.) 329.

1. *Jeffersonville, etc., R. Co. v. Hendricks*, 41 Ind. 48.

Rule Contrary to General Maritime Law.—A rule adopted by a District Court of the United States providing that among admiralty claims of otherwise equal dignity the one first libeling shall be first paid, but petitioners shall be paid *pro rata*, is contrary to the general maritime law and is therefore invalid. *Saylor v. Taylor*, 77 Fed. Rep. 476.

2. *De Lorme v. Pease*, 19 Ga. 220; *Larned v. Platt*, 26 Ill. App. 278; *Adams Express Co. v. Trego*, 35 Md. 47.

Allowance of Term Fees.—Where it is provided by statute that in appeal cases the trial judge may allow term fees in his discretion, a rule adopted by the judges of a particular circuit declaring that no term fees shall be allowed in such cases, is invalid. *Voigt Brewery Co. v. Wayne Circuit Judge*, 108 Mich. 356.

The Allowance of Amendments to Pleas being a matter which properly rests in the discretion of the court, a rule forbidding the amendment of a plea is contrary to all principles of equity practice, and is invalid. *Greene v. Harris*, 11 R. I. 5.

The Number of Witnesses That May Be Examined concerning the reputation of a witness for truth and veracity is a matter which rests in the discretion of the court in each particular case, and therefore a general rule limiting the number of such witnesses to a certain number on each side is unreasonable and unlawful. *Larned v. Platt*, 26 Ill. App. 278.

7. AFFECTING COURT'S JURISDICTION. — The jurisdiction conferred upon a court by statute or by the constitution cannot be enlarged by rule,¹ nor can powers designed to be exercised by the court be transferred to any other body in this manner.²

But in Cases Where the Court Has Jurisdiction it may regulate the manner of exercising the same by the adoption of suitable rules in regard to its practice and procedure.³

The Recalling of Witnesses is a matter which by the common law is left to the discretion of the court, and a rule is invalid which restricts the exercise of such discretion by providing that witnesses shall first be examined by parties introducing them, then cross-examined by the adverse party, and that further examination shall not be had except by leave of the court first obtained, and then only upon the declaration of the attorney or witness that a material fact has not been stated, to which all further inquiry shall be directed. *De Lorme v. Pease*, 19 Ga. 220.

1. *Wilson v. Iowa County*, 52 Iowa 339; *The Brig Hiram*, 23 Ct. Cl. 431.

Rule Dispensing with Process. — A rule providing that an application to the court to raise any jurisdictional question shall be deemed an appearance, and no further process shall be necessary to bring the party into court, is invalid. Jurisdiction over a person can never be acquired, unless by a method which the law specifically provides, or by consent of the party himself. If the legal method has not been employed and the party expressly refuses his consent, an assumption of jurisdiction by the court will be purely arbitrary. *Huff v. Shepard*, 58 Mo. 242.

Conferring Jurisdiction of Invalid Appeal. — When an appeal bond has not been approved as required by law the appeal is invalid, and the appellate court acquires no jurisdiction of the cause, and it cannot refuse a motion to dismiss the appeal on the ground that such motion is not made within the time prescribed by a rule of the court. *Pickett v. Pickett*, 1 How. (Miss.) 267; *Rozier v. Williams*, 92 Ill. 187.

The Right of Appeal cannot be given by rule of court in a case where it does not exist by common law or statute. A rule conferring this right is a rule of law rather than of practice. *Bellamy v. Bellamy*, 4 Fla. 242; *Atty.-Gen. v. Sillem*, 10 Jur. N. S. 446.

Exception to the General Rule. — In England it has been held that a rule

may be valid although it affects the jurisdiction and not merely the procedure of the court, provided it has been adopted by virtue of authority directly conferred by a statute which contemplates the enactment of such a rule. *Ex p. London*, 25 Ch. D. 384.

2. Commissioners to Take Proof. — Where a court, by virtue of an act of assembly, has appointed commissioners to take proof between parties it cannot by rule transfer to said commissioners powers designed by statute to be exercised by the courts or the judges thereof. *Mitchell v. Mitchell*, 1 Gill (Md.) 66.

3. Regulating Hearing of Commissioner's Report. — Where a commission is created by statute to hear and determine certain claims, and the statute also provides that the commission shall make a report to the District Court for its approval or disapproval, the court thus acquires jurisdiction of the matter, and may provide under its rules for a hearing on notice, based on such report, to ascertain the facts necessary to the intelligent discharge of its duties, without the intervention of a jury. *Guthrie Nat. Bank v. Guthrie*, 173 U. S. 528.

Regulating Form of Proceeding in Admiralty. — The 12th rule of admiralty practice of 1844 provided that proceedings *in rem* might be had wherever the state law gave a lien, but in 1858 this rule was amended so as to provide for a proceeding *in rem* only where such lien was given by the general maritime law. In a case where the validity of this rule was called in question it was held that the court had authority both to enact the rule in its original form and to amend it in the manner indicated, and that the amendment was made, not on the ground that the court doubted its jurisdiction under the former rule, but simply on the ground of convenience. *The Steamer St. Lawrence*, 1 Black (U. S.) 522.

The 90th Equity Rule of the United States Supreme Court providing that "in all cases where the rules prescribed by this

2. Designating Terms and Arranging Business of the Court. — Rules fixing term days and arranging the business of the court, and the time at which it shall be transacted, are generally held to be valid.¹ Thus a particular term or part of a term may be set aside for the presentation of petitions in regard to certain specified matters, and the court may refuse to consider such petitions unless they are presented at the designated time.² Such rules, however, must not conflict with a constitutional provision that the courts shall be kept open for the administration of justice,³ and it is also doubtful whether the court can, by a mere rule, deprive itself during an entire term of the right to do any but a particular kind of business.⁴

3. Publication of Legal Notices. — The publication of legal notices may be regulated by rules of court,⁵ but where the amount to

court or by the Circuit Court do not apply, the practice of the Circuit Court shall be regulated by the present practice of the High Court of Chancery of England, so far as the same may reasonably be applied consistently with the local circumstances and local convenience of the district where the court is held, not as positive rules, but as furnishing just analogies to regulate the practice," is valid. The rule quoted does not attempt to enlarge the jurisdiction of the court, but simply regulates the manner of exercising such jurisdiction in those respects wherein the rules adopted do not apply. *Lewis v. Shainwald*, 7 Sawy. (U. S.) 403.

Manner of Taking Bail in Criminal Cases. — So far as the United States Supreme Court has power to admit to bail in a criminal case, pending proceedings in error, it may adopt rules regulating the manner of taking bail in such cases. *Hudson v. Parker*, 156 U. S. 277.

1. *Ex p. Sawtell*, 6 Pick. (Mass.) 110; *In re McCandless Tp. Road*, 110 Pa. St. 605. See also article TERMS OF COURT.

Establishing Term Days. — Under Mass. Stat. of 1821, chapter 109, the judges of the justice's court for the county of Suffolk had authority to establish a rule that certain days of the week should be regular term days, and to continue actions from term day to term day. *Ex p. Sawtell*, 6 Pick. (Mass.) 110.

Calling of the Docket. — The circuit court has authority to enact a rule that on the first and second calling of the docket, all motions, dilatory pleas, and

demurrers shall be disposed of, and if either be still in on the third calling, and then adjudged against the party pleading it, judgment of *nil dicit* shall go. *Fortenbury v. Nichols*, 5 Ark. 259.

2. Presentation of Road Petitions. — The court may adopt a rule prescribing the time or times when petitions to open roads shall be presented. Such a rule is valid provided it takes away no right secured by law; and where the statute provides that such a petition may be presented at a certain term the court may set apart a particular portion of the term for the purpose and may lawfully refuse to receive a petition presented at any other time. Thus a rule providing that petitions for view or review of roads shall be presented at a regular term of the court and not at an adjourned session, is valid. *Little Britain Road*, 27 Pa. St. 69; *In re McCandless Tp. Road*, 110 Pa. St. 605.

Also a rule providing that when proceedings for a road have failed a second petition for such road shall not be acted on for one year from the sessions at which such road was finally rejected. *Towamencin Road*, 10 Pa. St. 195.

3. Time of Making Motion for New Trial. — Where a party is otherwise entitled to a new trial his right thereto cannot be denied upon the authority of a rule of the court providing that motions for a new trial must be made and argued on the first Saturday after the trial of a cause. *Pawley v. M'Gimpsey*, 7 Yerg. (Tenn.) 502.

4. *Finegan v. Allen*, 46 Ill. App. 553.

5. *Chase v. County*, 2 L. T. Rep. N. S. 183.

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be paid for such publication is prescribed by statute, a rule fixing a different amount is void.¹

4. Service of Process. — Rules prescribing the manner in which subpoenas in chancery shall be served have been held valid;² and it has been held that a federal court, sitting in one of the states, may by rule require the delivery of a copy of the summons to the defendant in all cases, although the state law provides that in certain cases the reading of the same to the defendant shall be legal and sufficient service.³

5. Applications for Change of Venue or Judge — Time of Application. — Courts have power to enact rules providing that parties who desire a change of venue or a change of judge must apply for the same within a specified time,⁴ but such rules cannot apply where

of Common Pleas may establish a rule requiring the publication of its trial lists at the expense of the county. *Venango County v. Durban*, 3 Grant Cas. (Pa.) 66.

Accounts of Executors. — The Orphans' Court of a given county may establish a special rule providing that the accounts of executors and other fiduciaries shall be published by the register in the paper designated by the court for the publication of legal notices, in addition to their publication as prescribed by the Act of 1832. *McGreevy v. Kulp*, 126 Pa. St. 97.

1. *Reeser's Petition*, 12 Lanc. L. Rev. (Pa.) 33; *Register of Wills*, 15 Pa. Co. Ct. 479.

2. Where a statute provides that a nonresident defendant in a chancery suit may be served with the subpoena by publication thereof in a newspaper within the state, and by posting it at the court-house door, the court may further provide by rule that when the residence of the defendant is stated, either in the bill, or in the affidavits to obtain publication, the register shall enclose to him by mail within forty days from the time of making the order a copy of the order posted up at the court-house. Such a rule is valid and will be enforced. *Butler v. Butler*, 11 Ala. 668. And see in general article **SERVICE OF PROCESS**.

3. Under section 214 of the Code of N. Car., as in force in the year 1887, the reading of a summons to a defendant was a legal and sufficient service in certain cases, but a delivery of a copy of the summons was expressly required in actions against corporations, minors, and persons of unsound mind. While the law of the state was in this con-

dition the United States Circuit Court sitting in the state adopted a rule which required the marshal in all civil actions to deliver a copy of the summons to each one of the defendants. A question having arisen as to the validity of this rule, it was held to be valid and not in conflict with the U. S. Rev. Stat., § 914, since it included the state mode of procedure, and more effectually secured personal service on defendants. In this opinion the court said: "The reading of a summons by the sheriff may be a sufficient service in a state court, where actions are usually brought in the county in which defendants reside; but I think that service by the delivery of a copy is more just and appropriate in federal courts of more extensive territorial limits of jurisdiction and where the times and places of holding court are not so well known and convenient to defendants." *Lowry v. Story*, 31 Fed. Rep. 769.

4. *Anglemyer v. Blackburn*, 16 Ind. App. 352; *Hunnel v. State*, 86 Ind. 431; *Moulder v. Kempff*, 115 Ind. 459. See in general article **CHANGE OF VENUE**, vol. 4, p. 421.

Rules Have Been Held Valid providing that such applications must be made at least one day before the day on which the cause is set for trial. *Vail v. McKernan*, 21 Ind. 424; *Galloway v. State*, 29 Ind. 442; *Reitz v. State*, 33 Ind. 187; *Jeffersonville, etc., R. Co. v. Avery*, 31 Ind. 277. That they must be made not later than the day on which the cause is docketed for trial. *Redman v. State*, 28 Ind. 205; *Truitt v. Truitt*, 38 Ind. 16; *Bennett v. Ford*, 47 Ind. 264; *Hoke v. Applegate*, 92 Ind. 570. That they must be filed on

the causes which authorize the application do not arise, or are not discovered, until after the expiration of the time limited,¹ nor can they operate on a party who has not entered his appearance until after the expiration of such period.²

Requiring Applicant to Recognize. — A rule requiring an applicant for a change of venue in a criminal case to enter into a recognizance conditioned for his appearance at the next term of court has been held valid.³

Contents of Application. — A rule requiring the applicant to embody in his affidavit matters of fact, information, or belief, which are not specified in nor required by the statute regulating such applications, is inoperative.⁴

6. Time to Plead. — The time of pleading to the declaration and of filing pleas may be regulated by rule, provided such regulation does not operate to shorten periods of time prescribed by statute.⁵

7. Form of Pleadings, Briefs, and Stipulations. — Rules Prescribing the Form of the Pleadings to be filed in an action, which do not conflict

or before the second day of the term. *Shoemaker v. Smith*, 74 Ind. 71; *Jones v. Rittenhouse*, 87 Ind. 348. That they must be made by the second Tuesday of the term, or if made thereafter must be accompanied by a statement in writing setting forth sufficient reasons for the delay. *Thompson v. Pershing*, 86 Ind. 303. That an application will not be entertained after the party making the same has applied for a continuance which has been overruled. *Truitt v. Truitt*, 38 Ind. 16.

1. *Galloway v. State*, 29 Ind. 442; *Jeffersonville, etc., R. Co. v. Avery*, 31 Ind. 277; *Reitz v. State*, 33 Ind. 187; *Hays v. Morgan*, 87 Ind. 231; *Bernhamer v. State*, 123 Ind. 577.

In *Shoemaker v. Smith*, 74 Ind. 71, a motion for a change of venue was overruled because not made before the second day of the term as required by rule of the court; but on appeal the action of the trial court was reversed, and it was held that the rule although valid could not apply to the case at bar. In its opinion the court said: "The rule, though a reasonable one, cannot, however, embrace causes not fairly within its spirit. A reasonable rule, thus applied, becomes an unreasonable one. If, after the second day of the term, another judge should be called to preside, such a rule certainly could not preclude a party from taking a change of venue from such judge. Such rule, in such case, would deprive him of a right conferred by the

statute, without having had any opportunity to exercise it, and would not only be unreasonable, but would be absurd."

2. *Truitt v. Truitt*, 38 Ind. 16.

3. *State v. Ensley*, 10 Iowa 149.

4. A rule providing that the affidavit for a change of venue or of trial from the judge shall state that the party is informed and believes that he has a good cause of action or defense, and if a defendant, in general terms the character of the defense, and that the affidavit shall likewise state that the application is not for delay, is void. In cases of this nature, when a party has made and filed his affidavit of the bias, prejudice, or interest of the judge before whom the case is pending, such party has done all that the statute requires him to do, and he is then entitled of right, absolutely and unconditionally, to a change of judge. This is so whether he has been informed and believes or not that he has a good defense, and whether his application was or was not made for delay. *Krutz v. Griffith*, 68 Ind. 444.

5. See in general article TIME TO PLEAD.

Time of Filing Plea in Abatement. — A rule of the Court of Common Pleas that pleas in abatement may be filed at any time during the first four days of the return term, and not afterwards, is valid by virtue of statute of 1820, c. 79, § 7. *Thompson v. Hatch*, 3 Pick. (Mass.) 512.

with statutory provisions concerning the same subject, are generally held to be valid.¹

Briefs and Stipulations. — Likewise the form of briefs, the general manner in which causes shall be submitted,² and the form of

Time to Appear and Answer. — In *McGrew v. Downs*, 67 Iowa 687, it was held that a rule requiring defendant to appear and answer by noon on the first day of the term was valid, although the statute provided that the defendant should be cited by the original notice to appear and defend by noon on the second day of the term, another section further providing that the judges of the district and circuit courts in any district might provide by general rule that the time of filing pleas or motions should be other than that provided in the code.

Rules Shortening Periods Prescribed by Statute. — The superior court of Detroit is a tribunal of the same class as the circuit courts, and the statutes provide that its rules of procedure shall be uniform with theirs. A rule therefore which provides that a defendant sued by declaration shall be defaulted unless he answers within ten days after service is invalid, since the time allowed by the general laws governing the circuit courts is twenty days. *Wyandotte Rolling Mills Co. v. Robinson*, 34 Mich. 428.

Where by statute the plaintiff has until the calling of the cause in its regular order on the docket to file his pleas to the merits, this right may be extended to a longer time, by rule, but it cannot be restricted to a shorter period. The court may by a rule prescribe the times when the docket shall be called for the purpose of deciding preliminary questions, and it is not bound to wait until the cause shall be called for trial, but a rule requiring pleas to the merits to be filed on or before a certain day of the term, whether the cause be called or not, is invalid. *Hipon v. Weaver*, 9 Ark. 137; *Aaron v. Anderson*, 18 Ark. 268; *Collins v. Gauche*, 23 Ark. 646.

Rule Enlarging Statutory Time. — Where the time within which an answer or defense to an action must be filed is prescribed by statute the court has no power to extend the time thus limited by a general rule. *Fidelity Trust, etc., Co. v. Newport News, etc., Co.*, 70 Fed. Rep. 403.

1. **Requiring Written Pleadings.** — In

Trammell v. Vane, 62 Ala. 301, a rule was held to be valid which provided that in all cases pending in the court at the time of its adoption, written pleadings must be filed with the clerk on or before the first day of the next term; and that in all suits thereafter brought, written pleadings must be so filed within the time prescribed by law for pleading; and that in the causes in which written pleas were not filed as required, judgment by default or *nil dicit* would be entered on motion of plaintiffs; and that pleas in short by consent would be disregarded and taken from the file on motion, unless the written consent of parties should be indorsed on or filed with such pleas.

A Rule Requiring that a Memorandum of All Pleadings Filed shall be made in a book kept by the clerk for that purpose is reasonable and valid, and will be enforced. A demurrer filed without observance of such rule may be stricken from the files, and judgment *nil dicit* entered against the defendants. *Crump v. People*, 2 Colo. 316.

Verification of Pleas Not Required by Statute. — Where a statute, in designating pleas which must be verified, excepts pleas to the jurisdiction by necessary implication, a rule of the court that such pleas must be verified by affidavit is invalid. *Howe v. Thayer*, 24 Ill. 246.

2. **Written or Printed Briefs.** — A rule of the *Indiana* Supreme Court was held to be valid which provided that all causes pending in that court if submitted within one year from the date on which they were filed might be submitted upon plainly written or printed briefs, but if not submitted within one year from the date of filing, except when interlocutory orders might excuse the delay, they would be dismissed on the call of the docket unless submitted on printed briefs. *Shoecraft v. Cain*, 23 Ind. 169. And see in general article BRIEFS, vol. 3, p. 710.

Submission of Causes. — In *Florida* the Circuit Court of one of the counties adopted a rule that no cause standing for argument upon pleadings in cases at law should be submitted until the court had been furnished with a brief

stipulations and agreements may be regulated by rule.¹

8. Requiring Affidavit of Defense. — In some jurisdictions it has been held to be within the power of the courts to adopt rules requiring affidavits of defense to prevent the entry of judgments by default, or the trial of cases out of their regular order on the docket,² and also to provide by rule that the plaintiff may take

containing a statement of facts and citation of authorities; that upon such presentation the court might determine whether an extended or other oral discussion of the facts or law should be allowed, and might designate the time, place, and limit for such discussion; and that the court might also designate the time within which the opposite party should submit his abstract of the cause, and also the time within which the moving party might reply in writing. In a case where the validity of this rule was called in question the Supreme Court held that it was invalid. It was intimated that the supreme court would have had authority to enact such a rule, but since the revised statutes invest that court with power to adopt rules for the government of inferior courts, its adoption by a circuit court was unauthorized. *State v. Call*, 39 Fla. 504.

1. Martin v. De Loge, 15 Mont. 343. See also article STIPULATIONS.

The following rule, made by the District Court of *Kansas*, has been held to be valid: "Admissions or agreements about proceedings in an action will not be enforced unless reduced to writing, and signed by the parties or their attorneys, and filed, or unless the same be made in open court at the time the court is required to act upon them." *Jones v. Menefee*, 28 Kan. 436.

A rule is valid which provides that no agreement or stipulation between the parties to a cause or their attorneys in respect to the proceedings therein will be regarded unless the same shall be entered in the minutes in the form of an order by consent, or unless the same shall be in writing subscribed by the party against whom it shall be alleged or by his attorney or counsel. *Haley v. Eureka County Bank*, 20 Nev. 410.

2. In Pennsylvania it has been held that a court of common pleas may adopt a rule requiring an affidavit of defense from the defendant, and directing judgment to be entered against him if such affidavit is not filed within a

prescribed time. *Vanatta v. Anderson*, 3 Binn. (Pa.) 417; *Chain v. Hart*, 140 Pa. St. 374; *Horner v. Horner*, 145 Pa. St. 258. Likewise that a court of quarter sessions having exclusive jurisdiction by statute of actions on forfeited recognizances may make a rule authorizing the entry of judgment, unless an affidavit of defense is filed at any time after the third Saturday succeeding the return day to which the process is returnable. *Harres v. Com.*, 35 Pa. St. 416.

In Illinois the Superior Court of Cook county adopted a rule requiring an affidavit of defense in certain cases to prevent such cases from being tried out of their regular order on the docket. This rule was held valid in *Wallbaum v. Haskin*, 49 Ill. 313, and in *Titsworth v. Hyde*, 54 Ill. 386. But similar rules were not adopted by the courts of the same grade as the County Court of Cook county, and for this reason the rule in question has been held invalid in later cases, under the Practice Act of 1872, which requires the practice in all courts of the same class or grade in the state to be uniform. *Fisher v. National Bank of Commerce*, 73 Ill. 34; *Kidder v. Rand*, 73 Ill. 38; *Angel v. Plume*, etc., Mfg. Co., 73 Ill. 412; *Benson v. Johnson*, 90 Ill. 94; *Nelson v. Akeson*, 1 Ill. App. 165; *Gormley v. Uthe*, 1 Ill. App. 170.

In Tennessee a rule has been held valid which provides that the docket may be called on a certain day, and attorneys be required to state upon honor whether they have a defense to the action; and if not, that judgment shall be rendered for the plaintiff's claim. The provision of the code (§ 2479) that causes which have been docketed shall be tried and disposed of in their order, unless the parties consent to a different arrangement, is directory merely, and does not conflict with the rule given above; nor is such rule in conflict with any statute of the state. *Van Brocklin v. Wolcott*, 5 Heisk. (Tenn.) 743; *Tomeny v. German Nat. Bank*, 9 Heisk. (Tenn.) 493.

an interlocutory judgment for that part of his claim which is confessed by such affidavit to be due, which judgment shall be final unless he states his intention of proceeding for the balance.¹

9. Trial by Jury. — In cases where the right to a trial by jury is conferred by constitution or statute, it cannot be abridged by rule of court,² nor can such rules operate to deprive a party of his right to challenge individual jurors.³ So a rule regulating the manner of drawing a jury which conflicts with a statute is invalid.⁴ Subject to these restrictions, however, it is generally held that the manner of obtaining a jury and the organization thereof may be regulated by reasonable rules.⁵

A Rule of Court Requiring an Executor to file an affidavit of defense within fifteen days after service, provided letters were granted six months before, is unreasonable and will not be enforced. *Honeywell v. McGuire*, 5 Kulp (Pa.) 13. Nor will judgment be entered against an executor for want of any or a sufficient answer to plaintiff's statement, notwithstanding a rule of court authorizing such judgment, experience having demonstrated that such a rule is unwise. *National Bank v. Detwiller*, 22 Pa. Co. Ct. 150.

As to Affidavits of Merits or Defense in General, see article AFFIDAVITS OF MERITS OR DEFENSE, vol. 1, p. 338.

1. *Russell v. Archer*, 76 Pa. St. 473.
2. *Hinchly v. Machine*, 15 N. J. L. 476; *Biggs v. Lloyd*, 70 Cal. 447.

3. **Illustrations of Rules Held Invalid.** — Under the provisions of the Criminal Practice Act, the defendant may peremptorily challenge a juror at any time after his appearance in the box and before he is sworn to try the case; and even after he is sworn, but before the jury is completed, it is enjoined upon the court to permit it upon good cause shown. This plain and express provision of the statute cannot be contravened by any arbitrary rule of the court, and a rule compelling a defendant in a criminal action to interpose his peremptory challenges at any particular time is invalid. *People v. Jenks*, 24 Cal. 11.

Where a statute provides that parties shall be entitled, after the challenges for cause have been exhausted, to have a list of eighteen names drawn according to the terms of the statute, upon which list their peremptory challenges are to be made, a court cannot refuse to make up the list of eighteen as requested, and confine the right of peremptory challenge to the twelve jurors

called to be sworn, on the ground that such is the custom or rule of the court. Such a rule cannot override the mandatory terms of the statute. Thus to impanel a jury in violation of the law, and in such a way as to deprive a party of his right to peremptory challenge, constitutes reversible error. *Gulf, etc., R. Co. v. Shane*, 157 U. S. 348.

4. Where a statute authorizes the ordering of special juries in a certain manner, a rule of the court which provides that special juries shall be drawn from the wheel in the same manner as ordinary juries is invalid. *State v. Withrow*, 133 Mo. 500.

5. See in general article JURY, vol. 12, p. 223.

Payment of Fees in Advance. — The Superior Court may adopt a rule requiring a party who demands a trial by jury to deposit the jury fees with the clerk in advance of the trial. Such a rule is a reasonable regulation of the mode of enjoyment of a trial by jury, and is not a denial or an impairment of the right thereto. *Conneau v. Geis*, 73 Cal. 176.

Time of Demanding Jury Trial. — A rule which requires that a jury trial shall be demanded at a certain time, but which does not declare that a failure to demand it at that time shall constitute a waiver of the right to a trial by jury, is valid, and under such a rule the right to a jury trial is not waived by neglecting to demand a jury within the prescribed time. A rule declaring the right to a jury trial to be forfeited unless demanded within a prescribed time would be invalid. *Biggs v. Lloyd*, 70 Cal. 447.

A Court of Chancery May Adopt a Rule that no jury will be allowed in that court unless the demand therefor is made on or before the second day of the term, by motion on the motion

10. Number of Witnesses and Order of Proof. — Rules which conflict with a constitutional right of the defendant in a criminal case to have compulsory process for obtaining witnesses in his favor,¹ or which operate to deprive him of his right to cross-examine the witnesses of the adverse party, are invalid.²

docket or at the bar of the court. *Stadler v. Hertz*, 13 Lea (Tenn.) 315.

Mode of Organizing Jury. — A rule is not necessarily invalid because it prescribes a mode of organizing a petit jury, when produced to a prisoner for challenge, different from that which has prevailed before at common law. Where the mode of forming a jury in such cases has been regulated entirely by precedent, it is competent for the court to alter the practice and adopt a rule. *State v. Clayton*, 11 Rich. L. (S. Car.) 581; *State v. Boatwright*, 10 Rich. L. (S. Car.) 407.

Special Rule for Examination of Jurors. — In *Foute v. State*, 15 Lea (Tenn.) 712, upon making up the jury the judge stated that he had adopted a rule prohibiting the attorney-general and counsel for defendants from asking a juror if he had formed or expressed an opinion, etc., and requiring that counsel should submit such questions to the court, and he would ask the jury. On appeal this rule was held to be valid.

1. Restricting Number of Witnesses in a Felony Case. — A rule of the Circuit Court which forbids the clerk to issue subpoenas for more than five witnesses in a felony case, unless application is made to the court showing their materiality, is invalid, since it conflicts with the constitution. The enforcement of such a rule, however, is not ground for reversal unless it appears that the defendant has been prejudiced thereby. *Aikin v. State*, 58 Ark. 544.

A Rule of Court Is Invalid Which Restricts to Fifteen the number of subpoenas for witnesses to which one indicted for murder is entitled as of right, and which provides that in order to obtain other witnesses the defendant must file a motion before the court or judge setting forth fully the names of the witnesses desired, what facts such witnesses are expected to prove, that their evidence is material to the issue involved, and wherein it is material, and that the facts cannot be established by the witnesses for which subpoenas have been issued, as of course. *State v. Gideon*, 119 Mo. 94.

Rule Regulating Fees of Witnesses. —

In *Iowa* the statutes provide that a witness who is subpoenaed in two or more cases, by the same party, shall be entitled to but one single compensation from such party for the same day's attendance or travel; and it has been held that a rule is valid which provides that witnesses shall not be entitled to claim fees in more than one cause at the same time, but they may select in which case they will claim the same; nor will they be permitted to claim as witness for more than one day when under recognizance to appear at the same time in court on a charge of some criminal offense, nor when a juror. Such a rule is not in conflict with the statute mentioned before, but simply makes a consistent application of the principles thereof to witnesses not embraced in its language. *Meffert v. Dubuque, etc.*, R. Co., 34 Iowa 430.

And see *supra*, II. 1. *Rules in Contravention of Common Law or Statute.*

2. In *State v. Bryant*, 55 Mo. 75, two defendants, B. and T., were tried together, and after the trial was begun it was discovered that their interests came in collision. The defendants were represented by different counsel, and the counsel for the defendant T. conducted the cross-examination. Counsel for the defendant B. desired to question a witness in regard to matters which were material to his defense, but which were damaging to T., the codefendant. The court refused to allow the counsel for B. to put the questions, but said they might be asked through the counsel for T., who had been conducting the cross-examination of the witness. This ruling of the court was made in accordance with a rule of the circuit court forbidding more than one counsel on either side to examine witnesses. On appeal the ruling of the trial court was reversed, and the appellate court said: "The rule relied upon is inserted in the transcript, and we have examined it, and think that the court misinterpreted it, and that it was not designed to apply to a case of this description. But be that as it may, we hold that it was not in the power of a court to adopt any rule

Rules Regulating the Order of Proof may properly be enacted, provided they do not conflict with any statutory or common-law provision.¹

11. Proof of Pleadings and Written Instruments.—The law of evidence cannot be altered by rule, but it has been held that the courts may adopt rules dispensing with the proof of averments contained in the pleadings where such averments have not been specifically denied,² likewise rules dispensing with proof of the execution or signature of written instruments on which suit is brought, unless their validity is denied, or notice is given that proof will be required.³

which would deprive a defendant in a criminal case of the right of cross-examination. This right is one of the essential tests of truth in the examination of testimony, and any rule, regulation, or order which goes to deprive a party of its benefits is illegal and void." See also article EXAMINATION OF WITNESSES, vol. 8, p. 70.

1. See article ORDER OF PROOF, vol. 15, p. 375.

Relative Time of Offering Testimony and Raising Question of Law.—A rule providing that the whole testimony on both sides shall be offered before any question of law is raised, except objections to the competency of such testimony, is valid. *Gist v. Drakely*, 2 Gill (Md.) 330.

Admission of Evidence After Prayer Offered.—A rule of court that when a plaintiff or defendant has closed his case on the testimony, and a prayer shall be offered to the court upon such testimony, he shall not offer any additional testimony on the subject to which the prayer refers, or with regard to the case in any particular, may be valid as a general rule of practice, but it cannot operate to prevent a party from having a sheriff's return corrected so as to conform to the facts. *Main v. Lynch*, 54 Md. 658.

2. Verified Answer Taken Pro Confesso.—A rule of court is valid which provides that a verified answer to a verified petition shall be taken *pro confesso*, in the absence of a replication on oath. *Russell's Appeal*, 93 Pa. St. 384.

In Maine a rule has been held valid providing that parties filing specifications of the nature and grounds of defense, under the Act of March 16, 1855 (c. 174, § 4), shall in all cases be confined on the trial of the action to the grounds of defense therein set forth; and that all matters set forth in the writ and declaration which are not specifically denied shall be regarded

as admitted for the purposes of the trial. *Fox v. Conway F. Ins. Co.*, 53 Me. 107; *Day v. Frye*, 41 Me. 326.

3. *Reese v. Reese*, 90 Pa. St. 89; *Medary v. Cathers*, 161 Pa. St. 87; *Mills v. U. S. Bank*, 11 Wheat. (U. S.) 431.

In Pennsylvania the Act of March 11, 1836, § 6, gives the District Court authority to adopt rules regulating and altering the time and manner of pleading, and the form and effect thereof. Under this enactment it has been held that the court may make a rule requiring a defendant to deny by affidavit the execution of an instrument on which suit is brought, and, in a suit against partners, so to deny the partnership in order to put the plaintiff to the proof of these facts. In a case where the validity of such a rule was called in question it was held to be valid, and the court said: "The distinction between a rule of court which tends to alter the law of evidence and one which is established merely for the regulation of practice is strikingly illustrated in the two cases on this subject decided in the Supreme Court of the United States. In *Patterson v. Winn*, 5 Pet. (U. S.) 233, it was held that the Circuit Court could not by rule of court change the right of a party to introduce secondary proof of a writing alleged to be lost; and therefore a rule requiring the oath of the party in addition to the usual proof was invalid. But in *Mills v. U. S. Bank*, 11 Wheat. (U. S.) 431, it was determined that the court might make a rule dispensing with proof of a bond, note, etc., unless the defendant filed with his plea an affidavit denying the execution of the instrument; and that is the case now before us. The reasons given for this decision by Mr. Justice Story are satisfactory and conclusive. The object of such rule is to prevent unnecessary expense and useless delays or objections,

Rules Regulating the Opening, Filing, and Proving of Depositions have also been held valid in some jurisdictions.¹

often frivolous. It does not interfere with the rules of evidence. It does not take away the right to demand proof of execution, but only requires the party to give notice by affidavit that he means to contest the fact. Not doing so is a waiver of objection." *Odenheimer v. Stokes*, 5 W. & S. (Pa.) 175.

In **Maine** it has been held that the 33d rule of the Supreme Judicial Court, which corresponds with the rule of the Court of Common Pleas, and provides that in actions on promissory notes, orders, or bills of exchange the counsel for the defendant cannot deny the genuineness of his client's signature, unless thereto specially instructed, or unless defendant, being present in court, shall deny the signature to be his or to have been authorized by him, is valid. The rule applies to instruments attested by a witness as well as to others. *McDonald v. Bailey*, 14 Me. 101; *Libby v. Cowan*, 36 Me. 264.

Proof of Deeds by Office Copies. — A rule providing that in all actions touching the realty office copies of deeds pertinent to the issue, from the registry of deeds, may be read in evidence without proof of their execution, when the party offering such copy in evidence is not a party to the deed, and does not claim as heir nor justify as servant of the grantee or his heirs, is valid. *Sellers v. Carpenter*, 27 Me. 497.

The above rule, however, does not apply to the introduction of any papers touching the realty except deeds. *Dunlap v. Glidden*, 31 Me. 510.

1. See in general article DEPOSITIONS, vol. 6, p. 471.

Opening and Filing of Depositions. — In *Illinois* the statutes provide that depositions shall be invalid if they are returned to the court unsealed, or if the seal has been broken previous to their reception by the clerk, and it is also provided that it shall not be lawful for any party or for the clerk of the court in which the deposition is returned to break the seal, either in term time or vacation, unless by written consent of the parties or their attorneys, or by order of court duly entered of record. It has been held, however, that a rule of the court which authorizes the clerk to open and file depositions which have been returned to him amounts to the

order contemplated by the statute, and that it is valid as a rule of practice. *Gage v. Eddy*, 167 Ill. 102.

Manner of Excepting to Depositions. — A rule is valid which provides that all exceptions to depositions, exclusive of those on account of competency and relevancy, shall be considered waived, unless the exceptions be filed in writing within six days from the commencement of the next term, if the deposition be filed in vacation; and if said deposition be filed in term time, within five days after notice thereof served on the attorney of the opposite party; and if the deposition be not filed within five days before the trial, all such exceptions shall be determined before the jury is sworn, and when practicable shall be disposed of on a law day if one precede the trial of the cause. *Brooks v. Boswell*, 34 Mo. 474.

In an **Early Case in Kentucky** it was held that a rule of the court was valid which provided that no exception should be taken to the reading of any deposition or voucher in a chancery cause for the want of notice, or any other ceremony in its taking or authentication, unless a notice was served on the adverse party or his counsel. But it was also held that this rule related only to those vouchers and instruments which by their authentication would be evidence without proof *aliunde* if there were no defect in the ceremony of their authentication; and that it could not apply where the paper offered and admitted in evidence was a deed which had not been recorded. Such a deed is a mere private paper without authentication, and can only be established by proof *aliunde*. *Kennedy v. Meredith*, 3 Bibb (Ky.) 465. And in another case it was held that the rule in question would not be enforced where notice of taking the deposition had not been given to the adverse party. *Williams v. Gilchrist*, 3 Bibb (Ky.) 49.

Objections to Authority of Officer Taking Deposition. — A rule of the Superior Court that when a deposition is taken and served by any person purporting to be an officer authorized by the commission to take the deposition, if it shall be objected that the person so taking and serving the same was not such officer, the burden of proof shall be on the

12. Motions and Orders to Show Cause.¹ — The form of motions and petitions, and the time for filing them, and serving notice thereof on the adverse party, may be prescribed by rules of the court;² but such rules cannot operate to shorten periods of time prescribed by statute,³ nor can they apply to motions made by persons who are not in court as parties to the suit,⁴ or to motions of course made in the progress of the cause.⁵

The Provisions of a Statute Requiring Notice of Motions in all cases cannot be dispensed with by virtue of a rule which authorizes the dismissal of appeals without notice, as a penalty for noncompliance

party so objecting, is valid. The court has authority to adopt such rule under General Statutes, c. 131, § 31. *McKinney v. Wilson*, 133 Mass. 131.

1. Motions and Petitions. — See in general articles MOTIONS, vol. 14, p. 70; PETITIONS, vol. 16, p. 500.

2. Form and Notice of Motions. — In *Cronkrite v. Bothwell*, 3 Wyo. 736, a rule of the Supreme Court was held to be valid which provided that all motions submitted to the court should be in writing, and notice thereof, except in cases of petitions for a rehearing, should be served on the adverse party or his attorney at least one day before the hearing of such motion.

Motion to Set Aside Findings or Judgment. — In *New Mexico* a rule of the Supreme Court has been held valid which provides that no motion to set aside any findings or judgment rendered in vacation shall be entertained unless it shall be filed and a copy thereof served upon the opposite party within ten days after the entry of such findings or judgment. *Rio Grande Irrigation, etc., Co. v. Gildersleeve*, 174 U. S. 603.

Notice Other than That Prescribed by Statute. — At a time when the statutes of *South Dakota* provided for eight days' notice of motion the Supreme Court of that state adopted a rule prescribing the same period. Subsequently the statutes were amended so as to provide for six days' notice, but the Supreme Court rule requiring notice of eight days was not correspondingly altered. In a case arising subsequent to the amendment of the statute the validity of this rule was called in question, but the court held that it was still valid and might be enforced. *Smith v. Hawley*, (S. Dak. 1899) 78 N. W. Rep. 355.

Notice of Road Petition. — A rule of

the court providing that before any petition for a new road or to vacate an old one shall be granted, ten days' notice shall be given to the supervisors, is reasonable and valid. *Cherrytree Tp. Road*, 10 Pa. Co. Ct. 389.

3. Petition for Rehearings. — Where the statute allows an application for a rehearing to be made three judicial days after decision rendered, a rule of the Circuit Court requiring applications to be made on the same day that the decision is rendered is illegal. *State v. Judges*, 37 La. Ann. 596.

Motions in Arrest of Judgment. — In *Wilkinson v. Daniel*, *Wright* (Ohio) 369, the defendant moved for a new trial, which motion was overruled the next day, and he then moved in arrest of judgment, but the court refused to consider this latter motion because it was not filed the day after the verdict, and so came too late, under a rule of the court which required such motions to be filed the day after the verdict. On appeal, however, it was held that the trial court erred in overruling the motion. The statute provides that motions for a new trial shall be first made, and that if denied the defendant may then move in arrest of judgment, and since in the case at bar a new trial was not denied until the second day after the verdict the defendant could not move in arrest of judgment before that time without waiving his motion for a new trial or violating the law. The enforcement of the rule, therefore, operated to deprive the defendant of a statutory right, and was improper.

4. Application to be Joined as Party. — The application of a necessary party to be joined as a party to an action cannot be refused on the ground that it is not made within the time required by a rule of the court. *Clough v. Thomas*, 53 Ind. 24.

5. Johnson v. Adleman, 35 Ill. 265.

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with its requirements.¹

Motions for Continuances are thus subject to regulation by rules, provided such rules do not conflict with statutes or improperly limit the discretion of the court.²

Orders to Show Cause. — Rules regulating the allowance and discharge of orders to show cause have also been held valid in some jurisdictions.³

13. Requests for Instructions to the Jury. — The time when requests for instructions must be presented to the court, and the manner of presenting the same, whether orally or in writing, may be regulated by reasonable rules, but such rules must not be extended to cases which are not within their reason and spirit, nor be allowed to cut off instructions the occasion for which has arisen after the expiration of the prescribed period.⁴

1. *Cates v. Mack*, 6 Colo. 401. See also, as to notice of motions, article MOTIONS, vol. 14, p. 121 *et seq.*

2. A rule providing that all grounds of motion for nonsuit, in arrest of judgment, and for continuance must be urged and insisted upon at once, and that, after a decision upon one or more grounds, no others afterwards urged will be heard by the court, is valid. This rule when properly construed does not deny to the judge the discretion in every conceivable aspect of a case, to continue it after one application, refused to the same party, and cases may arise where a suspension of the rule should be allowed, but in all ordinary cases it should be strictly enforced. *Wilson v. State*, 33 Ga. 214.

Rule Limiting Court's Discretion. — Where the granting or refusing of a continuance is confided by statute to the discretion of the court, the court cannot be deprived of this discretion by any mere rule, and where it has exercised its discretion an appeal does not lie on the ground that its decision is in violation of a rule of the court. *Adams Express Co. v. Trego*, 35 Md. 47.

3. A rule providing that an order to show cause must be accompanied by a notice of motion setting forth the grounds thereof, and that an order to show cause shall not be granted when a motion can be made in the ordinary form upon notice, is valid. This rule, however, may be dispensed with in any particular instance in order to allow the court to dispose of the application on its merits. *Gillette-Herzog Mfg. Co. v. Ashton*, 55 Minn. 75.

Discharge of Rule for Non-Appearance of Parties. — In *Pennsylvania* a rule of

the County Court of Allegheny county provides that where goods levied upon by the sheriff are claimed to belong to persons other than the defendant in the execution, the sheriff may obtain a rule upon the parties to show cause, and that if said parties fail to appear and answer the rule shall be discharged within five days after service, and that if the default is made by the plaintiff alone the officer shall release the property, but otherwise shall proceed with the execution. It has been held that this rule is valid, and that it is authorized by the Act of May 26, 1897 (P. L. 95). *Strouse v. Bard*, 8 Pa. Super. Ct. 48.

4. See in general article INSTRUCTIONS, vol. 11, p. 47.

Before Beginning of Final Argument. — Rules providing that instruction must be submitted to the court in writing before the beginning of the final argument are valid, but they should not be strictly adhered to in cases where their enforcement will work injustice. *People v. Williams*, 32 Cal. 280; *People v. Silva*, 121 Cal. 668; *People v. Demasters*, 105 Cal. 669; *Standard F. Ins. Co. v. Wren*, 11 Ill. App. 242; *Prinderville v. People*, 42 Ill. 217.

A Rule Which Requires Special Instructions and Interrogatories to the jury to be presented to the court before the argument begins is in accordance with the statute (2 G. & H., § 324, p. 199, c. 4) and is valid. *Ollam v. Shaw*, 27 Ind. 388.

Before Close of Argument. — A rule providing that instructions offered after the conclusion of the arguments of counsel on both sides before the jury will not be entertained or considered

14. Arguments of Counsel. — Reasonable rules may be adopted in regard to the argument of causes, but rules which prohibit all argument and deprive a party of his right to be heard are invalid.¹

15. Settlement of Case and Exceptions. — Courts may enact rules prescribing the time within which cases on appeal and bills of exceptions must be served on the adverse party and presented for settlement and signature by the judge, provided such regulations do not conflict with statutory provisions.²

by the court, is valid. *Sterling Organ Co. v. House*, 25 W. Va. 65.

Presentation to Adverse Party of Points to Charge Upon. — The court of common pleas may make a rule requiring points to charge upon, to be presented to the counsel for the adverse party, and may refuse instructions where the rule has not been complied with. Such a rule is calculated to prevent surprise, and to enable the court to give due reflection to the points on which the charge is requested. *Haines v. Stauffer*, 13 Pa. St. 541.

Contra — That Such Rules Are Invalid. — In *Kentucky*, however, it has been held that a court cannot adopt a rule prohibiting a party from obtaining the instructions of the court to the jury on any matter of law relevant to the case, at any time before the jury retire from the bar. *Bell v. North*, 4 Litt. (Ky.) 133.

Notice that Written Instructions Are Desired. — A rule of court requiring a party before trial to notify the court of his desire to have the instructions to the jury put in writing is repugnant to the laws of this state. *Laselle v. Wells*, 17 Ind. 33.

1. *Lynch v. State*, 9 Ind. 541. And see article ARGUMENTS OF COUNSEL, vol. 2, p. 698.

Rule Forbidding Oral Argument. — Section 3 of rule 2 of the Supreme Court of *Nebraska* refusing to permit oral arguments by the appellee in a case where said appellee has moved for affirmance under the rule, on the ground that the appeal is without merit and is taken for delay, is valid. Such a rule simply forbids oral argument and does not prohibit a hearing in the proper sense of the term, and therefore does not violate section 24 of the Bill of Rights. *Schmidt v. Boyle*, 54 Neb. 387.

Limiting Time for Argument. — In *People v. Tock Chew*, 6 Cal. 636, which was an indictment for grand larceny, the court announced on the trial that

the argument of the prosecuting attorney would be limited to forty-five minutes and the argument of the defense to thirty minutes. On appeal it was held that the adoption of this rule by the trial court was proper, since it did not appear that the issues were numerous or complicated or that the defendant had been prejudiced.

A Rule of the Court Is Invalid which takes away the right to be heard upon an order equivalent to a final adjudication, as, for instance, an order striking out a pleading and precluding a party from making any defense, as a penalty for failure to comply with a rule of court respecting the discovery of books and papers. *Rice v. Ehele*, 55 N. Y. 518.

2. See in general articles BILLS OF EXCEPTIONS, vol. 3, p. 374; CASE MADE ON APPEAL, vol. 3, p. 879.

Time of Noticing Case for Settlement. — In *Jones v. Menefee*, 28 Kan. 436, a rule was held valid which provided that cases made should, after the suggestion of amendments, be noticed for settlement within a certain time, and that a failure to comply with this rule should be sufficient reason for the courts refusing to settle and sign the case.

Time of Presenting Bill of Exceptions. — The Circuit Court may enact a rule that bills of exceptions, where not agreed to, shall be presented within fifteen days after verdict and judgment. Such a rule is valid, but it does not apply where the bill of exceptions is agreed to by counsel. *Mallon v. Tucker Mfg. Co.*, 7 Lea (Tenn.) 62.

Rules in Conflict with Statute. — In *Missouri* it is provided by statute that exceptions taken during a trial may be reduced to writing and filed during the term at which they are taken; and that it is the duty of the trial judge to settle a bill if properly prepared and presented at any time during the term. Under this statute Rule 31 of the St. Louis city circuit court, requiring bills

16. Appellate Procedure. — The time of docketing appeals¹ and of filing points and authorities,² the form of the transcript and the time when it shall be filed,³ the notice to be given to the adverse party,⁴ the payment of the clerk's fees for filing the

of exceptions to be prepared and served on the adverse party within ten days after any ruling at special term which is excepted to, and prohibiting the signing of any bill by the judge unless served within such time, has been held to be invalid. *State v. Withrow*, 135 Mo. 376.

In New York. — A rule prescribing the time within which a proposed case and exceptions shall be served upon the adverse party may be established. *De Lamater v. Havens*, 5 Dem. (N. Y.) 53. But a rule which prescribes a shorter time for service than that prescribed by statute is invalid. Thus where the time for serving a case of exceptions does not begin to run under the statute until the entry of judgment and notice thereof, and where the plaintiff has ten days thereafter within which to make such service, a rule which requires a case to be served within ten days after written notice of the decision or report in a case tried before the court or a referee, is invalid. *French v. Powers*, 80 N. Y. 146.

1. In *State v. Edwards*, 110 N. Car. 511, a rule of the Superior Court was held to be valid which provided that appeals from justices of the peace in civil actions would not be called for trial unless returns of such appeals had been docketed ten days previous to the term, but that appeals docketed less than ten days before the term might be tried by consent of parties.

2. A court may adopt rules requiring printed points and authorities on behalf of the parties to appeals to be filed within a specified time after the filing of the transcript, and declaring that the time so limited shall not be extended, except by order of the court upon stipulation of the parties, or affidavit showing good cause therefor, and also providing that appeals may be dismissed for noncompliance with these provisions. *Shain v. People's Lumber Co.*, 98 Cal. 120. See also article BRIEFS, vol. 3, p. 710.

3. *Martin v. Hudson*, 79 Cal. 612; *Conkling v. Cameron*, 3 Okla. 525.

Requiring Printed Abstracts. — A rule providing that cases in the supreme court shall be submitted on printed

abstracts, is valid. *State v. O'Day*, 68 Iowa 213.

A Rule Requiring Marginal Notes to be placed on the transcript to indicate the several parts of the pleadings in the cause, is reasonable and valid. *Bass v. Doerman*, 112 Ind. 390; *Egan v. Ohio, etc., R. Co.*, 138 Ind. 274.

Time of Filing Transcript. — In *Pinders v. Yager*, 29 Iowa 468, the following rule of the Circuit Court was held to be reasonable and valid: "In cases where appeals are taken from judgments of justices of the peace (which appeals are allowed ten days before the succeeding or subsequent term of the Circuit Court), and the appellant neglects to have a certified transcript filed with the clerk of said court, or an affidavit showing some cause for not so doing, on or before the second day of said term of said court, then the appellee may, on the second or any subsequent day of such term, have a transcript of such judgment and copy of appeal bond filed, and the case docketed and the judgment affirmed, and judgment against the sureties on the bond. This rule applies to cases whether notice of appeal has been filed or not. This rule shall not be taken to preclude filing appeals already taken by the second day of the next term thereafter." "

A rule of the Superior Court that the record and transcript on appeal from a justice's court must be filed within ten days after the perfecting of the appeal under penalty of dismissal for noncompliance, is valid. *McKay v. Superior Ct.*, 86 Cal. 431.

Rule Conflicting with Statute. — A rule which makes a change of venue case non-triable at a given term, unless the transcript is filed at least fifteen days before said term, is invalid. Such a rule conflicts with § 4167, Rev. Stat. 1889. *State v. Underwood*, 75 Mo. 230.

Rule Permitting Appellee to File Transcript. — A rule permitting the appellee, in appeals taken from justices, to file a transcript with the same effect as if filed by appellant, is invalid. *McConochie v. Bieber*, 2 Northam. Co. Rep. (Pa.) 386.

4. **Notice of Appeal from Award of**

papers,¹ and the stay of execution pending the determination of the cause in the appellate court,² may all be regulated by rule.³

A Rule Requiring Specific Assignments of Error by an appellant who seeks to impeach the rulings of the trial court is reasonable and may be enforced.⁴

17. Allowance of Costs and Applications for Security. — It is generally held to be within the power of the courts to adopt rules in regard to motions for costs,⁵ and cost bonds.⁶ Rules, however, which require the payment of costs in advance, under a penalty of dismissal for noncompliance, are invalid;⁷ and a

Arbitrators. — The court of common pleas may adopt a rule that a party appealing from the award of arbitrators shall give his opponent notice of the time and place of entering the appeal, and of the name of his surety. *Barry v. Randolph*, 3 Binn. (Pa.) 277.

1. A rule is valid which provides that the clerk's fees for filing and docketing the papers in a case appealed from a justice shall be paid before the case is entered, and that, if they are not paid within thirty days, the opposite party may pay them, docket the case, and have the appeal dismissed. *Salt Lake City v. Redwine*, 6 Utah 335.

2. In *Michigan*, Circuit Court rule 47, subdiv. *h.* (which rule was prescribed by the Supreme Court for the Circuit Court), provides that unless within ten days after settlement of a bill of exceptions, the proposed appellant cause a writ of error to be issued out of the Supreme Court and filed, any order staying execution shall become inoperative, and the adverse party shall be entitled to an execution, provided that on cause shown, on special motion and on proper terms, the court may order a recall of such execution. It has been held that it was within the power of the Supreme Court to adopt this rule for the government of the Circuit Court, and that the rule is valid. *Ismond v. Scougale*, (Mich. 1899) 78 N. W. Rep. 546.

3. See in general article APPEALS, vol. 2, p. 1.

4. *Denton v. Woods*, 86 Tenn. 37. See also article ASSIGNMENT OF ERRORS, vol. 2, p. 920.

5. A rule is valid which provides that motions for costs, when filed after the return term, must disclose upon their face that the cause for the motion has arisen, or the knowledge thereof has come to the party making the motion since the last adjournment of the

court. A motion not complying with this rule may properly be overruled. *Nutter v. Houston*, 42 Mo. App. 363.

Form and Service of Bill of Costs. — A rule is reasonable and valid which provides that when a cause is continued on trial, the bill of costs for attendance of witnesses must contain the names of the witnesses, and must be filed and served upon the adverse party within four days. *Flisher v. Allen*, 141 Pa. St. 525.

6. A rule is valid which provides that a defendant who applies for security for costs on the ground that the plaintiff is a nonresident, must make his application before answering the complaint, unless the answer is made in ignorance of the fact that the plaintiff is a nonresident, or unless he has become a nonresident since the complaint was answered. *Jeffersonville, etc. R. Co. v. Hendricks*, 41 Ind. 48.

Also a rule requiring such applications to be made at the first calling of the docket, unless the affidavit on which the motion is based shows that the plaintiff's nonresidence was not known to the defendant or his attorney at that time, and that the motion was made as soon as the fact was known. *Pancoast v. Travelers Ins. Co.*, 79 Ind. 172. See in general article SECURITY FOR COSTS.

7. *Pekin v. Dunkelburg*, 40 Ill. App. 184; *People v. McClellan*, 31 Cal. 102.

In *People v. McClellan*, 31 Cal. 102, which was an action in the name of the people to recover taxes levied and assessed upon the property of the defendant, the defendant demurred and answered at the same time. The demurrer was overruled, and the court on motion of plaintiff made an order that the answer be stricken out, unless the defendant should pay to the plaintiff, in twenty days from that day, the sum of twenty dollars costs, provided by

mere rule of court cannot authorize the entry of a judgment for costs contrary to the established practice of the jurisdiction in which the court is held.¹

18. Miscellaneous Rules.—The courts in the different states have from time to time upheld the validity of particular rules regulating the practice in divorce proceedings,² ejectment suits,³ certiorari cases,⁴ and suits for the settlement of executors' and administrators' accounts,⁵ and also of various other rules of prac-

rule of court to be paid in such cases. On appeal it was held that this action of the trial court was erroneous, since the statutes of the state authorized defendants to demur and answer to a complaint at the same time, and that any rule of court operating to deprive a party of this statutory right was invalid, and could not properly be enforced.

1. In a jurisdiction where it is the settled practice that no judgment for costs shall be entered upon a reversal by the common pleas on certiorari of the judgment of a justice, a rule of court which provides for the entry of such a judgment is invalid. *Metz v. Ebersole*, 3 Pa. Dist. 672.

2. Divorce Proceedings — Appointment of Referees.—A rule of the *New York* Supreme Court which provides that in divorce cases the court shall in no case order a reference to a referee nominated by either party, nor to a referee agreed upon by the parties, is valid and in accordance with the Code, and cannot be disregarded by the court. *Ives v. Ives*, 80 Hun (N. Y.) 136.

Time of Filing Objections to Absolute Decree.—In *Massachusetts* rule 5 of the Superior Court for the regulation of practice in divorce provides that "at any time before the expiration of six months from the granting of a decree of divorce *nisi*, the libellee or any other person may file in the office of the clerk for the county in which the libel is pending, a statement of objections to an absolute decree; such statement to set forth the facts on which it is founded, verified by affidavit." It has been held that this rule is valid, but that it does not prevent a libellee from filing his statement of objections after the time limited in a case where the causes for such objections arise after the expiration of that period. *Pratt v. Pratt*, 157 Mass. 503.

Rule Extending Statutory Time to Answer Complaint.—Where a statute provides that in actions for divorce a

copy of the complaint shall be served on the defendant, and also a notice to appear and answer within thirty days, or such other notice as the court or judge may direct, a rule adopted by a district court which allows a defendant in certain cases a longer period to answer the complaint, to wit, ninety days, is void. *Pagebank v. Pagebank*, 9 Minn. 72.

3. Ejectment Suits — Rule Requiring Abstracts of Title.—In *Pennsylvania* it has been held that the Court of Common Pleas may adopt a rule requiring parties to ejectment suits to file abstracts of their title, and authorizing the entry of judgment in favor of the plaintiff in cases where his abstract shows a good *prima facie* title and where the defendant has not filed any abstract whatever. *Lehman v. Howley*, 95 Pa. St. 295.

Requiring Defendant to Admit Possession of Premises.—In *Georgia* it has been held that the judges of the Superior Court may adopt a rule providing that no person shall be allowed to defend an ejectment suit without admitting that he was in possession of the premises in suit at the commencement of the action; and also that they may amend this rule so as to make it applicable to statutory actions for the recovery of land. *Snipes v. Parker*, 98 Ga. 522.

4. Certiorari.—The Court of Common Pleas may require exceptions to be filed within a limited time in all certioraris to remove the judgments of justices. *Snyder v. Bauchman*, 8 S. & R. (Pa.) 336.

5. Written Statement of Objections to Administrator's Account.—In *Cummings v. Bradley*, 57 Ala. 224, which was a suit for the settlement of an administrator's account, an administrator *de bonis non* filed exceptions to several items of the account, and the trial was entered upon. Pending the trial he offered oral objections to items to which he had not excepted, and offered

tice designed to prevent delay, and to promote the trial of causes on their merits.¹

III. METHOD OF ADOPTION — 1. In General. — The federal courts, while admitting that written rules are preferable, have held that a practice may be established by a uniform mode of proceeding for a number of years without being embodied in writing,² and it is undoubtedly true that all courts have certain rules which rest in

proof in support of such objections. He also made a similar offer of objections and proof against items which he had excepted to, but on grounds other than those specified in his exceptions. The Probate Court confined him to his written exceptions and ruled out the evidence under a rule of said Probate Court in reference to settlements of executors, administrators, and guardians. This rule provided that when an account was disputed, the party contesting must file his exceptions in writing specifying to which items of the account he excepted, with the ground of exception, or as to which additional proof might be required. On appeal the ruling of the Probate Court was sustained, and it was held that said court had authority to adopt and enforce the rule in question.

Notice of Motion to Discharge Fiduciary. — A rule is valid which provides that "unless notice be waived in writing, no administrator, executor, guardian, or trustee will be discharged from further duty or responsibility, nor upon final settlement, until notice of the application shall have been given to all persons interested, as required in case of an original notice for the commencement of a civil action, unless a different notice be prescribed by the court." *Van Aken v. Coldren*, 80 Iowa 254.

1. Time of Making Defaults Absolute. — Under general rule 23 the *Michigan* Circuit Court has power to make a special rule shortening the time for making defaults absolute to two days in term. *Howard v. Tomlinson*, 27 Mich. 168.

Manner of Offering Prayers for Instructions. — The court may make a rule that all prayers for instructions to be offered must be offered together, and may properly refuse to grant or hear prayers which are offered after the time limited by the rules. *Sparrow v. Grove*, 31 Md. 214.

Dismissal of Action for Failure to Prosecute. — A rule providing that "upon

the calling of the docket at the commencement of each regular term without notice to either party, and in term time upon proper notice to the opposing party, all actions, suits, and other proceedings in which no order of progress has been made and entered of record for the period of one year or more, shall be dismissed by the court for failure to prosecute, unless the court, for good cause shown, shall otherwise direct," is valid, and its enforcement in a case where the plaintiff has been guilty of gross laches is proper. *Cone v. Jackson*, (Colo. App. 1899) 55 Pac. Rep. 940.

Rule Forbidding Removal of Records. — The court may adopt a rule that after a cause is at issue no party or attorney shall take any of the papers in the case from the court-room or the clerk's office. *Langsdale v. Woollen*, 99 Ind. 575; *Vice v. Jones*, 4 Ind. App. 426.

Examination of Adverse Party Before Issue Joined. — Rule 21 of the New York Superior Court adopted in 1871, authorizing the court to grant an order for the examination of the defendant to enable the plaintiff to prepare his complaint, was a valid rule, and authorized the examination of a party before issue joined, although under the practice previous to the adoption of the rule such examination could only be had after issue joined. *Havemeyer v. Ingersoll*, (Supm. Ct. Spec. T.) 12 Abb. Pr. N. S. (N. Y.) 301. Rule 21 adopted in 1874 differed in its phraseology from the rule of 1870, but it was held that whatever might be its language it could not deprive the plaintiff of his right to examine the defendant for the purpose of preparing his complaint. *Glenney v. Stedwell*, 64 N. Y. 120. See also article EXAMINATION OF PARTIES BEFORE TRIAL, vol. 8, p. 35.

2. Uniform Practice Without Written Rules. — *Fullerton v. U. S. Bank*, 1 Pet. (U. S.) 604; *U. S. v. Stevenson*, 1 Abb. (U. S.) 495; *Duncan v. U. S.*, 7 Pet. (U. S.) 435; *Lowry v. Story*, 31 Fed. Rep. 769.

parol,¹ but in most of the states it is held that the general rules of practice enacted by the courts must be embodied in writing and adopted of record.²

2. Printing and Filing Copies. — It is also essential that reasonable publicity should be given to the rules thus adopted, and to this end it is frequently provided that they be printed and that

1. In *Maloney v. Hunt*, 29 Mo. App. 379, the court said: "It is a fact well known to bench and bar that trial courts have certain rules of procedure which are not specified in the statute or the canons of the common law, and which may not even be spread upon the record of the court. Yet they are well understood and observed by both lawyers and judge. For instance, the court has a certain hour for convening and adjourning court each day; a certain hour of the day, or day of the week or term, for calling and hearing the motion docket; the number of times a case will be called before parties are required to make a definite announcement, and the like."

2. Rules to Be Adopted of Record. — *Chicago Anderson Pressed Brick Co. v. Sobkowiak*, 148 Ill. 575; *Roby v. Title Guarantee etc., Co.*, 166 Ill. 336; *Illinois Cent. R. Co. v. Haskins*, 115 Ill. 300; *State v. Ensley*, 10 Iowa 149.

Rules Announced Orally by the Court. — In *Owens v. Ranstead*, 22 Ill. 161, the complainant offered to introduce certain evidence, but it was rejected by the trial court on the ground that there was a general rule of the court requiring parties who intended to offer such evidence to give notice of the same ten days previous to the first day of the term. On appeal it was shown that this rule had never been entered upon the records of the court, but had been announced orally from time to time during the progress of business in open court. In view of this fact the appellate court held that the action of the trial court in excluding the evidence was erroneous. Rules of the character of the one in question should be written and recorded, and unless they are adopted in this manner they should not be enforced.

Presumption that Rules Have Been Regularly Adopted. — In *Illinois Cent. R. Co. v. Haskins*, 115 Ill. 300, the trial court refused to give certain instructions asked for by the defendant, on the ground that the request was not presented within the time required by a

rule of the court. On appeal the defendant's counsel contended that they could find no such rule among those appearing of record and officially published, and therefore that the action of the trial court in refusing to give the instructions was erroneous. This contention, however, was overruled, and in its opinion the appellate court said: "Appellant's counsel say they can find no such rule among those appearing of record and officially published. We take this as a concession that there are rules of court appearing of record and officially published, and had the bill of exceptions stated that such was the case, and that this rule in question was not among them, we would have had the right to infer that no such rule had been made and entered upon the record; but as the bill of exceptions shows that the court has a rule of practice requiring all instructions to be presented by the commencement of the closing address of plaintiff's counsel, we must presume in the absence of anything to the contrary, and in favor of the regularity of judicial proceedings, that it was a written rule, and had been duly announced and spread upon the records. Had such not been the case, the judge would undoubtedly have incorporated the facts into the bill of exceptions, had he been requested to do so. To make such a rule valid and obligatory upon suitors, it must be in writing and spread upon the records of the court, and reasonable publicity should be given to it."

Change in Constitution of Court — Effect on Rules Previously Adopted. — A rule duly adopted by a court is not rendered invalid by an amendment of the constitution changing the number of judges assigned to hold the court. Such a rule does not cease to be operative until it is revoked by an order of the court, and where it never has been revoked, and where the trial judge certifies that it has been continuously observed by the court, its enforcement in a given case does not constitute reversible error. *Sterling Organ Co. v. House*, 25 W. Va. 64.

copies be filed in the office of the clerk.¹ When duly adopted and published they are presumed to be known to all attorneys practicing in the court.²

3. Adoption by Convention of Judges. — In some jurisdictions the judges of the superior courts are authorized to meet in convention at stated periods for the purpose of adopting rules.³

4. Adoption by State of Federal Rules. — Where the statutes of a state declare that the equity rules adopted by the United States Supreme Court shall apply to chancery causes in the courts of the state, such statutes must be construed to apply to all rules and amendments thereof adopted by the Supreme Court whether before or after their enactment.⁴

IV. OPERATION. — Rules of Court Must Be Held to Operate Prospectively, unless it is expressly provided by their terms that they shall apply

1. *Illinois Cent. R. Co. v. Haskins*, 115 Ill. 300; *Gant v. Shelton*, 3 B. Mon. (Ky.) 420.

In *Smith v. Lee*, 10 Nev. 208, it was said to be doubtful whether the district court could enforce a rule which had not been formally recorded in the minutes and published for thirty days as required by law.

Rules Published but Not Filed. — The rules adopted in a judicial district, or a printed copy of them, if not spread upon the records, should within a reasonable time be filed in the clerk's office of each county; but if they have been adopted and published, and a copy has been deposited in the court-house, it seems that they may be enforced although a copy has not been actually filed in the clerk's office. *State v. Ensley*, 10 Iowa 149.

2. Rules Presumed to Be Known. — *Buckley v. Eaton*, 60 Ill. 252.

Parties to an action, and their attorneys, whether residents or nonresidents of the county where the case is pending, must watch its progress, and are charged with notice of the fact that it has been set for trial. A party is bound to know the rules of the trial court, and if they fix a day for setting causes for trial he is presumed to know the fact, and if they do not he must govern himself accordingly, and learn from the proceedings of the court when his case is to be heard. *Dusy v. Prudom*, 95 Cal. 646.

Former Practice Restored — Ignorance of Attorney Excused. — In *Sterling v. Ritchey*, 17 S. & R. (Pa.) 263, it was held that when the circuit court system was restored, after having been out of use for a number of years, the

old rules of practice in that court were also restored, but that ignorance by an attorney of the necessity of an affidavit of defense might be excused under these circumstances where he offered to make the required affidavit as soon as he learned of the rule.

3. In Georgia, by the Act approved Dec. 24, 1821, the judges of the Superior Court of the state were required, after the next election of judges, to convene annually at the seat of government for the purpose of establishing uniform rules of practice throughout the several circuits of the state. And it was made the duty of the judges so convening to notify absent judges of the rules adopted, and of alterations in the existing rules. *Wilson v. State*, 33 Ga. 214.

In New York. — In *Havemeyer v. Ingersoll*, (Supm. Ct. Spec. T.) 12 Abb. Pr. N. S. (N. Y.) 301, it was held that the judges in convention might make rules altering the practice previously settled by decisions of the courts.

In Illinois the judges of the Circuit Court of Cook county have no authority to jointly hold a term of court, but a single record by the clerk of rules of court adopted at such a term, showing assent thereto by the several judges, has been held valid. Since the court has but one clerk, who keeps on one record the proceedings before the judges separately, to contend that the rules enacted must be adopted and recorded on the same record as many times as there are judges of that court, would be to require a useless act, which the law never does. *Gage v. Eddy*, 167 Ill. 102.

4. Kahn v. Weinlander, 39 Fla. 210.

to actions pending at the time of their adoption.¹

A Rule Which Is Retrospective in its terms and which operates as an act of limitation is void.²

V. PROOF. — Every court is bound to take judicial notice of its own rules,³ but appellate courts do not take notice of the rules of inferior courts, unless they are embodied in the record.⁴ A

1. Prospective Operation. — *Dewey v. Humphrey*, 5 Pick. (Mass.) 187; *The Steamer St. Lawrence*, 1 Black (U. S.) 522.

In *Poyntz v. Reynolds*, 37 Fla. 533, it was held that the rules of practice adopted by the Supreme Court at its June term, 1895, for the government of the circuit courts in the preparation of bills of exceptions and transcripts of records in civil causes, did not go into effect or become operative, by the express terms of the order of the court adopting them, until the first day of December, 1895; also that the rules adopted by the Supreme Court at the June term, 1895, for its own use, did not go into effect or become operative until the 15th day of October, 1895, and did not apply to or effect any cause brought in that court prior to the last named date, except in those instances and in those respects wherein the rules themselves expressly provided to the contrary. But since rule 20 of the rules last mentioned expressly provided that its provisions shall apply to all civil causes made returnable to the January term, 1896, said rule did apply to a cause made returnable at that term.

Rules Made in Vacation. — Rules materially changing the practice of the court should not be adopted in vacation, and if so made, it seems that they should have no binding force till one term has elapsed since their adoption. *Risher v. Thomas*, 2 Mo. 98.

A Rule May Be Made to Operate on Actions Pending at the time of its adoption, by an express provision to that effect, embodied therein. *Chain v. Hart*, 140 Pa. St. 374; *Boswell v. Coaks*, 57 L. J. Ch. 101. Thus where a rule has been found to work injustice another rule on the same subject may be adopted, and may be made by its terms to operate on all pending actions. *Coffin v. McClure*, 23 Ind. 356.

2. Reist v. Heilbrenner, 11 S. & R. (Pa.) 131, in which case the following rule was held to be invalid: "In all suits now pending, if the plaintiff be dead and his executor or adminis-

trator shall not be substituted within one year after the adoption of this rule, or if the defendant be dead and process shall not be issued within that time to make his or her executor or administrator parties, in either case the suits shall abate, and the prothonotary shall make an entry accordingly."

3. Judicial Notice of Rules. — It is one of the maxims of jurisprudence that the practice of the court is the law of the court, and rules of practice adopted by trial courts of general jurisdiction are so far as those courts are concerned rules of law. As they are rules of law, although only such in a limited sense, they are of course always before the court by which they are framed, and need not be there pleaded, nor in any way formally brought to the notice of that court. Of its own rules the court takes notice. *Rout v. Ninde*, 111 Ind. 597, citing *Broom's Maxims*, p. 134; *Sandon v. Proctor*, 7 B. & C. 800, 14 E. C. L. 131.

4. Notice by Appellate Court of Rules of Inferior Court. — *Warden v. Mendocino County*, 32 Cal. 655; *Sweeney v. Stanford*, 60 Cal. 363; *Cutter v. Caruthers*, 48 Cal. 178; *Switzer v. Lottenville*, 4 Ill. App. 219; *Roby v. Title Guarantee, etc., Co.*, 166 Ill. 336; *Knarr v. Conway*, 42 Ind. 260; *Roul v. Ninde*, 111 Ind. 597; *Butler v. De Hart*, 1 Mart. N. S. (La.) 184; *Bowman v. Flowers*, 2 Mart. N. S. (La.) 267; *Allen v. Sowerby*, 37 Md. 410; *Stockbridge v. Fahnestock*, 87 Md. 127; *Byrne v. Wood*, 9 Cinc. L. Bul. 308, 8 Ohio Dec. (Reprint) 760.

In *Maryland*, however, it is held that the Court of Appeals is bound to know judicially what the rules of the Court of Chancery are. *Contee v. Pratt*, 9 Md. 67.

In *Iowa* it is the duty of the Supreme Court to take judicial notice of the rules of the district courts, but if a default is set aside because prematurely entered, and it appears that the default was premature, unless there is some rule on the subject, and if the counsel for the appellant does not call the attention of the court to any such rule, it

party, therefore, who desires to show on appeal that the lower court has violated one of its rules must have such rule incorporated in the bill of exceptions, or in some manner made a part of the record,¹ and unless he does so the appellate court will presume that the proceedings in the court below were had in accordance with its rules.²

will be presumed that the action of the lower court was regular, and the judgment will be affirmed. *Huebner v. Farmer's Ins. Co.*, 71 Iowa 30.

1. *Cutter v. Caruthers*, 48 Cal. 178; *Denton v. Murdock*, 5 Rob. (La.) 127.

Proof by Affidavit—Record.—A rule which rests in parol and has never been spread on the records of the court may be established by the affidavit of members of the bar familiar with the facts. *Maloney v. Hunt*, 29 Mo. App. 379. But the existence of a rule which has been recorded must be shown by the record, and cannot be proved by affidavit. *Davis v. Northwestern El. R. Co.*, 170 Ill. 595.

Mere Allusion to Rule in Brief of Counsel.—If it is claimed that the District Court has violated one of its own rules as to the assignment of causes to different divisions of the court, such rule must be embodied somewhere in the transcript of the record, and a mere allusion thereto in the brief of counsel on appeal is not sufficient. *Kindel v. Le Bert*, 23 Colo. 385.

Rule Set Out in Paper Extraneous to Record.—The fact that a rule of court purports to be set out in one of the reasons filed with a motion to dismiss a petition is not a sufficient proof to the appellate court of its existence, there being no proof of such a rule in the record. *Robinson v. Harford County*, 12 Md. 132.

Certified to Appellate Court by Order of Court Below.—In *Stadler v. Hertz*, 13 Lea (Tenn.) 315, a decree of the lower court refusing a jury recited that the jury was refused because not applied for within the time required by a general rule of the court, and that said rule was thereby made part of the record, and would be certified in case of appeal, with the transcript. On appeal it was held that this order made the rule a part of the record, and since it had been served by the clerk as ordered by the court, the appellate court took notice thereof.

In *Rout v. Ninde*, 111 Ind. 597, an appellee asked for a writ of certiorari requiring the clerk of the trial court to

certify to the Supreme Court a copy of a rule of a Circuit Court governing applications for changes of venue. The petition alleged that such a rule existed, but did not show that it had been ordered to be certified to the Supreme Court, nor that it had been made part of the bill of exceptions. The application was denied, and in its opinion the court said: "It is obvious, therefore, that we cannot take notice of the existence of rules such as that here sought to be brought before us, unless they are properly in the record. In may be that, as such a rule is part of the permanent law of the trial court, it need not be incorporated in a bill of exceptions, but may be certified to this court by order of the trial court. But granting that this is so, still the clerk cannot certify such a rule unless it is ordered by the court or is incorporated in a bill of exceptions. This is so, because the clerk cannot determine what is the law of the court, nor can he certify to anything not properly in the record. It may, perhaps, be within the power of the trial court to order its rules certified to us; but until such an order is made, the clerk cannot authoritatively certify a rule to us unless it is incorporated in the bill of exceptions. We are not now required to decide whether the trial court may not, upon proper application, direct the rule to be certified to us; for the appellee's motion is fully disposed of when we hold, as we must, that without an order of that kind a writ cannot issue to the clerk directing him to certify the rule, except in a case where the bill of exceptions contains the rule."

Made Part of the Record by Agreement.—The usual mode of making a rule a part of the record is by incorporating it in the bill of exceptions, but it may also be made a part thereof by agreement of the parties duly signed and entered of record. *Truitt v. Truitt*, 38 Ind. 16.

2. *Cone v. Jackson*, (Cal. 1899) 55 Pac. Rep. 940; *McAuliffe v. Destrehan*, 9 Rob. (La.) 466; *Cherry v. Baker*, 17 Md. 75; *Scott v. Scott*, 17 Md. 78;

VI. CONSTRUCTION. — Rules which are enacted by virtue of statutory authority, and which are mandatory in their terms, have the force of law, and should be construed in the same manner as statutes.¹

Liberal Construction. — But rules adopted solely for the convenience of the court, and of suitors appearing before it, should be construed liberally, with a view to the submission of cases upon their merits, and should not, by a literal interpretation, be extended to cases which are not within their true spirit and meaning.²

Each Court Is the Best Judge of the Rules Which It Has Adopted, and an appellate court will regard the construction placed upon its own

Tyler v. Murray, 57 Md. 418; *Matthews v. Dare*, 20 Md. 248; *Marshall v. Golden Fleece Gold, etc.*, Min. Co., 16 Nev. 156.

Where the Lower Court Certifies that a Bill Has Been Taken Pro Confesso because the defendant has not answered according to the rules of court, if such rules are not in the record, and the time of holding its intermediate equity terms prescribed by law does not appear therein, the appellate court will assume that the order *pro confesso* was properly passed. *Calwell v. Boyer*, 8 Gill & J. (Md.) 136.

Where the Record States that a Plea of Limitations Was Stricken Out because it appeared to the court that such plea was not filed on or before the day designated by the rules of the court, the appellate court must, in the absence of the rules of court in the record, and of all proof to the contrary, assume the verity of this statement. *Kunkel v. Spooner*, 9 Md. 462.

Qualification of the Rule. — The court will presume, in the absence of proof to the contrary, that the court below rightly applied its own rules; but where the trial court has rejected certain evidence in accordance with a rule, it is reversible error for it to subsequently grant instructions upon the evidence so excluded. *Morrison v. Welty*, 18 Md. 169.

1. Rules Construed as Statutes — *Alabama*. — *Butler v. Butler*, 11 Ala. 668.

California. — *Hansom v. McCue*, 43 Cal. 178.

Florida. — *Merchants' Nat. Bank v. Grunthal*, 39 Fla. 388.

Illinois. — *Axtell v. Pulsifer*, 155 Ill. 151; *Beveridge v. Hewitt*, 8 Ill. App. 467.

Indiana. — *Magnuson v. Billings*, 152 Ind. 177.

Iowa. — *David v. Aetna Ins. Co.*, 9 Iowa 45.

Maine. — *Maberry v. Morse*, 43 Me. 176.

Maryland. — *Meloy v. Squires*, 42 Md. 378; *Northern Cent. R. Co. v. Rutledge*, 48 Md. 262.

Missouri. — *Maloney v. Hunt*, 29 Mo. App. 379.

Nevada. — *Lightle v. Ivancovich*, 10 Nev. 41; *Haley v. Eureka County Bank*, 20 Nev. 410.

Tennessee. — *Haralson v. McGavock*, 10 Lea (Tenn.) 724.

United States. — *Seymour v. Phillips, etc.*, Constr. Co., 7 Biss. (U. S.) 460; *Scott v. The Propeller Young America*, Newb. Adm. 107.

2. Flagg v. Puterbaugh, 98 Cal. 134; *Smith v. Whittier*, 95 Cal. 279; *Palo Alto County v. Harrison*, 68 Iowa 81; *Wallace v. Okolona Sav. Institute*, 49 Miss. 620; *Ferguson v. Kays*, 21 N. J. L. 431; *Gibbes v. Greenville, etc.*, R. Co., 14 S. Car. 385; *Burr v. Lewis*, 6 Tex. 76.

"A court should lean in favor of giving to litigants every reasonable opportunity of presenting their cases on the merits, and rules of procedure should be made to serve their true purpose of expediting and facilitating the disposition of causes according to their merits rather than to convert them into a means of obstruction." *Per Beatty, C. J.*, in *Flagg v. Puterbaugh*, 98 Cal. 134.

A Rule Requiring All Instructions to Be Handed to the Judge before the beginning of final argument is unreasonable in a case where it operates to cut off instructions the occasion for which has arisen after that stage of the trial, but in other cases it is reasonable and valid. Such a rule, therefore, must be construed as applying only to the latter class of cases. *Standard F. Ins.*

rules by an inferior court as conclusive, and will not interfere therewith except in a case of gross and palpable abuse.¹

VII. ENFORCEMENT — 1. Penalties for Noncompliance. — The courts may punish material violations of their rules by the imposition of appropriate penalties,² and the action of a trial court in

Co. v. Wren, 11 Ill. App. 242; *Prindle v. People*, 42 Ill. 217.

1. Interference by Appellate Court with Construction by Lower Court — *Illinois*. — *Stanton v. Kinsey*, 151 Ill. 301; *Mix v. Chandler*, 44 Ill. 174.

Iowa. — *Baldwin v. St. Louis, etc., R. Co.*, 75 Iowa 297.

Missouri. — *St. Louis Mut. L. Ins. Co. v. Board of Assessors*, 56 Mo. 503.

Nebraska. — *Hunter v. Union L. Ins. Co.*, (Neb. 1899) 78 N. W. Rep. 516.

New York. — *Evans v. Backer*, 101 N. Y. 289.

Pennsylvania. — *Peck's Appeal*, 11 W. N. C. (Pa.) 31; *Snyder v. Baughman*, 8 S. & R. (Pa.) 336; *Gannon v. Fritz*, 79 Pa. St. 303; *Brennan v. Prudential Ins. Co.*, 148 Pa. St. 199; *McLane v. Hoffman*, 164 Pa. St. 491; *Higgins Carpet Co. v. Latimer*, 165 Pa. St. 617; *Morrison v. Nevin*, 130 Pa. St. 344; *Bair v. Hubartt*, 139 Pa. St. 96.

United States. — *Duncan v. U. S.*, 7 Pet. (U. S.) 435.

Rules Common to Courts of Different Grades. — Where the superior and city courts of a given county have mutually adopted rules which establish such a comity between the courts as to enable counsel employed in both to represent their clients in cases pending in either, and in a given case a conflict arises between such courts touching their authority under such rules, the construction of the rules is for the superior court, and the city court is bound by the judgment of the superior court in regard to their meaning. *Bibb Land-Lumber Co. v. Lima Mach. Works*, 98 Ga. 279.

Qualification of the General Rule. — In *Maine* it has been held that the Superior Court is not the final and conclusive judge of the construction and legal effect of its own rules. *Witzler v. Collins*, 70 Me. 290.

Likewise in *Massachusetts* it has been decided that the opinions of the judges of the Court of Common Pleas as to the construction of their rules, although entitled to great consideration, are nevertheless subject to revision by the Supreme Judicial Court. *Wigglesworth v. Atkins*, 5 Cush. (Mass.) 212; *Rath-*

bone v. Rathbone, 4 Pick. (Mass.) 89; *Thompson v. Hatch*, 3 Pick. (Mass.) 512.

And in *Maryland* it has been held that a party who has been prejudiced by the construction placed by the court upon one of its rules may seek redress by appeal, providing the decision is final, and there is no other objection to the appeal. *Dunbar v. Conway*, 11 Gill & J. (Md.) 92.

In *Pennsylvania*, in a case where this question arose, the court said: "It has been said, indeed, more than once, that courts are the best exponents of their own rules. *Ellmaker v. Franklin F. Ins. Co.*, 5 Pa. St. 189; *Dailey v. Green*, 15 Pa. St. 118. Yet it would often work the greatest injustice if they were to be allowed plainly to disregard or violate them. This court has often reversed for such cause." *Brennan's Estate*, 65 Pa. St. 16.

2. Violation of Rule Regulating Appellate Procedure. — When the rules regulating the manner of bringing cases before the Supreme Court have not been observed, the court in its discretion may dismiss the appeal or writ of error, but it is not to be inferred that dismissal will follow in all cases upon failure to comply with the strict letter of the rules. In acting on a motion to dismiss under such circumstances the court may give such direction to the case as will cause the least inconvenience or damage to the parties, as far as practicable. *Shanks v. Carroll*, 50 Tex. 17.

Failure to Observe Rules Regarding Transcript. — Where the rules regarding the printing and chronological arrangement of the several parts of the transcript have been violated, the court may either dismiss the appeal or may strike out the transcript and compel the appellant to print and file a new transcript at his own cost. *Martin v. Hudson*, 79 Cal. 612.

And it has been held that an appeal may be dismissed where the appellant fails to comply with the rules regarding the form of the transcript. *Conkling v. Cameron*, 3 Okla. 525.

In a Case Where the Assignment of

thus enforcing a valid rule is not generally reviewable on appeal.¹

2. Enforcement of Invalid Rule. — It has been held that prohibition lies to prevent the enforcement by an inferior court of a rule which operates to enlarge its jurisdiction contrary to law;² but the enforcement of an unconstitutional rule is not ground for a

Errors required by a rule of the court to be embodied in the record was omitted, and where the rule in reference to abstracts had been disregarded, the appellate court refused to consider the case, and the judgment of the lower court was affirmed. *Buckley v. Eaton*, 60 Ill. 252.

Disregard of Rule Requiring Points and Authorities. — An appeal will be dismissed where a rule requiring points and authorities on behalf of the respective parties to be filed within a specified time has been disregarded. *Shain v. People's Lumber Co.*, 98 Cal. 120.

Where a Rule Requiring Marginal Notes on the Transcript has been disregarded, the appellate court may either dismiss the appeal or have the notes made at the expense of the appellant. The latter seems to be the better practice. *Wheeler v. Barr*, 6 Ind. App. 530; *Egan v. Ohio*, etc., R. Co., 138 Ind. 274.

In a case, however, where the transcript is brief, and the judgment below is called in question chiefly upon the sufficiency of the pleadings, and where it appears that the merits of the case have been fully discussed in the briefs of both parties before the filing of the motion to dismiss, the appeal will not be dismissed for noncompliance with the rule in question. *Bass v. Doerman*, 112 Ind. 390. And see generally, as to dismissal of appeal for failure to comply with rules, article APPEALS, vol. 2, p. 1.

Violation of Rule Forbidding Removal of Records. — Where counsel for the appellant procures the records and papers in a case from the clerk's office, and retains them beyond the time allowed by the rules of the court, without sufficient excuse or reason therefor, the court may affirm the judgment and overrule a motion to set such affirmation aside. *Vice v. Jones*, 4 Ind. App. 426.

Likewise, where an attorney has violated a rule of court forbidding the removal of papers from the files, by taking certain depositions from the files, the court may strike out his motion to suppress certain parts of said depo-

sition. *Langsdale v. Woollen*, 99 Ind. 575.

Failure to File Interplea. — Where an interpleader in an attachment suit fails to observe a rule of the court requiring him to notify the adverse party of the filing of the interplea within a stated time, the interplea may be dismissed, but such dismissal should not follow in a case where the purpose of the rule has been subserved, although its express provisions have not been complied with. *Tennent-Stribling Shoe Co. v. Rudy*, 53 Mo. App. 196.

1. *Bushey v. Culler*, 26 Md. 534; *Caples v. Central Pac. R. Co.*, 6 Nev. 265; *Strouse v. Bard*, 8 Pa. Super. Ct. 48; *Foute v. State*, 15 Lea (Tenn.) 712.

The appellate court will not review the action of the court below in refusing to consider the reasons for a new trial on the ground that they were not filed within the time required by its rules. *Hughes v. Jackson*, 12 Md. 450.

Ruling of Trial Court Reversed — Exceptional Case. — In *Ferguson v. Kays*, 21 N. J. L. 431, an appeal was duly taken to the Court of Common Pleas from the judgment of a justice. The justice omitted to send up the papers during the term, but sent them to the clerk of the court a few days after the close of the term. When the cause was called the court dismissed the appeal on the ground that the appellants had not complied with a certain rule of the court, which rule provided that where the justice omitted to send to the court the appeal papers at the next term after the appeal was demanded and granted, the appellant must obtain a rule of the court at that term and serve the same upon the justice to send up the papers. On appeal, however, it was held that the Court of Common Pleas erred in dismissing the appeal in this case, since the justice sent up the papers in time to prevent any delay in the trial of the cause, and thus rendered compliance with the rule unnecessary.

2. *State v. Withrow*, 133 Mo. 500.

reversal of the judgment in cases where the parties have not been prejudiced thereby.¹

3. Failure by Court to Enforce Valid Rule. — Parties to actions and their attorneys are justified in presuming that rules will be enforced, nor are they chargeable with negligence in relying upon this presumption and acting accordingly,² and where the court violates its rules to their prejudice, such violation constitutes reversible error.³ An appellate court, however, may refuse to interfere where it appears that substantial justice has been done, and that no prejudice has resulted.⁴

1. *Aikin v. State*, 58 Ark. 544.

Waiver of Objection to Enforcement. —

Although a rule providing that causes may be advanced and tried out of their order on the docket in the absence of an affidavit of defense is invalid, a party who appears and goes to trial and interposes all the defense which he claims to have, thereby waives all objections to the enforcement of the rule in question. *Munson v. Adams*, 89 Ill. 450.

2. *Magnuson v. Billings*, 152 Ind. 177; *Maloney v. Hunt*, 29 Mo. App. 379.

Illustrations of the Rule — Calling Calendar. — Where a rule of the court provides that contested motions including demurrers shall be placed on the calendar of contested motions, that said calendar shall be called on Monday, and that motions not reached on that day shall go over to the following Monday, it is error for the court to continue the calling of the calendar on Tuesday, and to overrule a demurrer on that day without notice to the defendant or his attorney. In such a case the defendant is not chargeable with laches in absenting himself from court on Tuesday, since according to the rules his demurrer cannot be considered on that day. Nor does the fact that the court orally announces on Monday that the call of the calendar will be continued on the following day justify a violation of the rule to his prejudice. *Consolidated Rapid Transit, etc., R. Co. v. O'Neill*, 25 Ill. App. 313.

Where a rule requires the preparation of a trial calendar for each term, such calendar to be made up on or before a certain day, and it is provided that causes shall stand for trial in the order in which they appear on such calendar, parties to suits pending in the court are justified in presuming that such rule will be enforced. If, therefore, an

attorney in a case learns that no trial calendar has been prepared for a certain term on which his case appears, but that the court is engaged at a late period in the term in trying another class of causes, he has a right to assume that his suit is not in a situation in which it is liable to be called for trial before another term. Under these circumstances he is not obliged to watch the call of the calendar, and is not chargeable with negligence for failure to do so. Nor is the situation of the case changed by the fact that the court has already disregarded its rules, and has continued to call from the September calendar until the close of the October term. Parties are not bound to assume that because the court has violated its rules to this extent it will continue to do so still further, or to anticipate that near the close of a certain term it will, notwithstanding its rules, resume the call of a calendar which it has abandoned more than two terms before. *Beveridge v. Hewitt*, 8 Ill. App. 467.

General Disregard of Rule No Excuse. — Where a party to an action insists upon the observance of a rule, the adverse party cannot excuse his failure to comply therewith on the ground that the rule in question has been generally disregarded by the court in previous cases. *Hill v. Webber*, 50 Mich. 142.

3. *Abercrombie v. Riddle*, 3 Md. Ch. 320; *Wall v. Wall*, 2 Har. & G. (Md.) 79; *Thompson v. Hatch*, 3 Pick. (Mass.) 512; *Fanning v. Fly*, 2 Coldw. (Tenn.) 486; *Maultsby v. Carty*, 11 Humph. (Tenn.) 361.

4. *Field v. Chicago, etc., R. Co.*, 68 Ill. 367.

Hearing Motions. — Where a rule of the court provides that motions shall not be heard until twenty-four hours after they are filed, the action of the court in hearing a motion on the same

4. Waiver of Right to Insist on Enforcement. — Where a party fails to insist upon the observance of a rule, and proceeds to a trial of the cause upon its merits, he thereby waives his right to object that the rule has been violated.¹

day that it is filed constitutes a violation of the rule; but the appellate court will not interfere where the appellant does not show or claim that he has been injured by such violation, and where it appears that the judgment of the lower court is substantially correct. *Roush v. Fort*, 3 Mont. 175.

Effect of Violation on Court's Jurisdiction. — Where a court is divided into several departments, the transfer of a cause for trial from one of these departments to another does not effect a change or transfer of the jurisdiction of the cause, and therefore the fact that the rules regulating the transfer of causes have been violated in a certain case does not deprive the department to which the cause has been transferred of its jurisdiction. *White v. Superior Ct.*, 110 Cal. 60.

1. *Allen v. New York*, 7 Fed. Rep. 483.

Notice of Motion. — The objection that the trial court has disregarded one of its rules requiring eight days' notice of motion is waived where the party entitled to insist upon the observance of the rule appears and objects to the motion on other grounds. *Smith v. Hawley*, (S. Dak. 1899) 78 N. W. Rep. 355.

Submission of Requests to Find. — In *Matter of Chauncey*, 32 Hun (N. Y.) 429, an application to admit a will to probate was tried before a justice of the Supreme Court. On November 8, 1883, before the case had been finally decided, the parties met before the justice, and the respondent stated that he desired to submit certain requests to find, and asked for time to do so. The justice then stated in the presence of the appellant that the requests might be handed in, and that he would pass upon them as of the date of signing the decree. Judgment was granted on that day and filed on October 10. On October 25 requests to find were submitted, and thereafter the same were, with the judge's allowance and disallowance, by an order dated November 12, 1883, directed to be filed as of October 8. On appeal the appellant contended that this action was in violation of rule 32 of the general rules of prac-

tice, providing that "all requests to find facts or conclusions of law must be made in writing to the judge or referee before whom the trial was had, at or before the time of the submission of the action for decision." It was held, however, that the requirements of this rule might be waived by the consent of the parties, and that the action of the appellant in this case amounted to such waiver.

The Submission of a Cause by Agreement constitutes a waiver of the appellee's right to move for a dismissal of the appeal because the appellant has failed to comply with a rule respecting the preparation of the transcript. *Anderson Bldg., etc., Assoc. v. Thompson*, 88 Ind. 405.

Presumption of Waiver from Acquiescence. — In *North Carolina* a rule of the Superior Court provides that at the term at which the pleadings in an action are completed the plaintiff's attorney shall put in writing such issues as he may deem material and submit them to the defendant's attorney, who, if he approves, shall sign them, and they shall be treated as issues for trial; but if he disapproves them, then he shall prepare such as he may deem material, and the whole shall be handed to the judge, who shall settle the issues and file them with the clerk, to stand for trial at the next term. It has been held that the requirements of this rule may be waived by the parties, and that they will be considered waived if neither party asks for their enforcement. *Wittkowski v. Watkins*, 84 N. Car. 456.

In *England* it has been held that a party cannot complain of his opponent's failure to observe the rules of the court, after having acquiesced in such noncompliance for a considerable time. *Weale v. Rice*, 4 L. J. Ch. 17; *Hunter v. Capron*, 7 Jur. 185; *Tarback v. Tarback*, 4 Beav. 149. And especially where he has taken steps in the cause after learning that a rule has been violated, or has suffered the adverse party to take further steps without objection. *Riky v. Kemmis*, Beatty 322; *Davis v. Franklin*, 2 Beav. 369. Or where his own practice has been irregular and in

Unfair and Misleading Conduct on the Part of Counsel may, it seems, sometimes justify the court in refusing to enforce a rule in their favor.¹

VIII. DISPENSING WITH RULES — 1. In General. — There is a conflict of authority as to whether courts may suspend or dispense with their rules in particular instances. According to some decisions it is always in the power of the court to suspend its rules or to except a particular case from their operation.² In other cases, however, it has been held that rules of court when duly established have the force of statutes, and are equally binding upon the court and parties, that the court may at any time modify or rescind its rules, but until it does so it should administer them according to their terms, and that it has no discretion in applying them unless such discretion is reserved in the rules themselves.³

The General Principles to Be Derived from These Conflicting Decisions seem to be that rules which are merely directory, or which are prescribed solely for the governance of attorneys and the convenience of the court, may be dispensed with when the ends of justice so require, but that this power of dispensing with rules must never be exercised in an arbitrary manner in cases where it will operate to the prejudice of the parties, or tend to unsettle the established practice of the court.⁴

violation of the rules. *Morison v. Morison*, 4 Myl. & C. 215; *Suffield v. Bond*, 10 Beav. 146.

1. *Jones v. Menefee*, 28 Kan. 436; *Talbot v. Keay*, L. R. 8 Eq. 610.

2. *California*. — *People v. Williams*, 32 Cal. 280; *Pickett v. Wallace*, 54 Cal. 147; *People v. Demasters*, 105 Cal. 669; *Chielovich v. Krauss*, (Cal. 1886) 9 Pac. Rep. 945; *Symons v. Bunnell*, (Cal. 1889) 20 Pac. Rep. 859.

Mississippi. — *Vicksburg, etc., R. Co. v. Ragsdale*, 51 Miss. 461.

New Hampshire. — *Deming v. Foster*, 42 N. H. 165; *Eastman v. Amoskeag Mfg. Co.*, 44 N. H. 143.

Pennsylvania. — *Vansant v. Fishel*, 1 York Leg. Rec. (Pa.) 101; *Strouse v. Bard*, 8 Pa. Super. Ct. 48; *Lance v. Bonnell*, 105 Pa. St. 46.

Texas. — *De Leon v. Owen*, 3 Tex. 153; *Mills v. Bagby*, 4 Tex. 320.

United States. — *U. S. v. Breitling*, 20 How. (U. S.) 252; *Southern Pac. Co. v. Hamilton*, 54 Fed. Rep. 468; *Lawrence v. Bowman*, McAll. (U. S.) 419; *Poultney v. La Fayette*, 12 Pet. (U. S.) 472.

3. *Illinois*. — *Beveridge v. Hewitt*, 8 Ill. App. 467; *Owens v. Ranstead*, 22 Ill. 161; *Lancaster v. Waukegan, etc.*, R. Co., 132 Ill. 492.

Indiana. — *Magnuson v. Billings*, 152 Ind. 177.

Iowa. — *State v. O'Day*, 68 Iowa 213. *Louisiana*. — *Walker v. Ducros*, 18 La. Ann. 703.

Maine. — *Maberry v. Morse*, 43 Me. 176.

Maryland. — *Abercrombie v. Riddle*, 3 Md. Ch. 320; *Wall v. Wall*, 2 Har. & G. (Md.) 79; *Hughes v. Jackson*, 12 Md. 450; *Lovejoy v. Irelan*, 17 Md. 525; *Quynn v. Brooke*, 22 Md. 288.

Massachusetts. — *Thompson v. Hatch*, 3 Pick. (Mass.) 512; *Baker v. Blood*, 128 Mass. 545.

New Jersey. — *Haulenbeck v. Cronkright*, 23 N. J. Eq. 407; *Ogden v. Robertson*, 15 N. J. L. 124.

North Carolina. — *State v. Edwards*, 110 N. Car. 511.

Oregon. — *Coyote Gold, etc., Min. Co. v. Ruble*, 9 Oregon 121.

Tennessee. — *Maulsby v. Carty*, 11 Humph. (Tenn.) 361.

Wyoming. — *Halleck v. Bresnahan*, 3 Wyo. 73; *Spencer v. McMaster*, 3 Wyo. 105; *Cronkite v. Bothwell*, 3 Wyo. 739; *Chadron Bank v. Anderson*, 6 Wyo. 518.

United States. — *Rio Grande Irrigation, etc., Co. v. Gildersleeve*, 174 U. S. 603.

4. *Sheldon v. Risedorph*, 23 Minn. 518; *People v. Nichols*, 79 N. Y. 582; *Matter of Moore*, 108 N. Y. 280; *Matter of Argus Co.*, 138 N. Y. 557;

2. Particular Rules — Rules Which Should Not Be Suspended. — Rules requiring notice to be given to the adverse party are generally

Greene v. Harris, 11 R. I. 5; McNeish v. U. S. Hulless Oat Co., 57 Vt. 316; Mutual Bldg. Fund, etc., Bank v. Bossieux, 1 Hughes (U. S.) 387.

Decisions Supporting the General Rule. — It may be that a rule adopted solely for the purpose of regulating the proceedings of the court, and when the right of the parties are not involved, may be suspended or modified in its operation; or perhaps noncompliance may be excused in certain cases when caused by accident or mistake, and when no injustice can result to the opposing party. But where a rule is not for the guidance of the court alone, but regulates as well the proceedings and involves the interests of opposing parties, and there is no suggestion of accident or mistake as the cause of its violation, it cannot be disregarded. Nor in such cases can the court waive any of its provisions. Such waiver can be made only by the party for whose benefit the rule was adopted. Witzler v. Collins, 70 Me. 290.

The court cannot disregard a rule which provides that parties shall have a certain time within which to take a particular step in an action. It is true that the court may suspend the operation of its rules in certain cases, but there is a wide difference between a discretion which permits it to enlarge the provisions of a rule, for fear of a miscarriage of justice, and that which holds it authorized to reduce the time within which a party is at liberty to take some step in the progress of his case or defense. Tindal v. Tindal, 1 S. Car. 111.

In Magill's Appeal, 59 Pa. St. 430, the court said: "Rules are indispensable aids in the routine business of courts, and to this only they properly apply. Being subject to the authority which gives them existence, they are administered in subordination to the rights and equities of suitors. In other words, they are not to be instrumentalities to defeat those rights; but their provisions are always adhered to when, in any neglect of them, rights have accrued which it would be inequitable or unjust to disturb. When, however, a failure to comply with their requirements in any given case is the result of mistake, haste, or surprise, and positive injury is likely to ensue

to a party, courts will not adhere to them simply on account of the rules, at the expense of justice and the just rights of parties. Hence amendments to fulfil requirements are generally allowed when offered without unreasonable delay, and before much expense and costs have accrued."

In Green v. Elbert, 137 U. S. 615, Mr. Chief Justice Fuller said: "To the proper conduct of the business of this court rules are necessary, and, having been prescribed, reasonable compliance with them is expected and must be insisted upon. When they are disregarded, dispensation from the consequences can only be extended where the circumstances furnish adequate excuse. Were this otherwise, our regulations might become more honored in the breach than the observance, and the recognition of due procedure would be seriously weakened and impaired."

The English Cases support in general the principles stated in the text. Thus it has been held that rules made in pursuance of statute and having statutory force cannot be dispensed with. Calvert v. Gandy, 9 Jur. 122; Christ's Hospital v. Grainger, 10 Jur. 37; Wilson v. Parker, 1 Coop. C. C. 346. Unless there is something in the conduct of the party insisting on them which disentitles him from relying on them. Davies v. Davies, 10 Ir. Eq. 614; Downing v. Hodder, 12 Ir. Eq. 371.

But in various cases it has been held that particular rules may be dispensed with in the discretion of the court. Ferrand v. Bradford, 2 Jur. N. S. 360; Atkinson v. Ball, 3 J. & La. T. 374; Daniel v. Falmouth, 5 L. J. Ch. 69; Ex p. Reynolds, Montagu 508; Burrell v. Nicholson, 6 Sim. 212; Butler v. Bulkeley, 2 Swanst. 374; Ex p. Freeman, 1 Ves. & B. 34.

It has also been held that the masters have no authority to dispense with rules of the court. Smith v. Webster, 3 Myl. & C. 244, except where the power of the court in this respect has been transferred to the masters by statute. Miltown v. Stewart, 1 Jur. 940; Milbanke v. Stevens, 2 Jur. 759.

Suspension by Consent or Voluntary Action of Party. — Where a party who is entitled to insist on the observance of a rule consents to its suspension, its

mandatory and should be enforced in all cases,¹ and the same is true of rules limiting the time within which motions may be made.² Nor can the court dispense with the requirements of a mandatory rule requiring a certain certificate to be filed within a prescribed time,³ or of a rule regulating the appointment of referees in divorce cases.⁴ It has also been held that a court abuses its discretion in suspending a rule requiring stipulations to be in writing,⁵ or in allowing pleas in abatement to be filed after the time limited by rule.⁶

Rules Which May Be Suspended. --- On the other hand it has been held that rules prescribing the time within which requests for instructions shall be presented to the court may be suspended where their enforcement would work injustice;⁷ that rules requiring service of orders of the court on the adverse party may be dispensed with;⁸ and that the time limited by rule for filing excep-

requirements may be dispensed with. *Gist v. Drakely*, 2 Gill (Md.) 330.

Likewise, a rule which requires notice to produce written evidence is dispensed with where the party having such evidence in his possession voluntarily offers to produce it. *Dwinell v. Larrabee*, 38 Me. 464.

1. Notice of Hearing of Motions. — A rule of court requiring two days' notice of the hearing of motions, when duly adopted, has in the court which adopts it the binding effect of a statute, and cannot be disregarded in a particular case. *Axtell v. Pulsifer*, 155 Ill. 151.

Notice of Taking Testimony. — In *Quynn v. Brooke*, 22 Md. 288, it was held that a rule of court providing that a party taking testimony before a commissioner must give ten days' notice to the adverse party was binding upon the court in all cases, and that its requirements could not be dispensed with in particular instances.

But see *McNeish v. U. S. Hulless Oat Co.*, 57 Vt. 316, wherein it is intimated that a rule requiring notice of the taking of depositions without the state, may be relaxed in the discretion of the court.

2. Time of Filing Petitions for Rehearings. — Rules limiting the time within which petitions for rehearings must be filed are mandatory, and their requirements cannot be dispensed with in particular cases. *Coyote Gold*, etc., Min. Co. v. Ruble, 9 Oregon 121; *Chadron Bank v. Anderson*, 6 Wyo. 518; *Cronkrite v. Bothwell*, 3 Wyo. 739.

Motions in Arrest of Judgment and for New Trial. — The courts cannot dispense with the requirements of a rule

limiting the time within which motions in arrest of judgment and for a new trial shall be made. *Hughes v. Jackson*, 12 Md. 450.

Where a Rule Provides that Commissions for the Examination of Witnesses must be applied for before the trial of the cause, it is error for the court to issue a commission in a particular case when an application for such commission has not been made within the prescribed period. *Ogden v. Robertson*, 15 N. J. L. 124.

3. The Court Cannot Allow a Regents' Certificate to be filed *nunc pro tunc*, and thereby exempt an applicant for admission to the bar from the obligation of a rule requiring proof that he has passed the regents' examination within a certain time before making his application. *Matter of Moore*, 108 N. Y. 280.

4. Ives v. Ives, 80 Hun (N. Y.) 136.

5. Martin v. De Loge, 15 Mont. 343. And see in general article STIPULATIONS.

6. Thompson v. Hatch, 3 Pick. (Mass.) 512.

7. People v. Williams, 32 Cal. 280; *People v. Demasters*, 105 Cal. 669.

A rule providing that written instructions asked for by the parties shall be given before argument to the jury, is intended for the convenience of the court, and does not restrict the court as to the time at which it may give instructions of its own motion. *McDaniel v. Crosby*, 19 Ark. 533.

8. Sullivan v. Wallace, 73 Cal. 307.

In *Chielovich v. Krauss*, (Cal. 1886) 9 Pac. Rep. 945, it appeared that the court had adopted a rule providing

tions,¹ or presenting bills of exceptions to the court for signature, may be extended in particular cases.² Various other rules also have been suspended in particular cases by the courts in the different states, as illustrated in the notes.³

that in all cases where an extension of time to prepare, serve, and file the statement on motions for a new trial was granted, the order made in the premises must be served on the opposing counsel, or the party must be represented. On appeal it was shown that the above rule had been suspended by the lower court in the case at bar, and the appellate court held that such suspension was proper under the circumstances of the case.

1. Exceptions to Answer in Chancery. — In *Marsh v. Crawford*, 1 Swan (Tenn.) 116, it was held to be within the power of a chancellor to permit exceptions to be filed to an answer after the time limited by rule of the court.

Exceptions to Referee's Report of Sale. — In *Martine v. Lowenstein*, 68 N. Y. 456, which was a suit for the foreclosure of a mortgage, it was held that exceptions to the referees' report of sale might be filed more than eight days after the report was actually filed, although the rules of the Supreme Court required such exception to be filed within eight days. On appeal the Court of Appeals said, that the rules of the Supreme Court were generally under its control, and that it could overlook or relieve against a violation of them on non-compliance with them.

2. Vicksburg, etc., R. Co. v. Ragsdale, 51 Miss. 461; *McBeth v. Newlin*, 15 W. N. C. (Pa.) 129; *U. S. v. Breitling*, 20 How. (U. S.) 252; *Southern Pac. Co. v. Hamilton*, 54 Fed. Rep. 468; *Southern Pac. Co. v. Johnson*, 69 Fed. Rep. 559.

3. A Rule Requiring a Bond to Be Acknowledged by the sureties may be dispensed with in the discretion of the court. *Gale v. Seifert*, 39 Minn. 171.

Filing Copy of Notice of Argument. — By a rule of the Supreme Court it is provided that a copy of every notice of argument, with the date of the issue or motion to be argued, shall be filed with the clerk of the Supreme Court, two days at least before the term at which the same is to be argued. This rule, however, was made for the convenience of the clerk, and if he waives its requirements, parties who are not prejudiced by such waiver cannot ob-

ject. *Kennedy v. Kennedy*, 18 N. J. L. 51.

Time and Place of Hearing Contested Motions. — In *Matter of Argus Co.*, 138 N. Y. 557, it was held that rule 38 of the general rules of practice, providing that contested motions should not be introduced or brought to a hearing at any special term held at the same time and place with a circuit, was adopted simply for the convenience of the court and of attorneys, and that it might be dispensed with in the discretion of the court.

Application for Jury in Equity Case. — In a suit in equity between partners to settle copartnership matters, where issues are raised which involve inquiries, which business men accustomed to examine the facts should decide, the Supreme Court may direct the issues to be tried by a jury, and it is no objection to granting an application for such trial, that it is not made within ten days after issue joined, as provided by the general rules of the court. *Clark v. Brooks*, (C. Pl. Spec. T.) 26 How. Pr. (N. Y.) 285.

Consideration on Appeal of Points Not Urged Below. — Although a rule of the court provides that a party shall not be heard in the Court of Appeals on any ground which was not taken in the court below and made a ground of appeal, this rule can apply only to parties and counsel, and cannot prevent the court from considering questions which were not raised below, where it sees that such questions have an important bearing on the merits of the case. *Mitchell v. Anderson*, 1 Hill L. (S. Car.) 69.

Notice that Execution of Instrument Is Contested. — A rule requiring a defendant who is sued upon a promissory note to give notice that he will contest the execution of the note may be dispensed with in the discretion of the court. *National Union Bank v. Marsh*, 46 Vt. 443.

Time of Entering Action or Appeal. — Although a rule of court declares that a party must enter his action or appeal on the first day of the term, he may be allowed to enter such action or appeal after the expiration of the time thus

3. Rules Prescribed by a Higher Court. — Although courts may sometimes dispense with the requirements of their own rules, it is universally held that they have no such power in regard to rules prescribed for them by a higher court.¹

4. Applications to Have Rules Set Aside. — An application to have a rule of court set aside in a particular case will be refused unless strong reasons are presented in its favor,² and the action of a court in refusing to suspend one of its rules will not be reviewed on appeal, unless the rule in question and the circumstances alleged to justify its suspension are set out in the bill of exceptions.³

Mandamus Does Not Lie to compel a court to dispense with the requirements of its rules in a particular case.⁴

IX. AMENDMENT AND REPEAL — In General. — Courts may modify or rescind their rules to meet the ends of justice,⁵ but they can-

not prescribe, where its entry within the required period has been prevented by an act of Providence. *Bennet v. Whitney*, 1 Tyler (Vt.) 59; *Miller v. Goold*, 2 Tyler (Vt.) 405.

Time of Filing Answer to Injunction Bill. — A rule providing that an answer to an injunction bill must be filed within a certain time after the execution of the subpoena, may be dispensed with in the discretion of the court. *Hudson v. Kline*, 9 Gratt. (Va.) 379.

The United States Circuit Court of Appeals may dispense with the requirements of its rules regarding the return day of appeals and the filing of transcripts. The rules in question are directory, and the court may relieve parties who, have not complied with their provisions. *Florida v. Charlotte Harbor Phosphate Co.*, 70 Fed. Rep. 883.

And see in general *supra*, II. *Validity of Rules in Relation to Particular Subjects.*

1. *Tripp v. Brownell*, 2 Gray (Mass.) 402; *De Lamater v. Havens*, 5 Dem. (N. Y.) 53; *Baker v. State*, 84 Wis. 584; *Atty.-Gen. v. Lum*, 2 Wis. 507; *Wallace v. Clark*, 3 Woodb. & M. (U. S.) 359; *The Cashmere*, 15 P. D. 121.

Effect of Noncompliance on Decree. — In *Pennsylvania* the Supreme Court is authorized by statute to make rules regulating procedure in subordinate courts, and where a lower court disregards a rule thus prescribed for it by the Supreme Court and enforces an inconsistent rule which it has adopted for its own convenience, the decree rendered in such a case is a nullity. *Chester Traction Co. v. Philadelphia*, etc., R. Co., 180 Pa. St. 432.

Rule of Practice in Surrogate's Court. — Where the Supreme Court has prescribed a rule for the Surrogate's Court regulating the time within which a copy of a case and exceptions must be served, the latter court has no power to disregard this rule in a particular case, or to dispense with its provisions. *De Lamater v. Havens*, 5 Dem. (N. Y.) 53. 2. *Bernhamer v. State*, 123 Ind. 577; *Marsh v. Crawford*, 1 Swan (Tenn.) 116; *Lowe v. Morris*, 4 Sneed (Tenn.) 72.

A party seeking to set aside a rule of the court must make as strong a case as a defendant seeking to set aside a default. Thus where a party has allowed the time limited by rule of the court to take testimony to expire without having taken it, and where he shows no excuse for his failure to do so, except that his counsel were occupied with other business, a motion to take the testimony at a later time will be denied. In such a case also the party must state in his application what he expects to be able to prove by the witness he seeks to examine. *Thayer v. Swift*, Walk. (Mich.) 384.

Where a Rule Requiring Marginal Notes on the Transcript has been disregarded and the appeal has been dismissed, such appeal will not be reinstated if it is apparent that the appellant was guilty of gross negligence in failing to comply with the rule. *Egan v. Ohio*, etc., R. Co., 138 Ind. 274.

3. *Illinois Cent. R. Co. v. Haskins*, 115 Ill. 300.

4. *Alexander v. State*, 14 Lea (Tenn.) 88.

5. See *supra*, VIII. *Dispensing with Rules.*

not recognize any agreement by counsel to change or abrogate them,¹ nor can the court itself abolish or modify its rules in vacation,² or by orders resting in parol.³

Publication and Filing. — In some jurisdictions it is provided that amendments to rules must be published and filed of record.⁴

Operation and Effect. — Amendments to rules operate prospectively,⁵ and their effect is in general the same as that of amendments to statutes.⁶

Repeal by Enactment of Statute. — When a statute is repealed, all rules of court which derive their validity therefrom are rendered inoperative,⁷ and likewise a rule may be repealed by the enactment of a statute which is inconsistent with its provisions.⁸

1. Reynolds *v.* Lawrence, 15 Cal. 359; Spencer *v.* McMaster, 3 Wyo. 105.

2. Treishel *v.* McGill, 28 Ill. App. 68.

3. The fact that a judge of the court has announced to members of the bar that a certain rule is not in force is not sufficient to abolish it, and a party acting in compliance with its provisions without notice of its abolishment must be protected, if his practice under the rules is correct. Burlington, etc., R. Co. *v.* Marchand, 5 Iowa 468.

4. *In re* Maxwell, (Supm. Ct. Gen. T.) 14 N. Y. Supp. 658.

In Michigan. — In Norvell *v.* McHenry, 1 Mich. 227, it was held that an omission by the clerk to record an amendment to a rule furnished very slight evidence that it was not adopted, when opposed by the long acquiescence of the court and bar in the correctness of such amendment as published.

5. Rawlings *v.* Neal, 122 N. Car. 173.

6. **The Part of the Rule Which Remains Unchanged** is to be considered as having continued in force from the time of its original enactment, and the new or changed portion to have become operative only at and subsequent to the

making of the amendment. Matter of Warde, 154 N. Y. 342.

Effect of Revision on Pre-existing Practice. — Where the rules of the court are revised, pre-existing practice is not abrogated in regard to a matter which does not depend upon such rules, provided the practice is consistent with the code. This is true even where the revision of the rules does not contain any saving in terms of pre-existing practice. Miller *v.* Stettiner, (N. Y. Super. Ct. Spec. T.) 22 How. Pr. (N. Y.) 518.

7. Jordan *v.* White, 20 Minn. 91.

8. Bishop *v.* State, 30 Ala. 34; Texas, etc., R. Co. *v.* Saxton, 3 N. Mex. 282.

Effect of Statute Authorizing Court to Adopt Rules. — The enactment of a statute authorizing the court to make certain rules does not abolish the common-law power of said court to adopt rules, and rules previously adopted remain in force until new rules are made under the statute. Nor does the fact that the number of a judicial district has been changed by a statute render the rules previously prevailing in that district void, provided the counties which comprise the district have not been changed. Shane *v.* McNeill, 76 Iowa 459.

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